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Case No: FD19P00246 / FD19P00380
FD19F05020, FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2020

Before:

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

Re Al M

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

Hearing date: 23 October 2020

Approved Judgment

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

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THE PRESIDENT AND MR JUSTICE CHAMBERLAIN

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

Sir Andrew McFarlane P and Mr Justice Chamberlain:

Introduction

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) the mother's wardship application;

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

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

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

The present allegations

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

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

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

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

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

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

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

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

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

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

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

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

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

The submissions

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

The father's submissions

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

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

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

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

The mother's submissions

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

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

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

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

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

The guardian's submissions

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

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

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

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

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

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

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

31 Ms Fottrell continues as follows:

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

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

Discussion

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

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

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

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

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

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

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

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

The relevance of the NCND practice

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

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

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

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

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

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

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

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

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

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

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

The scope of the FAS doctrine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Does the "third rule" apply in this case?

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

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

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

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

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

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

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

The public policy exception

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

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

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

74 Lord Sumption said this at [250]:

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Neutral Citation Number: [2020] EWHC 3305 (Fam)

Case No: FD19P00246, FD19P00380, FD19F05020 and FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2020

Before :

The Rt Hon Sir Andrew McFarlane
President of the Family Division

Re Al M (Non molestation application)

Charles Geekie QC, Nicholas Cusworth QC, Tim Otty QC, Adrian Waterman QC, Sharon Segal and **Daniel Burgess** (instructed by **Payne Hicks Beach**) for the **Applicant Mother**
Lord Pannick QC, Richard Spearman QC, Brian Green QC, Deborah Eaton QC, Godwin Busuttil, Daniel Bentham and **Stephen Jarmain** (instructed by **Harbottle & Lewis**) for the **First Respondent Father**
Deirdre Fottrell QC, and **Thomas Wilson** (instructed by **Cafcass Legal**) for the **Respondent Children**

Hearing dates: 17th and 20th November 2020

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Approved Judgment

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

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THE PRESIDENT OF THE FAMILY DIVISION

This judgment shall not be disclosed or circulated to anybody other than the parties and their legal advisers other than with the express permission of the Court

Sir Andrew McFarlane P:

1. By an application dated 11 November 2020 Her Royal Highness Princess Haya Bint Al Hussein ("the mother") seeks to vary and extend a non-molestation order initially made on 2 March 2020. The respondent to the application is His Highness Sheikh Mohammed bin Rashid Al-Makhtoum ("the father").

2. The application to vary is unusual in that the behaviour that the mother seeks to control by a revised injunction falls, in part, outside the ordinary categories of behaviour which are typically covered by non-molestation injunctions granted by the family court under the Family Law Act 1996 ['FLA 1996']. In recent times the mother has become aware that the father, or at least trustees of an extended family trust of which the father is one of the beneficiaries, was in the final stages of agreeing the purchase of a substantial estate which immediately abuts the mother's family home in Berkshire. The mother's application therefore seeks to prohibit the father, or those acting on his behalf, from proceeding with the acquisition of any interest whatsoever in that property and acquiring any interest in or renting any property or land whose boundary falls within a widely drawn zone in the locality of the mother's property. In addition, the application seeks to prohibit activity near to her property either on the ground or in the air.

3. The application is strongly resisted by the father. It is, however, supported by the children's guardian who acts for the parents' two children in ongoing wardship proceedings.

Background

4. In a judgment handed down on 11 December 2019 I made extensive findings of fact with respect to the father's past behaviour and its impact on the mother and their relationship (*Re Al M (Fact-Finding)* [2019] EWHC 2415 (Fam)). In that judgment, in addition to finding that the father had been responsible for the capture and enforced removal of two of his older daughters, I made further findings with respect to allegations made by the mother that the father had conducted a campaign of fear and intimidation against her (paragraph 168 onwards). I found (at paragraph 174) that "the cumulative effect of each of these episodes was to place the mother in a position of great fear leading her to conclude that she had no option but to leave Dubai with the children ..." Further, I concluded that the father had deliberately used connections with the press to generate hostile stories aimed at destabilising and harming her (paragraph 176). The overall conclusion (at paragraph 180) was that the mother had largely proved all of the allegations that she made on the balance of probabilities and "that the father has therefore acted in a manner from the end of 2018 which has been aimed at intimidating and frightening the mother, and that he had encouraged others to do so on his behalf."

5. More recently the mother has made further allegations against the father, or those acting on his behalf. At present those allegations are unproved and the court is in the process of managing the proceedings towards a further factfinding hearing.

Proposed property purchase

6. In addition to property in central London, the mother has a family home at "Castlewood House" in Berkshire near to Windsor Great Park which was left to her by her late father King Hussein of Jordan on his death ['Castlewood'].

7. Following the factfinding hearing in December 2019, but prior to the publication of the court's judgment, the mother learnt that those acting for the father were actively engaged in purchasing properties or land close to Castlewood. As well as interest being shown in a particular property which had also been owned by the mother's late father, the mother learned that one firm of estate agents had sold four properties to a high profile Dubai based family in the previous three months (around the factfinding hearing). The mother recognised the names of those responsible for negotiating the purchases as being the father's London agents.

8. On 20 February 2020 the mother's solicitors wrote to father's solicitors asking for confirmation that neither the father, nor those acting on his behalf, would rent or purchase land or buildings close to the mother's homes in London or Berkshire. It took one month for the father's solicitors to respond to that request. When they did, they confirmed that a trust which owns properties in or around the Ascot area had been involved in the property market. The response confirmed that enquiries had been made in 2013 with respect to the other property that King Hussein had owned and went on to state "no further enquiries have been made by our client or anyone acting on his behalf since then." No further details were given.

9. The high level of concern that the mother had about the potential for the father to purchase property close to her home was a matter referred to by her in statements, and position statements, filed with the court throughout the summer of 2020.

10. In the autumn of 2020, the mother received information that those acting on the father's behalf were in the process of purchasing the Parkwood estate ['Parkwood']. Parkwood is a seventy-seven-acre estate situated in an elevated position overlooking Castlewood and immediately adjacent to it.

11. On 14, 19 and 23 October the mother's solicitors wrote to the father's solicitors setting out her concern at the prospect of the father, or those connected with him, purchasing property adjoining Castlewood and asking for information. No reply was received to any of those three letters. The matter had also been raised in a position statement filed for a court hearing on 30 October. No substantive response to the point was made on behalf of the father.

12. On 3 November 2020, following a direct request from the court for them to reply, those acting for the father accepted that a trust which had been acquiring properties for use by members of the ruling family and their staff was indeed in the process of buying the Parkwood estate and that exchange of contracts "may take place within the next few weeks".

13. It was against that background that the mother issued her application to vary the non-molestation injunction to prevent the purchase of Parkwood proceeding and to prohibit the father, or those acting for him, from purchasing other properties in the surrounding area.

14. In early November those acting for the father indicated that the proposed purchase of Parkwood was no longer going to proceed. However, the mother, in her statement to the court, stated that this information did not reduce the level of anxiety that she felt. She stated:

> "It feels as if I am being stalked, that there is literally nowhere for me to go to be safe from (the father), or those acting in his interests. It is hugely oppressive. To know that a property was being purchased just minutes away for the benefit of (the father) and which overlooks Castlewood is just completely overwhelming. I simply will not feel safe, even in our own garden, wondering whether someone is in residence, and whether they are watching."

Later in her statement the mother says:

> "The prospect of Sheikh Mohammed, or those on his behalf buying the properties around Castlewood is terrifying and utterly wearing. It feels like the walls are closing in on me, that I cannot protect the children and that we are not safe anywhere. I feel like I am defending myself against a whole "state". Even in our own home they will be towering over us. I have described how I have felt pinned down by Sheikh Mohammed in this litigation. This suggested purchase and the prospect of others close by makes that all the more real. I feel like I cannot breathe anymore; it feels like being suffocated. I don't want the children to live with the kind of fear that punctuates my existence at all times. They do not deserve this."

The application to vary

15. The mother's application seeks to prohibit the father, or those acting on his behalf, from:

(a) entering, at ground level, a restricted zone surrounding Castlewood;

(b) entering the airspace above ground level at 1,000 feet or below in a 700-metre radius around Castlewood;

(c) proceeding with the acquisition of any interest whatsoever in Parkwood;

(d) acquiring any interest in or renting any property or land whose boundary falls within a more widely drawn restricted zone.

16. In addition, the mother seeks a direction that the father should provide responses to a series of questions from the mother's solicitors relating to the proposed, but now abandoned, purchase of the Parkwood estate.

17. On behalf of the father, the mother's application is robustly opposed on the basis that, as well as being fundamentally flawed, the relief sought by the mother is unprecedented,

draconian and unnecessary. It is submitted that, as the proposed purchase of Parkwood has now been discontinued, there is no continuing basis for a variation of the injunction.

18. Separately the father, correctly, asserts that there is no evidence at all that he, or anyone acting on his behalf, has been in close proximity to Castlewood. Although the father has for a long time had the use of an estate that is relatively close to Castlewood, there is no evidence that he, or those acting on his behalf, either at ground level or in the air, have behaved in any way which might be regarded as molestation. The father's primary case, therefore, is that there is no evidential basis for the mother's application.

19. Further, Lord Pannick QC, leading counsel for the father, submits that the extension sought by the mother cannot be justified as a matter of law. Referring to established authority, to which I will turn shortly, Lord Pannick submits that the law prior to the FLA 1996 established that "molestation" means deliberate conduct of sufficient seriousness to warrant the intervention of the court. In circumstances where the mother already has the benefit of a protective injunction, it is necessary for her to demonstrate that further orders are necessary to prevent a different molestation by the father; this, he submits, the mother cannot do.

20. Lord Pannick asserts that there is no reported case in which the courts have considered the question of whether there is jurisdiction under FLA 1996, s 42 to impose an exclusion zone as part of a non-molestation order. Even if such a jurisdiction exists, he submits that the extent of the zone originally sought by the mother, covering the whole of Windsor Great Park and beyond, is wholly without justification.

21. With respect to a prohibition of property purchase, Lord Pannick submits that property purchase itself cannot amount to molestation. In addition, he submits that the court does not have jurisdiction to regulate the conduct of the trustees of the family trust. That submission is accepted by Mr Charles Geekie QC, leading counsel for the mother. In those circumstances, therefore, Lord Pannick submits that the court should not exercise its jurisdiction to make an injunction which cannot bite on those who would actually be involved in any property purchase, namely the trustees.

22. The hearing of the application was, for practical reasons, spread between two court days. Following observations made during submissions on the first day, the scale of the ground and property purchase exclusion zones was radically reduced when the proceedings returned to court on the second day, so that the ground exclusion is now limited to a radius of 100 metres around the boundary of Castlewood, together with the access road that leads to and past the property. The property purchase exclusion zone was reduced to cover a range of substantial estates in the immediate area of Castlewood.

23. When considering the mother's revised and more modestly drawn application, Lord Pannick rightly cautioned the court that the scale of the various exclusion zones is irrelevant when, as the father submits, the court has no jurisdiction to grant any such order or the application is otherwise not supported by evidence and has no justification.

24. In a manner similar to that adopted by the father's counsel, Mr Geekie reviewed the case law relating to "molestation". Mr Geekie submits that the definition adopted by the courts is wide and is in keeping with the definition of "domestic abuse" and "coercive control" as set out in Family Procedure Rules, Practice Direction 12J which states:

> ""domestic abuse" includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional…"
>
> ""coercive behaviour" means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish or frighten the victim".

25. Mr Geekie draws particular attention to FLA 1996, s 42(5) which states:

> "(5) In deciding whether to exercise its powers under this section and, if so, in what manner, the court shall have regard to all the circumstances including the need to secure the health, safety and wellbeing –
>
> (a) of the applicant; and
>
> (b) of any relevant child."

26. Mr Geekie submits that the court plainly has jurisdiction to include prohibition from entering an exclusion zone within a non-molestation order. Reference is made to the decision of Sir Nicholas Wall (President of the Family Division) in *Re W (Family Proceedings: Applications)* [2011] EWHC 76 (Fam), [2011] 1 FLR 2163 in which the court imposed an exclusion zone prohibiting a father from entering any part of the county of Wiltshire.

27. Reference is also made to *Re T (A child: One parent killed by other parent)* [2012] 1 FLR 472, in which HHJ Bellamy, sitting as a High Court judge, having noted that the provision of an exclusion zone was legally permissible under the terms of FLA 1996 as part of an occupation order, held that, depending on the context of the case, it was possible "to describe as "molestation" the act of going within a defined radius of a particular location". Further, Judge Bellamy went on to hold, if his construction of FLA 1996 were too wide, that the court had power in any event to make an exclusion order under its inherent jurisdiction.

28. In Mr Geekie's submission the inherent jurisdiction remains as an alternative basis to support the making of an exclusion zone in this case.

29. Ms Deirdre Fottrell QC, leading counsel for the children's guardian, on balance, supports the mother's application on the basis that the orders sought are likely to provide the mother with reassurance and peace of mind in circumstances where she has expressed real anxiety and distress at the prospect of the father purchasing property so close to her home. As the children's primary carer, such reassurance and peace of mind can, submits Ms Fottrell, only be to their benefit.

The legal context: molestation

30. The statutory power to make a non-molestation order is contained within FLA 1996, s 42, the relevant provisions of which are:

'42. Non-molestation orders

(1) In this Part a "non-molestation order" means an order containing either or both of the following provisions—

(a) provision prohibiting a person ("the respondent") from molesting another person who is associated with the respondent;

(b) provision prohibiting the respondent from molesting a relevant child.

(2) The court may make a non-molestation order—

(a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or

(b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made.

(3) In subsection (2) "family proceedings" includes proceedings in which the court has made an emergency protection order under section 44 of the Children Act 1989 which includes an exclusion requirement (as defined in section 44A(3) of that Act).

(4) …

(4ZA) …

(4A) A court considering whether to make an occupation order shall also consider whether to exercise the power conferred by subsection (2)(b).

(4B) In this Part "the applicant", in relation to a non-molestation order, includes (where the context permits) the person for whose benefit such an order would be or is made in exercise of the power conferred by subsection (2)(b).

(5) In deciding whether to exercise its powers under this section and, if so, in what manner, the court shall have regard to all the circumstances including the need to secure the health, safety and well-being—

(a) of the applicant; and

(b) of any relevant child.

(6) A non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both.

(7) A non-molestation order may be made for a specified period or until further order.

(8) A non-molestation order which is made in other family proceedings ceases to have effect if those proceedings are withdrawn or dismissed.'

31. It is common ground that there is no definition of "molestation" in FLA 1996. Reference has been made by all parties to the case law both prior to the implementation of the 1996 Act and thereafter. In particular, in *C v C (Non-Molestation Order: Jurisdiction)* [1998] 1 FLR 554, Sir Stephen Brown P held that molestation:

> "implies some quite deliberate conduct which is aimed at a high degree of harassment of the other party, so as to justify the intervention of the court…It does not include enforcing an invasion of privacy per se; there has to be some conduct which clearly harasses and affects the applicant to such a degree that the intervention of the court is called for."

32. From Sir Stephen Brown's analysis, it is clear that the impact upon the applicant of the behaviour is an important element in deciding whether or not some quite deliberate conduct clearly harasses her or him.

33. Although in *C v C* [2001] EWCA (Civ) 1625, an order was made controlling conduct which "was calculated to cause alarm and distress to the mother", the courts have held that the respondent's intention is not a necessary element in establishing conduct which amounts to molestation.

34. In *Re T (A Child)* [2017] EWCA (Civ) 1889, having referred to the earlier authorities, I urged caution against attempts to narrow down the definition of "molestation":

> "27. In the decades that have followed those judicial utterances those sitting in the Family Court have, on a day by day, case by case, basis, deployed good sense and judgment in determining whether or not particular conduct amounts to "molestation". In my view this court should continue to be very wary of offering any further precision in the definition."

Later in the same judgment I went on to state:

> "42. When determining whether or not particular conduct is sufficient to justify granting a non-molestation order, the primary focus, as established in the consistent approach of earlier authority, is upon the "harassment" or "alarm and distress" caused to those on the receiving end. It must be conduct of "such a degree of harassment as to call for the intervention of the court". Although in *C v C* the phrase "was calculated to cause alarm and distress" was used, none of the authorities require that a positive intent to molest must be established."

35. What is needed to justify the intervention of the court is some form of deliberate conduct which has the effect on the applicant of harassment to such a degree that the court's protection is called for. The negative impact on the applicant can include elements of psychological and/or emotional harm. The conduct of the respondent,

whilst being deliberate, does not need to have been with the intention of causing that harm.

Legal Context: Exclusion Zone

36. It is important to be clear that the analysis that follows relates to this case and to similar cases where an exclusion provision is sought that would not interfere with a respondent's existing right to occupy property by virtue of an estate or interest in the property or 'home rights' as defined by FLA 1996, s 30. The power under FLA 1996 to regulate the occupation of property and, if justified, impose an exclusion zone around the relevant property, is contained in ss 30 to 38. This case concerns the court's power to prohibit entry to a prescribed zone in order to protect an applicant from molestation under FLA 1996, s 42, in circumstances where the prohibition would not interfere with any existing property rights.

37. When granting an "occupation order" the FLA 1996 expressly provides that the court may exclude a respondent from a defined area in which the relevant dwelling house is included (see FLA 1996, ss 33(3)(g), 35(5)(d), 36(5)(d), 37(3)(d) and 38(3)(d)). No similar express statutory provision is made with respect to the court's power to make a "non-molestation order" under FLA 1996, s 42.

38. It is of note that commentators regard it as only 'arguable' that a non-molestation order can include provision to exclude a respondent from a defined area ("*Emergency Remedies in the Family Court*" para E 3.11 and "*Rayden and Jackson on Relationship Breakdown, Finances and Children*" para [26.351]-[26.360]). Nevertheless, the editors of *Rayden and Jackson* observe:

> "However, whereas an order keeping a respondent away from premises they had already vacated, and excluding them from a zone around such premises, were originally also seen only as occupation orders, it has become standard practice to include an exclusion zone order in a non-molestation order, especially since the change in the law in 2007 when breaches of a non-molestation order became criminal offences." (FLA 1996, s 42A inserted by Domestic Violence, Crime and Victims Act 2004)

39. It is, however, of note that the editors of *Family Court Practice 2020* in commentary to FLA 1996, s 42 under the heading "*Wording of non-molestation orders*" (para 2.593 [1]) include the following template provision in a specimen non-molestation order forbidding a respondent to:

> "(2) come within [100] metres of [address];"

The commentary continues

> "a "stay away" clause, such as in (2) above, could be expressed as part of an occupation order but it is not necessary to make an occupation order solely for that purpose and [it] can be included in a non-molestation order. Such a provision should not be included as a matter of routine, must be proportionate and necessary and supported by evidence (*R v R* [2014] EWFC 48).

> A "get out" order, i.e. an order requiring a party to leave, cannot form part of a non-molestation order and must be made as part of an occupation order."

40. As I have recorded in paragraph 39, whilst some commentators may regard the point as arguable, the decisions in *Re W* of Sir Nicholas Wall in 2011 and HHJ Bellamy in *Re T* in 2012 are clear and authoritative examples of the jurisdiction being accepted. That this is so was also expressly acknowledged in the judgment of Peter Jackson J in *R v R (Family Court: Procedural Fairness)* [2014] EWFC 48:

> "Extra injunctive provisions such as exclusion areas and orders prohibiting any direct communication between parties should not be routinely included in non-molestation orders. They are serious infringements of a person's freedom of action and require specific evidence to justify them."

41. In so far as a point is made by drawing attention to the express statutory provision permitting the inclusion of an exclusion zone in an occupation order, whereas there is no similar express statutory provision in FLA 1996, s 42 regarding a non-molestation order, it is right to observe that the structure of s 42 is in very different terms to those sections which deal with occupation orders. FLA 1996, ss 33-38, which provide for the exclusion of an individual from a property that they would otherwise be entitled to occupy, are narrowly drawn and are explicit as to the elements that such an order may contain. Given the purpose of such orders, the need for a narrow and explicit demarcation of the court's powers is understandable.

42. The structure of section 42 is different. The purpose of s 42 is focussed upon protection and does not involve regulation of property rights. It is therefore understandable that s 42 merely defines a non-molestation order as an order containing a provision prohibiting molestation. As is accepted, the definition of molestation is not to be found in the statute, and has been deliberately maintained on a broad and flexible basis by the courts so that it can be adapted to the particular circumstances of any individual case where the facts justify the court's intervention.

43. It follows that the absence of an express provision providing jurisdiction to make an exclusion order is no indication that the court lacks jurisdiction to do so when making a non-molestation order.

44. As is apparent from the commentary to which I have referred and the acceptance of the jurisdiction to impose an exclusion zone in the three relevant reported cases, Family Courts do exercise jurisdiction by granting an exclusion element within a non molestation order where the facts of the particular case justify doing so.

45. Drawing all these matters together, I am entirely satisfied that this court is not barred for lack of jurisdiction from adding an exclusion zone to the non-molestation order in this case.

46. If my conclusion on jurisdiction under the FLA 1996 is in error, then I am entirely satisfied that the court would have jurisdiction to grant an injunction order imposing an exclusion zone under its inherent jurisdiction within the current wardship proceedings. Mr Geekie's submissions on this aspect of jurisdiction were effectively unchallenged

by Lord Pannick on behalf of the father and it is not necessary for me to deal with the matter further at this point.

47. Further, although it may be an unusual example of the exercise of jurisdiction, if it is permissible for the court to impose an exclusion zone restraining the physical presence of an individual in a particular location, there must also be jurisdiction to restrict their use of airspace and, indeed, the purchase or occupation of property in a particular location. At all times, however, the court must be cautious in exercising such a jurisdiction, only doing so when the facts of the case require such intervention and where the terms of the order are limited to those which are proportionate to the need.

Discussion

48. It is necessary to maintain focus upon the unusual factual background to this application. The father is an individual of immense wealth, political power and international influence. The findings of fact made in December 2019 demonstrate the manner in which he is prepared to use his position to impose his will on family members when he considers that it is right to do so. The findings with respect to the abduction of two of his adult daughters, one from England and one in international waters off the coast of India, demonstrate his ability to act and to do so irrespective of domestic criminal law.

49. The mother asserts that these findings establish strong grounds for believing that, were he to spot an opportunity to do so, the father would not hesitate to attempt to abduct the two children in order to repatriate them to Dubai. She also believes that her own life and wellbeing are at extreme risk because her actions have greatly angered the father, who has made explicit threats, albeit in the context of poetry, encouraging others to kill her.

50. The mother's need for security for herself and the children must be assessed against that background. What might be considered reasonable for an ordinary citizen may not be sufficient either to protect the mother and children, or at least to enable them to feel less intimidated or under threat. In circumstances when it takes but a moment to snatch a child from a garden or a country lane, the ability to undertake close covert surveillance so that a would-be abductor can know or predict the precise whereabouts of the child and any security detail would be most valuable. Thus, the need to prevent the father, or those acting on his behalf, from coming close to the mother's property is, in my view, fully made out on the basis of the previous findings, even after taking account, as I do, of the fact that there is no evidence that they have in fact done so.

51. The imposition of an exclusion zone around Castlewood is therefore both within the court's jurisdiction under FLA 1996 and justified by the evidence. A zone on the scale originally sought by the mother, which covered a very substantial area, could not be justified on the basis of controlling the physical presence of individuals. The very substantially reduced zone, establishing a 'no entry' cordon in a band 100 metres around the boundary of Castlewood and prohibiting presence on the lane leading to and past the property is, however, reasonable, proportionate and justified.

52. In like manner, the application for a 'no fly zone', prohibiting aircraft, drones or other craft flying between 1,000 feet and the ground from a circular area centred on Castlewood and shown on a map submitted to the court, is made out and will be granted.

53. Separately, the need to prevent the father, or those acting for him, from purchasing, renting or otherwise occupying, property in the vicinity of the mother's home is established. When the father's daughter, Sheikha Shamsa, was abducted from Cambridge in August 2000, she was driven to one of his properties in Newmarket before being taken by helicopter to France, where she was put on a private plane and flown to Dubai. The circumstances in 2020 with respect to the mother and two young children are in some respects different. There has been widespread publicity of the court's findings of fact and of the fact that the mother and children are being protected from the possible risk of abduction. Copies of court orders restraining abduction are on record with the police and other authorities. The time-window that any would-be abductors might have to snatch and then transfer the children or the mother to a helicopter before possible apprehension by the authorities may consequently be narrow. Against that background, the mother is justified in regarding the purchase of a substantial estate immediately abutting her own as being a very significant threat to her security, both in terms of providing an opportunity for 24 hour close surveillance and as a close-to-hand transport hub for a helicopter.

54. The fact that the father and those instructing his English lawyers in these proceedings seem to have given a deliberately misleading reply (after a delay of one month) to the mother's reasonable request for information made in February 2020 significantly adds to the level of concern about the proposed purchase of the Parkwood estate. The purchase had apparently been the subject of negotiations for some 3 years. The estate comprises, according to press reports, the most expensive development land currently on the market with a price of some £30 million. It lies immediately next to the mother's estate. For the father, or those acting for him and giving instructions to his English solicitors, not to mention these facts in response to a direct request for confirmation that neither the father, nor those acting on his behalf, would rent or purchase land or buildings close to her home, can only go to raise the mother's already heightened level of concern to a significant degree. That state of affairs will have been further exacerbated by the serial failure to respond to her solicitors' reasonable requests for information in October 2020, ending in confirmation (only after the court had intervened) for the very first time that Parkwood was in the process of being purchased, with exchange of contracts only a few weeks away.

55. There can be no doubt that this deliberate behaviour, both in negotiating a purchase and then withholding information about it, by those who are acting for the benefit of the Dubai ruling family, will have had the effect of intimidating this mother to a very marked degree. In this context, the mother's account in her statement of the impact that the news that her immensely powerful ex-husband was about to take control of the substantial property standing above and right on the boundary of her property had on her is entirely justified.

56. Lord Pannick rightly reminds the court that it has heard neither evidence nor explanation from the father and those acting for him on these points. I, therefore, do not assume that the decision to dissemble for 7 months rather than to reply openly to the request for information about a possible purchase was a deliberate attempt to intimidate. I do not assume that the proposed purchase was driven by a desire to frighten or more directly molest the mother or children. Also, I do not assume that the decision to abandon the purchase was in any way connected with the fact that news that it was about to happen had been disclosed into these proceedings but a few days earlier. The

court does not, at this stage make any such assumptions, but the mother is entitled to do, and does so, and, on that basis, she is entirely justified in saying that she feels mightily intimidated and frightened by these actions.

57. On the basis that I have described, I therefore conclude that this deliberate course of conduct relating to property purchase has been carried on by the father, or those acting on his behalf, and that it has been justifiably regarded as intimidating behaviour of a high order by the mother. The need to 'secure the health, safety and well-being' (FLA 1996, s 42(5)) of the mother and the children justifies extending the non-molestation order to prohibit each of the areas of behaviour set out in the application, including the purchase and/or occupation of property within the revised zone put forward on her behalf.

58. In reaching my decision I have not taken any account of the more recent allegations that are as yet not proved. All parties accept that the nature of these new allegations should remain confidential within the proceedings for the time being, and I do not therefore say more about their substance. At this interim stage, however, a court considering making, or varying, an interim injunction would be required to consider the need for protection, based on allegations, prior to a full hearing. On that basis, it is clear that the case in support of an interim variation of the injunction in the terms sought would be further justified if it had been necessary to consider these recent allegations more fully.

59. Finally, it is necessary to deal briefly with the mother's application for a direction that the father should respond to a series of questions concerning the now abandoned purchase of Parkwood and other general matters concerning the trust. In considering this issue a number of matters arise upon which I would welcome further short submissions. This part of the application is therefore adjourned for consideration at the next listed hearing.

Conclusion

60. The mother's application to vary and extend the non-molestation injunction is therefore granted in each particular and on the basis of the revised zones that have been submitted to the court.

[Judgment ends]

Neutral Citation Number: [2021] EWHC 303 (Fam)

Case No: FD19P00246, FD19P00380, FD19F05020
FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Wednesday, 13th January 2021

Before:

THE PRESIDENT OF THE FAMILY DIVISION
(Remotely via MS Teams)

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Between:

RE AI M

- -
- -

MR. NICHOLAS CUSWORTH QC, MS. SHARON SEGAL, MR. NICHOLAS WILKINSON and **MR. DANIEL BURGESS** (instructed by **Payne Hicks Beach**) appeared for the **Mother.**

LORD PANNICK QC, MR. NIGEL DYER QC, MR. DANIEL ALEXANDER QC, MS. DEBORAH EATON QC, MR. BRIAN GREEN QC, MR. STEPHEN JARMAIN, MR. DANIEL BENTHAM and MR. GODWIN BUSUTTIL (instructed by **Harbottle & Lewis LLP**) appeared for the **Father.**

MR. TOM WILSON (instructed by **CAFCASS Legal**) appeared for the **Children.**

- -

Approved Judgment
In Private

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IN PRIVATE

SIR ANDREW MCFARLANE P :

1. This is an application for additional payment under the legal services order that has hitherto been made in these proceedings which relate to two young children. The principle of there being a legal services order made by the court was established as long ago as June 2020 and subsequent orders have been made by the court since then.

2. The particular element of fees which are the subject of this application relate to an appeal which is listed to be heard in the Court of Appeal later this month for two days, in relation to a ruling that the court made now some months ago on the question of whether the court has jurisdiction to investigate the acts of the state of the UAE and/or Dubai, which potentially may be issues of fact at large in a fact-finding process which is yet to be undertaken. The court decided at first instance that the court did have jurisdiction and the father has permission to appeal that issue to the Court of Appeal and that is the appeal that is to be heard.

3. The position of the parties is that the mother seeks an additional payment under the legal services order of £643,000 to cover her fees for the pending appeal. The quantum of that sum is not in issue. The question of whether it should be paid upfront, as is it were, under the legal services order is. The position of the father is that the appeal process should be looked at separately from the ordinary run of interlocutory and final hearings that are taking place at first instance. He submits that there should be no distinction between these parties and any other parties before the Court of Appeal Civil Division, where costs normally follow the event, and an impecunious respondent to an appeal is entitled to apply for security for costs. The father is offering the precise sum claimed, £643,000, as security for costs, to be held by his solicitors, to be used to pay costs to the mother if she is successful in responding to the appeal and a costs order is then made in her favour.

4. In that way, Mr. Nigel Dyer QC, for the father, says that the mother's position is entirely protected inasmuch as it would be were she to be any other litigant before the appeal process. If she is unsuccessful and the father succeeds on appeal, the mother would be unlikely to get a costs order in her favour but, submits Mr. Dyer, she is a person of substantial wealth and has more than easy access to funds of even this size to pay her lawyers. He therefore submits that, as a matter of principle, the approach should be to follow the ordinary course that would be followed in a civil appeal and deal with the matter as security for costs. In supporting that position, Mr Dyer argues that the common law jurisdiction for the provision of legal services that has developed to fund impecunious parents/former partners is limited to the interlocutory stages and final hearing of the proceedings at first instance, and does not extend to cover any appeal. Provision for costs on appeal, including security for costs for an impecunious respondent, exits and justifies any appeal process being given different consideration to that at first instance.

5. Mr. Nicholas Cusworth QC, for the mother, makes submissions in support of her application. He does so by referring to the now well-established case law, starting with *Currey v Currey (No 2)* [2006] EWCA Civ 1338; [2007] 1 FLR 946 , which has developed into the jurisdiction in the Family Court for providing litigation funding for a deserving party in proceedings and funding it by way of a periodical payments order paid in advance. The jurisdiction mirrors that which is in statutory form in the Matrimonial Causes Act 1973, section 22ZA, which provides for orders for payment

with respect to legal services in matrimonial proceedings, but, as a common law development, it is of course not tied by that statutory provision because the payments are not, as in this case, limited to matrimonial proceedings.

6. Mr. Cusworth accepts, and Mr. Dyer clearly rightly firmly argues, that for the court to make an order for legal services funding that covers the costs of an appeal may be breaking new ground, certainly insofar as any reported cases are concerned. There is simply an absence of authority one way or the other on whether appeals are to be included or, for some reason, excluded from the legal services funding jurisdiction. Mr. Dyer says that that must be for good reason, namely that there is a sound, fair and proper costs regime in the Court of Appeal, represented by the security for costs mechanism, and that there is simply no need for impecunious litigants to look to legal services funding orders to cover appeals.

7. Mr. Cusworth did not accept that submission and, by illustration, he pointed to a limited number of authorities that show that the court has been prepared to make legal services funding payment orders with respect to proceedings other than first instance trials and other first instance proceedings in this jurisdiction, for example, funding proceedings abroad or for arbitration. Mr Cusworth refered in particular to:

i) In *Currey* itself, Wilson LJ (at paragraph 32) endorsed the approach that awards for legal services were separate from any consideration of costs:

> 'Nevertheless it may be helpful to state that I entirely agree with Mr Mostyn in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, FD, at para [127] that a costs allowance within a maintenance order is not an order for costs and so would not fall foul of the new general rule ['no order for costs']; and perhaps helpful also to observe that, insofar as the objection in principle to a costs allowance has previously been cast in part upon an argument that it pre-empts the normal despatch of issues as to costs at the conclusion of the proceedings, such an argument will largely fall away by virtue of the new rules. The proper treatment of liabilities for costs thereunder will generally be that they are debts to which the judge should have regard in making his substantive award; and so in my view an allowance for costs within an award of maintenance in the circumstances which I have sought to outline would be consonant with the movement under the new rules to cater for costs at an earlier stage than hitherto.';

ii) In *Rubin v Rubin* [2014] EWHC 611 (Fam); [2014] 2 FLR 1018, Mostyn J described the purpose of the jurisdiction at paragraph 13(iv):

> > 'The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate inter partes costs jurisdiction.'
>
> And again at paragraph 13(x), where a wide spectrum of potential dispute resolution procedures is said to be included:

> 'The court should make clear in its ruling or judgment which of the legal services mentioned in s 22ZA(10) the payment is for; it is not however necessary to spell this out in the order. A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.';

iii) In *G v G (Child Maintenance: Interim Costs Provision)* [2009] EWHC 2080 (Fam); [2010] 2 FLR 1264, Moylan J held that there was no distinction to be drawn as between an order for legal services provision made with respect to proceedings relating to a child in England and Wales and those in a foreign jurisdiction (paragraph 47);

iv) In *M-T v T* [2006] EWHC (2496); [2007] 1 FLR 925 (at paragraph 22), Charles J emphasised that one purpose justifying deployment of the court's jurisdiction to make provision for legal funding was to establish or maintain equality of arms:

> 'To my mind it certainly can be for the benefit of the children in cases under [CA 1989] Sch 1 to ensure that they are properly represented and have an appropriate equality of arms to the respondent to those proceedings. Therefore, if Bennett J was deciding that the court did not have such jurisdiction in *W v J (Child: Variation of Financial Provision)* [2003] EWHC 2457 (Fam), [2004] 2 FLR 300 for the reasons I have given, I respectfully do not agree and I do not propose to follow that decision. I find that I do have such jurisdiction.'.

8. For my part, I can see no distinction which would justify limiting the court's jurisdiction so as to exclude funding of an appeal process. Each case will turn on its own facts and whether an award is actually made to cover an appeal will need to be looked at on a case-by-case basis. However, as a matter of principle, I can see no reason for making the distinction. With respect, I consider that the father's submissions confuse two separate matters. The first is funding of legal services for an impecunious litigant; that is the target of the legal services order jurisdiction that has been developed by the court. The second is the costs regime and it is that to which Mr. Dyer refers. This is not a costs application that is being made by the mother. It is payment for legal services and for funds by which she can pay her lawyers so that she can take part in the legal process. Therefore, as I see it, it is either irrelevant, or certainly not determinative, that the Court of Appeal has a security for costs mechanism available to it and that the father is willing to co-operate in making a secured costs payment into his solicitors' account. That is, of course, a welcome gesture, but it nevertheless leaves the mother open to the outcome of an appeal process whereby either she does not succeed in opposing the appeal or, for some other reason, the Court of Appeal does not make an order for costs in her favour at the conclusion of the appeal.

9. In the generality of these proceedings, the court has already determined that irrespective of the assets that she undoubtedly has at her disposal, the father should be funding her legal fees on an ongoing basis during the currency of the proceedings. As

Mr. Cusworth points out, this is neither a blank cheque nor a one-way transmission of funds. At each stage, accounts will be taken and it remains open to the court, at the final hearing of the financial dispute between this couple, to readjust what has been paid upfront in terms of legal fees with the benefit of hindsight as to what has happened both as to the outcome of the proceedings, the litigation conduct within the proceedings, the fees that have been charged and other matters. The purpose of these orders is to keep the boat afloat, as it were, and the show on the road during the currency of the proceedings.

10. The only point that the father can refer to, as he does properly and clearly in Mr. Dyer's submissions, is the availability of funds to the mother by which she can pay her solicitors herself for the appeal now without having to turn to the father for this particular payment. However, as I have indicated, the court has already determined that the mother should not be looking to draw on her own funds at this stage with respect to these matters. I cannot see that the appeal process should be dealt with and approached entirely differently from all of the other hearings in this case.

11. A further, final matter that weighs in my mind in this case -- it is not a major factor but it is there as part of the balancing exercise and in so far as it is there, it goes in the mother's favour -- is that the particular point upon which the appeal is being taken arises from the father's status. It is not an ordinary point in the dispute between them as parents of these two children. It is a particular characteristic that almost uniquely, in the experience of this court, arises because of the father's status in his country and the connection he has with his state. That seems to me all the more reason why the mother should not be at any disadvantage in the appeal process. The father is entitled to, and the Court of Appeal has given him permission to, appeal the point. It is a point which is of importance, but it relates to his status and his role. It is important that the mother is able to contest the appeal, as she did at first instance, and it therefore seems to me that for that reason in addition, she is entitled to legal services funding for that from the father so that she can take a full part in the appeal process.

12. So, for those reasons, I therefore accede to the application and I make the additional legal services funding order of £643,000 which is sought.

(Please see main transcript for continuation of proceedings)

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.

Neutral Citation Number: [2021] EWHC 1577 (Fam)

Case No: FD19P00246, FD19P00380
FD19F05020 and FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2021

Before :

THE PRESIDENT OF THE FAMILY DIVISION

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Re AL M

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- -

Mr Charles Geekie QC, **Mr Timothy Otty QC** and **Ms Sharon Segal** (instructed by **Payne Hicks Beach**) for the **Applicant Mother**
Lord Pannick QC, **Ms Deborah Eaton QC**, **Mr Richard Spearman QC**, **Mr Godwin Busuttil**, **Mr Daniel Bentham** and **Mr Stephen Jarmain** (instructed by **Harbottle & Lewis**) for the **Respondent Father**
Ms Deirdre Fottrell QC and **Mr Tom Wilson** (instructed by **Cafcass**) for the **Children's Guardian**
Hearing date: 25th May 2021

- -

Approved Judgment

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

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THE PRESIDENT OF THE FAMILY DIVISION

Sir Andrew McFarlane P:

1. The purpose of this short judgment is to determine a single issue that has arisen in the course of long-running wardship proceedings, the background to which is well known and need not be repeated here. The issue is whether the mother of the two wards should now be granted a 'child arrangements order' under Children Act 1989, s 8 ['CA 1989'], within the wardship, identifying her as the person 'with whom [each] child is to live' [a 'lives with order']. The application is strongly opposed by the children's father, but firmly supported by the children's guardian.

2. The application is made in circumstances where the fact that the children live with, have always lived with and will continue to live with their mother has been established, agreed and accepted since the early stages of the proceedings some two years ago. On 31 July 2019 the court made an order, with the agreement of all parties, expressly prohibiting any person from removing the children from the care and control of their mother. That order remains in force and there is no suggestion that it should be altered or revoked. In his witness statement of 4 October 2019 the father acknowledged that the mother 'is and will continue to be the parent with whom the children live'. On 8 October 2019, the father consented to an order in those terms and recording that that state of affairs could be communicated to the children. More recently, in an order of 15 July 2020, it is stated that 'the children will live with the mother and attend school in England'.

3. At the final welfare hearing, which is now planned for September 2021, there is no issue over the plan for the children to continue to have their home with their mother and for her to be their sole carer.

4. The mother's application for a 'lives with' order under CA 1989, s 8 was made as long ago as 17 September 2019. At earlier hearings the court has declined to make a s 8 order on the basis that to do so was not necessary. In particular on 8 October 2019 I rejected the proposal that a s 8 order should be made, preferring the arrangements to be recorded within the wardship.

5. Matters have now, however, come to a head and, despite there being no dispute about the living arrangements, despite the final welfare hearing being only a few months away and despite it being accepted that the wardship will continue at least in the medium term, the mother seeks to persuade the court to grant her a 'lives with' order at this hearing.

The mother's application for a 'lives with order'

6. In order to understand the context within which the mother makes this application, it is necessary to rehearse some of the recent history and to note what the mother says about the impact that it has had on her. The recent history, of course, itself sits within the overall background to these proceedings which is characterised by coercive and controlling behaviour of a high order by the children's father and which is marked by the serious findings made by the court in the main fact-finding judgment dated 11 December 2019 [2019] EWHC 3415 (Fam). Those findings, which included holding that the father had arranged for the forced abduction and, thereafter, house arrest of two of his adult children, established that the mother had fled to England from Dubai as a result of threats of violence to her and that since arrival in this jurisdiction she had been

subjected to a sustained campaign of intimidation and threat orchestrated by the father and those acting on his behalf.

7. More recently, the father, through a family trust, has attempted to purchase the 70 acre estate immediately abutting the mother's home in Berkshire. Despite negotiations for this purchase having been ongoing for some two years, and despite the mother's lawyers, over a period of many months, persistently and directly asking the father, through his English lawyers, to confirm that he was not engaged in purchasing property near to hers, the father did not reveal details of the proposed purchase until the court required a straight answer to the question.

8. At around the same time, in August 2020, the mother and her English lawyers became aware that her mobile phone and those of some members of her security staff and her solicitors had been the target of hacking by a highly sophisticated software programme that is only available for use by nation states. The father firmly denied that any of the phones had been hacked and claimed that, if they had, then he had no knowledge of or involvement in the hacking. In order to marshal and then evaluate the evidence relating to this complex and highly technical issue, the court was involved in an extensive case management process which culminated in a full fact-finding hearing, during which, at every stage, the father deployed the very considerable legal resources at his disposal to challenge and contest the mother's prosecution of her case. In the event, in a judgment handed down on 5 May 2021 [2021] EWHC 1162 (Fam), the court concluded that the hacking allegations were proved and that the father had indeed orchestrated or permitted those acting for him to use bespoke covert surveillance software licensed for the use of the State of the UAE to target the phones of the mother and five other individuals connected to her.

9. In her recent statement to the court, the mother has described the impact that being the focus of the father's actions over the past 2½ years has had upon her.

> 'Since July 2020, the pressures on me have dramatically increased. I have felt my health and my strength deteriorate slowly and progressively under the strain of the harassment of me, both through the litigation and otherwise. However much I have tried to shield the children from Sheikh Mohammed and his agents' relentless attack, I have little doubt that the children have seen the toll that these proceedings have taken on me. Every time I think a resolution may be in sight, the ground shifts again, and the finish line recedes further into the distance. At times, I am exhausted by trying to keep my balance and a level head in the face of the magnitude of what I face.'

Her statement describes the impact that the father's behaviour and the proceedings have had on her health. She also describes the effect of having to live with the children in 'confinement and isolation' for over two years. She sees the father's action in attempting to purchase the neighbouring estate as being 'part of a multi-faceted plan aimed ultimately at the abduction of the children and causing harm to me.' Later she states:

> 'All in all, since my last updating statement I have been beset by threats and pressures: the ongoing tragedies of Sheikhas Latifa and Shamsa, the constant security threats, the spectre of the hacking allegations, the physical threat and financial power of the move to purchase Parkwood, defamation and intrusion in the global press, misrepresentation

of the case in the Arab press, Sheikh Mohammed's violent and threatening poetry, and the heavyweight arrival of the UAE Government, and NSO.

As this list makes clear, some of the threats and pressures come from within the litigation, some external to it. I wish the Court to understand that from my perspective they are all linked.'

And later:

'I do not feel that I can freely move forward as things stand now, while I am and feel hunted all the time, and I am forced to look over my shoulder at every moment of the day.'

10. It is against that background that the mother describes her concern over what would happen to the children if she were to die. If no adult is available to stand in her place, although the children would remain wards of court, they would have to take her 'place in that instance in having to defend themselves until their minority ends'. This is a concern that, she says, keeps her awake at night and that it would give her 'immeasurable peace in my own daily life to know that I had done all I can possibly do to ensure that they have a bright and stable future, with or without me'. She therefore seeks a 'lives with order' because, on her understanding and on the advice of her lawyers, such an order would mean that the appointment of a person nominated by her as the guardian for her children would take immediate effect on her death, as opposed to the current position where such a nomination would not take effect until the death of both parents.

11. The application is therefore made on two, albeit connected, bases. Firstly, to ensure that the appointment of her nominated guardian will take effect on her death. Secondly, to achieve a degree of reassurance from knowing that those arrangements were in place where the issue is playing on her mind in circumstances where she believes, and the court's findings establish, that her life may be in imminent danger as a result of the actions of the father or those who are, or may believe they are, acting in his interests, and where she is, in any event, being constantly assailed by the multiple stresses and threats as she describes.

The father's opposition to a 'lives with' order

12. The father, through submissions made by Deborah Eaton QC, strenuously opposes the application for a 'lives with' order. He does so on a number of grounds. The first ground is based in law. Ms Eaton submits that, contrary to the interpretation upon which the mother relies, a 'lives with' order will not lead to the appointment of a guardian nominated by her taking effect immediately on her death if the father, as the other parent with parental responsibility, is still alive. Analysis of the competing legal submissions on this point will follow, but, Ms Eaton submits, if the father's interpretation is correct it removes the sole justification that the mother has put forward for making an order and her application should therefore be dismissed.

13. More generally, and irrespective of the primary legal point that is taken, the following submissions are made on the father's behalf against the application:

a) There is no justification for making such an order at an interim stage, and particularly so when the final welfare hearing is only a few months away;

b) There is already complete clarity as to the living arrangements for the children and there is therefore no need for a 'lives with' order;

c) The court and the father must be told the identity of the individual who the mother wishes to have appointed as testamentary guardian for the children. In the case of the father he has a 'right' to know the identity of the person that the mother wishes to appoint. To conceal the identity of the proposed guardian is, in any event, illogical as the father will come to know the identity in any event if the mother were to predecease him and, contrary to his legal arguments, the appointment takes effect;

d) Making an order under CA 1989, s 8 determining with whom a child is to live sits uncomfortably with the continuing wardship proceedings;

e) The appointment of a testamentary guardian is a very significant step to take (particularly if the father is not to be told of the identity). As such the mother should not make any appointment without the leave of the court and the court should not grant leave without being told of the identity of the appointee. Not to insist on disclosure risks the identity of the guardian only becoming known in the fraught circumstances that will immediately follow the mother's death in a manner that is unlikely to be compatible with the children's welfare interests;

f) The mother may appoint someone who is unsuitable or who, for example, may claim immunity from the jurisdiction of the court; and

g) The father would agree to the court order recording that, in the event of the death of either parent, the wardship court will, at all times, retain ultimate decision-making responsibility for the children and, in the event of the mother's death, the children would not be removed from her home or from their schools pending the decision of the wardship court.

14. The father would consent to a 'lives with' order, if the mother is insistent on applying for one, but only on two conditions. Firstly, that the order spells out the legal position on the basis of the father's submissions. Secondly, that the identity of any testamentary guardian is disclosed to the father and to the court.

The position of the children's guardian

15. The children's guardian expressed significant concern at the situation that the mother describes in her recent statement and, in particular, the pervasive feeling of being 'hunted' that is recorded there. The guardian, from the perspective of the children's welfare, understands and is concerned by the degree of sustained pressure that the mother appears to be under.

16. Ms Deirdre Fottrell QC, for the guardian, submitted that a 'lives with' order would simply reflect the practical reality and it was, in the circumstances, 'highly regrettable'

that the father is arguing against it. There is, in Ms Fottrell's submission, nothing unusual in a CA 1989, s 8 order being made within wardship proceedings.

17. Ms Fottrell did not agree with the father's interpretation of the underlying legal position (to which I will now turn), but, in any event, she submitted that if a testamentary guardian were to be appointed there would be no disadvantage to the father.

18. In all the circumstances, if the children's welfare is afforded paramount consideration as it must be [CA 1989, s 1(1)], the mother's circumstances and her description of their impact upon her, render it necessary that her application be granted and that a 'lives with' order is made at this hearing.

The legal effect of a CA 1989, s 8 'lives with' order on the appointment of a testamentary guardian

19. The issue between the parties is whether the appointment of a testamentary guardian nominated by a parent who, at the time of their death, has a s 8 'lives with' order in their favour, takes effect on the death of that parent (as the mother and the children's guardian contend), or (as the father contends) only on the subsequent death of any other parent with parental responsibility (or if there is no such other parent alive, when the 'lives with' order parent dies).

20. A testamentary guardian may only be appointed in accordance with CA 1989, s 5, the relevant parts of which are:

> **'5 Appointment of guardians.**
>
> (1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian if—
>
> (a) the child has no parent with parental responsibility for him; or
>
> (b) a parent, guardian or special guardian of the child's was named in a child arrangements order as a person with whom the child was to live and has died while the order was in force; or
>
> (c) paragraph (b) does not apply, and the child's only or last surviving special guardian dies.
>
> (2) …
>
> (3) A parent who has parental responsibility for his child may appoint another individual to be the child's guardian in the event of his death.
>
> (4) …
>
> (5) …
>
> (6) A person appointed as a child's guardian under this section shall have parental responsibility for the child concerned.

(7) Where—

(a) on the death of any person making an appointment under subsection (3) or (4), the child concerned has no parent with parental responsibility for him; or

(b) immediately before the death of any person making such an appointment, a child arrangements order was in force in which the person was named as a person with whom the child was to live or the person was the child's only (or last surviving) special guardian,

the appointment shall take effect on the death of that person.

(8) Where, on the death of any person making an appointment under subsection (3) or (4)—

(a) the child concerned has a parent with parental responsibility for him; and

(b) subsection (7)(b) does not apply,

the appointment shall take effect when the child no longer has a parent who has parental responsibility for him.

(9) Subsections (1) and (7) do not apply if the child arrangements order referred to in paragraph (b) of those subsections also named a surviving parent of the child as a person with whom the child was to live.

(10) …

(11) …

(12) …

(13) A guardian of a child may only be appointed in accordance with the provisions of this section.'

21. For the mother, Mr Charles Geekie QC submits that, where a parent has a current 'lives with' order in their favour at the time of their death, the appointment of a testamentary guardian takes effect on their death under s 5(7)(b) in the following manner:

a) s 5(3) establishes the right of a parent with parental responsibility to appoint another individual to be their child's guardian in the event of their death;

b) there is no requirement for the fact of the appointment, or the identity of the individual, to be communicated to or agreed with any other parent;

c) s 5(7)(a) provides that, where on the death of the appointing parent, the child has no parent with parental responsibility for him or her, the guardian's appointment shall take effect on the death of that parent;

d) s 5(7)(b) provides that, where immediately before the death of any person making an appointment under s 5(3), a child arrangements order was in force in which the person was named as a person with whom the child was to live, the guardian's appointment shall take effect on the death of that person;

e) conversely, under s 5(8), where on the death of the appointing parent the child concerned has a parent with parental responsibility (who is still living) and s 5(7)(b) does not apply (meaning that there was no 'lives with' order in favour of the appointing parent at the time of death), the appointment only takes effect when the child no longer has a parent who has parental responsibility for him; and

f) by s 5(6) a person appointed as a child's guardian will have parental responsibility for the child (once the appointment takes effect).

22. Presenting the argument to the contrary, Ms Eaton QC submits that the 'person' referred to in s 5(7)(b) in the phrase 'a child arrangements order was in force in which the person was named as a person with whom the child was to live' [emphasis added] is a reference to the person appointed to be the guardian and not to the deceased person referred to in the phrase 'immediately before the death of any person making such an appointment'.

23. In this regard, reliance is placed upon the judgment of King LJ in *Re E-R (Child Arrangements Order)* [2015] EWCA Civ 405. *Re E-R* arose from tragic circumstances in which a mother, who had terminal cancer and who was living with a couple who progressively took over the care of her 5 year old child (T) as the cancer took hold, sought to establish SJH's (the female carer) position, as against that of the child's father, in two ways. Firstly, a without notice s 8 'lives with' order had been made in favour of SJH as the mother's condition deteriorated. Secondly, the mother had appointed SJH and her husband as her child's testamentary guardians. The mother subsequently died and there were contested proceedings in the respect of the care of the child between her father and SJH and her husband. The appeal turned on whether the judge had been correct to afford a priority to the claim of a natural parent in such circumstances. In the course of her judgment, however, King LJ considered the impact of the mother's attempt to ensure that T would be looked after by SJH and her husband following her death by appointing them as guardians under CA 1989, s 5(3). Applying the provisions in s 5, that appointment had not taken effect on the mother's death, as she had hoped, and caused King LJ (paragraph 36) to describe it as something 'which may trap the unwary'.

24. The paragraph relied upon by Ms Eaton is paragraph 37:

> "37. By s 5(6) CA 1989, a person appointed as a child's guardian has parental responsibility. However where as here, the child has a surviving parent with parental responsibility and there is no child arrangements order directing that T is to live with the named guardian, (here SJH and her husband), the appointment of SJH and her husband as T's guardians does not take effect for so long as the father is alive and has parental responsibility (s 5(7) and (8) CA 1989). It follows therefore that SJH derives her parental responsibility in respect of T from the order made by the judge in August 2014, and not by virtue of her having been named by the mother as testamentary guardian." [emphasis added]

25. Ms Eaton's submission is that paragraph 37 of *Re E-R* establishes that the making of a 'lives with' order would not have the effect contended for by the mother, namely that any appointment of a guardian would have effect on her death were she, the mother, to have a 'lives with' order in force in her favour at that time. Ms Eaton particularly relies upon the passage in paragraph 37 that is emphasised above. She submits that King LJ must be taken to be interpreting s 5(7)(b) as applying where the 'lives with' order referred to in s 5(7)(b) is one 'directing that [the child] is to live with the named guardian', and not, as Mr Geekie submits, where the person named in the 'lives with' order was the recently deceased parent.

26. I can deal with this point shortly.

27. The only people who are entitled to appoint a testamentary guardian are 'a parent with parental responsibility' [s 5(3)] or a guardian who has already been appointed [s 5(4)].

28. It follows that, in s 5(7)(b), the phrase 'immediately before the death of any person making such an appointment' can only refer to a person who is either a parent with parental responsibility or an existing guardian. Where, in the remainder of the sub-sub section there is reference to 'a child arrangements order which was in force in which the person was named as a person with whom the child was to live' [emphasis added], 'the' person must be the appointing parent or guardian. To hold otherwise would not explain the use of the definite article to define 'person'.

29. Further, s 5(7)(b) when describing the 'lives with' order uses the past tense: 'was in force' and 'was to live'. Such use again clearly ties the order and its terms to the person who has died who, I repeat, is the person making the testamentary guardian appointment and is therefore a parent with parental responsibility.

30. Thirdly, there would be no purpose in the enactment of s 5(7)(b) if the child arrangements order referred to was one naming the nominated guardian. If such an order were in force at the death of the child's parent it would continue in force, be unaffected by the death, and the named person would continue to have parental responsibility.

31. Fourthly, s 5(7)(b) plainly establishes an exception from the ordinary position where one parent's (or guardian's) appointment of a testamentary guardian does not take effect on their death, unless at that time there is no other living parent with parental responsibility [s 5(7)(a)]. Where there is a living parent with parental responsibility and the exception in s 5(7)(b) does not apply, the appointment made by the first deceased parent will only take effect on the death of the second parent [s 5(8)]. The exception is therefore to give priority to the appointment of a guardian when it has been made by a parent whom a court has determined should have the child living with them. In some cases both parents may have a 'lives with' order and, in each case, the guardian appointed by a deceased parent would take effect on the death of the appointing parent.

32. Despite the firmness of Ms Eaton's submissions, they are without substance on this point. Firstly, the father's interpretation is on the basis that a parent, who does not have a 'lives with' order in their favour, but who has appointed X as a guardian, dies and, if there is a 'lives with' child arrangements order in force naming X at that time, then the appointment of X as guardian will take effect on that parent's death. It is difficult to discern what purpose Parliament had in mind in enacting the provision if that is its meaning. Such circumstances are likely to be extremely rare.

33. For the reasons that I have already given, the father's case does not accord with the plain and ordinary meaning of the words. It involves holding that 'the' person referred to was not the deceased appointing parent, which is an interpretation that is unsustainable on the wording and which ignores the use of the past tense. If X is still living and the 'lives with' order remains in force, why would Parliament refer to X as 'the person [who] was named' or X as being the 'person with whom the child was to live', when the wording of s 8(1) refers to a person 'with whom a child is to live'.

34. Further, the reference to paragraph 37 of King LJ's judgment in *Re E-R* is not relevant to the issue in this case and does not therefore assist the father's case. In *Re E-R* the deceased mother did not have a 'lives with' order in her favour at the time of her death and, therefore, as King LJ described, 'the appointment of SJH and her husband as T's guardians does not take effect for so long as the father is alive and has parental responsibility'. SJH had parental responsibility for T, but that was afforded under the earlier 'lives with' order and not because the guardianship had taken effect. If the deceased mother had had a 'lives with' order in her favour at the time of her death, then the guardianship appointment would have taken effect at that time. It is this latter situation that the mother in the present cases is seeking to achieve.

35. I therefore hold that the interpretation put forward on behalf of the mother, and supported by the children's guardian, is correct and, if the mother has a 'lives with' order in her favour at the time of her death, then any guardianship appointment made by her under s 5(3) will take effect then, and not on the subsequent death of the father, if that is the case.

Welfare Analysis

36. In determining this application, the court must afford the welfare of each of the children paramount consideration and only make an order if it considers that doing so would be better for the child than making no order at all [CA 1989, s 1(1) and (5)]. Whilst the 'welfare checklist' in s 1(3) must be considered, in circumstances where there is no dispute about the living arrangements for the children, many of the elements in the list are not of any active relevance. The exception is the 'physical, emotional and educational' needs of the children [s 1(3)(b)]. In that regard, it is very much in the children's interests for their mother's wellbeing and emotional viability to be supported where possible. Despite her best efforts, the impact on her life of the events that she describes is such that any reasonable step that the court can take to reassure her and meet her emotional needs as a parent and as the children's primary carer is likely to be justified in the extreme and unusual circumstances of this case.

37. Whilst the mother herself does not push this issue to the forefront, I share, and certainly do not disagree with, the guardian's concern about her wellbeing. I also agree that granting a 'lives with' order, which is not an exceptional course in wardship proceedings, to reinforce further the message that the present arrangements are firmly fixed, is in the children's best interests.

38. The express purpose that the mother does present as the primary justification is that a 'lives with' order will entitle her to nominate a guardian whose appointment would take effect on her death. A parent may nominate a testamentary guardian at any time. Each of these two parents may or may not have already done so. Whilst possibly having consequences for the children in time to come in the event that both of their parents

were to die during their minority, I do not agree with Ms Eaton that the act of nomination itself is a step in the child's life that is of sufficient importance to require the permission of the wardship court. I do, however, agree with Ms Eaton that the making of a 'lives with' order which, if granted would prioritise the mother's choice of guardian by engaging the s 5(7)(b) exception, is an important step in the child's life and, of course, the court will only grant a 'lives with' order if to do so is in the best interests of the child having taken account of this and all other relevant factors.

39. Ms Eaton's submission goes further and describes the actual choice of individual guardian that the mother proposes to make as being, itself, an important step and therefore one which requires the court being told who it is who is to be appointed. The baseline for this submission is that, contrary to the father's case, a parent in his position does not have a 'right' to be told the identity of a nominated guardian. In some families it is a joint choice, or there will be discussion between parents; but it is not required by the law.

40. Here, the mother has established a strong case against informing the father of the identity of the individual she appoints. In short she is confident that the father would, once the information is known, seek to target that individual and expose them to the force of his influence in a way that would be wholly contrary to the mother's wishes and intentions, and in a way that would simply compound her feeling of being controlled and undermined at every turn by the actions of the father and those who do his bidding.

41. In some cases it may be justified for a court in wardship to require disclosure of the identity of a nominee for guardianship. The wardship jurisdiction is wide and I am certainly not holding that the court has no power to require disclosure. I am, however, clear that in the present case it would be entirely contrary to the children's welfare to require the mother to disclose the identity of her nominee. To do so would in many ways defeat the very purpose of her application and, were the identity to be known and were the father to turn his attention to that individual in a negative manner, which I am satisfied is a legitimate concern on the evidence and findings made, then that development, rather than enhancing the mother's emotional wellbeing, would be likely to have the converse effect.

42. All that the court has read and heard about this mother, from her statements and from the appraisals of both the former and the current guardian, indicates that she is entirely focussed on meeting the needs of her children and that she succeeds in doing so, albeit within the straitened circumstances in which they are all forced to live. There is no basis for contemplating that she would choose someone unsuitable for the role of guardian; on the contrary I am satisfied that she will be anxious to choose someone who is best suited for stepping into her shoes if the need arose.

43. In all the circumstances, I am satisfied that it is both in the children's interests for a s 8 'lives with' order to be made and for that to be done now at this late interim stage. I make the order on the basis that, as the mother has with full openness described, she will appoint a testamentary guardian for the children (if she has not already done so). Insofar as the court may have power to require her to disclose to the court the identity of her nominee, I decline to exercise that power.

44. In all the circumstances, I grant the mother's application and will make an order under CA 1989, s 8 forthwith providing for the two children to live with their mother.

Neutral Citation Number: [2021] EWHC 1162 (Fam)

Case No: FD19P00246, FD19P00380
FD19F05020 and FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2021

Before :

The President of the Family Division

Re Al M (Fact-finding)

Mr Charles Geekie QC, Mr Timothy Otty QC, Ms Sharon Segal, and **Mr Daniel Burgess** (instructed by **Payne Hicks Beach**) for the **mother**
Lord Pannick QC, Mr Richard Spearman QC, Mr Nigel Dyer QC, Mr Andrew Green QC, Mr Godwin Busuttil, Mr Daniel Bentham, Mr Stephen Jarmain and **Mr Jason Pobjoy** (instructed by **Harbottle & Lewis**) for the **father**
Ms Deirdre Fottrell QC and **Mr Tom Wilson** (instructed by **Cafcass legal**) for the **Children's Guardian**

Hearing dates: 13th, 15th, 16th & 19th April 2021

Approved Judgment

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

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THE PRESIDENT OF THE FAMILY DIVISION

Sir Andrew McFarlane P :

Introduction

1. The focus of this judgment is the determination of a number of factual allegations that have been made in the course of ongoing proceedings relating to the welfare of two children. The children are Sheikha Al Jalila bint Mohammed bin Rashid Al Maktoum and Sheikh Zayed bin Mohammed bin Rashid Al Maktoum, who are now aged 13 and 9 years respectively. Their mother is Her Royal Highness Princess Haya bint Al Hussein. Their father is His Highness Mohammed bin Rashid Al Maktoum. The ultimate purpose of the proceedings is the resolution of issues relating to the children's welfare, in particular with respect to the contact that they are to have with their father and with respect to their education.

2. In 2019 the court conducted an extensive fact-finding process. In the 'First Fact-finding Judgment' handed down on 11 December 2019 ([2019] EWHC 3415 (Fam)) a number of very serious findings were made against the father. It had been anticipated by the court and the parties that no further fact-finding process would be needed and the court could, therefore, move on to determine the outstanding welfare issues. However, events in July and August 2020 have generated a number of additional factual allegations made by the mother against the father and those acting on his behalf in Dubai. As will become apparent, it has been necessary for the court to determine a number of legal and evidential issues between the parties relating to these new factual allegations before, finally, conducting a hearing to determine whether or not any of them is established.

3. In this judgment, following a recital of the detailed factual allegations that have been made, I will describe the legal context within which the factual matters fall to be determined and the various procedural steps that have been undertaken in preparation for the final hearing, before turning to the detailed evidence and, finally, to the court's conclusions.

Factual allegations

4. The mother seeks the following findings:

   i. The mobile phones of the mother, two of her solicitors (Baroness Shackleton and Nicholas Manners), her Personal Assistant and two members of her security staff have been the subject of unlawful surveillance during the course of the present proceedings and at a time of significant events in those proceedings.

   ii. The surveillance has been carried out by using software licensed to the Emirate of Dubai or the UAE by the NSO Group.

   iii. The surveillance has been carried out by servants or agents of the father, the Emirate of Dubai or the UAE.

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

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

5. At issue, are two basic assertions, firstly, whether any phones of those identified in paragraph 4(i) have been, in lay terms, hacked and, secondly, if the fact of hacking is established, whether it has been carried out by servants or agents of the father, the Emirate of Dubai or the UAE and whether the hacking has occurred with the express or implied authority of the father.

The legal context

6. The legal context within which factual allegations are determined is well settled and is not controversial as between the parties. The burden of proof is on the party who makes the allegations, the mother in this case, and it applies both to the fact of hacking and the question of the attribution of responsibility. The standard of proof is the simple balance of probabilities. The burden of proof is not reversible and there is no responsibility on the father in this case to prove anything. In particular, if the court is satisfied that the fact of hacking is proved, that state of affairs does not establish a 'pseudo-burden' upon the father to prove that responsibility should be attributed to some other person or State (to adopt the phrase used by Mostyn J in *Lancashire v R* [2013] EWHC 3064 (Fam)).

7. Findings of fact must be based on evidence rather than speculation. In *Re A (Fact-finding: Disputed Findings)* [2011] 1 FLR 1817, Munby LJ (as he then was) said:

> "(it is an) elementary proposition that findings of fact must be based on evidence, (including inferences that can properly be drawn from evidence) and not on suspicion or speculation."

In *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35 Baroness Hale (at paragraph 31) said:

> "In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability."

8. The court must consider all of the evidence, and consider the picture created by the evidential jigsaw as a whole. In *Re T* [2004] 2 FLR 838 Dame Elizabeth Butler-Sloss P described the process in these terms:

> "...evidence cannot be evaluated and assessed separately in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the

> evidence in order to come to the conclusion whether the case put forward…has been made out to the appropriate standard of proof."

9. The present case involves a good deal of expert evidence. It is for the court to determine the factual issues upon which expert opinion may then be offered. The role of the expert and of the judge are distinctly different as described by Ward LJ in *Re B (Care: Expert Witnesses)* [1996] 1 FLR 667:

> "The expert advises but the judge decides. The judge decides on the evidence. If there is nothing before the court, no facts or no circumstances shown to the court which throw doubt on the expert evidence, then, if that is all with which the court is left, the court must accept it. There is, however, no rule that the judge suspends judicial belief simply because the evidence is given by an expert."

10. Where more than one person or agency may be responsible for behaviour which the court has found proved, the court must be careful to ensure that a positive finding is only made against one or other on the balance of probabilities. The approach was correctly described by Lord Justice Peter Jackson in *Re B (A Child)* [2018] EWCA Civ 2127:

> "20. Even where there are only two possible perpetrators, there will be cases where a judge remains genuinely uncertain at the end of a fact-finding hearing and cannot identify the person responsible on the balance of probabilities. The court should not strain to identify a perpetrator in such circumstances: *Re D (Care Proceedings: Preliminary Hearing)* [2009] EWCA Civ 472 at [12].
>
> 21. In what Mr Geekie described as a simple binary case like the present one, the identification of one person as the perpetrator on the balance of probabilities carries the logical corollary that the second person must be excluded. However, the correct legal approach is to survey the evidence as a whole as it relates to each individual in order to arrive at a conclusion about whether the allegation has been made out in relation to one or other on a balance of probability. Evidentially, this will involve considering the individuals separately and together, and no doubt comparing the probabilities in respect of each of them. However, in the end the court must still ask itself the right question, which is not who is the more likely, but does the evidence establish that this individual probably caused this injury? In a case where there are more than two possible perpetrators, there are clear dangers in identifying an individual simply because they are the likeliest candidate, as this could lead to an identification on evidence that fell short of a probability. Although the danger does not arise in this form where there are only two possible perpetrators, the correct question is the same, if only to avoid the risk of an

> incorrect identification being made by a linear process of exclusion."

11. The father's case includes the suggestion that there may be a 'pool of possible perpetrators', if the fact of phone hacking itself is established. In *North Yorkshire County Council v SA* [2003] EWCA Civ 839, the Court of Appeal established that a person would only be included in the pool of possible perpetrators if the evidence established that there was 'a likelihood or real possibility' that they were the perpetrator. That approach was endorsed by the Supreme Court in *Re S-B (Children)* [2009] UKSC 17 where Baroness Hale said (paragraph 43) 'if the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved.'

Foreign Act of State

12. As part of his response to the allegations, the father asserted in September 2020 that the 'Foreign Act of State' doctrine ['FAS'] precluded the court from investigating the allegations. After a full hearing the court (The President and Mr Justice Chamberlain) held, in a judgment handed down on 20 October 2020 ([2020] EWHC 2883 (Fam)), that the FAS doctrine did not prevent the court from carrying out a fact-finding investigation and adjudicating upon all of the mother's allegations. On 8 February 2021 the father's appeal against this decision was dismissed by the Court of Appeal (The Master of the Rolls, Moylan and Andrews LJJ; [2021] EWCA Civ 129). On 8 March 2021, the father's application for permission to appeal was refused by the Supreme Court. Thus, it was only after that date the court was able to proceed with the fact-finding hearing.

The origin of the mother's allegations

13. In order to maintain the overall fairness of the court process it has been necessary to adopt certain novel, or at least out of the ordinary, procedural measures. Resort to these additional procedural steps were necessary largely in consequence of the two separate channels through which the mother's principal solicitor, Baroness Shackleton, came to learn of possible phone hacking in the course of 5 August 2020.

14. The first contact to Baroness Shackleton was via a message from another solicitor, Mr Martyn Day of Leigh Day Solicitors, which informed Baroness Shackleton of the identity and role of a computer surveillance expert, Dr Marczak. The second, and entirely separate, source of information came in a telephone call from Mrs Cherie Blair QC who had been invited to make contact with Baroness Shackleton by a senior official in NSO Group, an Israeli based software company responsible for marketing highly sophisticated surveillance programs for the exclusive use of State Governments and their intelligence services ['NSO' or 'NSO Group'].

(a) Dr Marczak

15. Dr William Marczak is a post-doctoral researcher in computer science at the University of California, Berkeley. He is also a research fellow attached to 'Citizen Lab', which is an independent research body based in Canada with an interest in electronic surveillance.

16. Through Citizen Lab, and independently, Dr Marczak has for some years conducted research into nation-state use of spyware and hacking tools to carry out covert surveillance against journalists, dissidents and other individual targets. It will be necessary to describe Dr Marczak's methods and his evidence in more detail at a later stage. For the present a broad overview will suffice.

17. To the ordinary layman phrases such as 'spyware' or 'malware' are likely to indicate the unwelcome deposit into their computer or mobile phone of a malevolent program which then seeks to extract confidential data or otherwise function in a destabilising manner. The software program which is at the centre of this fact-finding hearing, and which is manufactured and sold by NSO Group, operates in a different manner. The software is called 'Pegasus'. A principal feature of the Pegasus operation is that at no stage during the process of surveillance should it be possible to detect any trace of its covert processes. Thus, rather than requiring the owner of the device to be tricked into clicking on a link and downloading a subversive program onto their device, where it could then be detected by conventional antivirus software, the Pegasus software operates by linking the device with a remote server or servers, which may be anywhere in the world. The server will then send 'command and control' messages to the hacked device. Each of the remote servers used by Pegasus, and there are many, must, in common with any other internet connected device, have its own individual IP address ('IP' stands for 'internet protocol'). In order to cover up the trail of transmission of messages using Pegasus to and from a hacked device, command and control signals sent down the line will be likely to pass through a number of such 'proxy servers' before connecting to the ultimate controller, being an operative in the intelligence services of a particular customer State.

18. The trigger event that may cause a target device to communicate with a Pegasus proxy server may be a single click by the device's owner to a link in a spoof text message. Alternatively connection may be made without any action on the part of the device's owner at all by an 'over-the-air' method of infection, which involves sending a 'push message' that triggers the device to connect to the proxy server.

19. It follows that it is unlikely to be possible to detect that a phone or computer has been hacked by Pegasus software if the method of investigation is limited to searching for the electronic presence of spyware or malware even with the most sophisticated and professional antivirus search mechanisms. There will simply be no trace of Pegasus on the device because it does not need to maintain a presence there even for a very short time in order to control the device's functions and harvest data from it.

20. In order to detect the deployment of Pegasus software Dr Marczak has therefore had to adopt different methods of investigation. In broad terms these have involved the following three avenues:

    (a) Identifying Pegasus proxy server IP addresses;

    (b) Identifying unconventional applications ('apps') used by Pegasus;

    (c) Spotting idiosyncratic grammar and syntax used by Pegasus software programmers.

21. A breakthrough occurred some few years ago when Mr Ahmed Mansoor, a human rights campaigner active in the Middle East, received a text message which seemed suspicious. Mr Mansoor passed his phone to Dr Marczak. Dr Marczak, having established the ability to monitor the phone's activity, clicked on the link and was able to detect and record the various IP addresses with which the device then fell into communication. Dr Marczak advised the court that the format of a spyware program's 'check-in' and a server's response to it is often unique to the particular family of spyware being used. Dr Marczak has the ability to screen computer messages across every single IP address in the world. He undertook this process with the check-in message generated by clicking on the link contained in the text message received by Mr Mansoor's phone. Dr Marczak was then able to record those IP addresses which returned a response consistent with the functioning of that seen on Mr Mansoor's phone. On that occasion he identified some 237 IP addresses in this way. He was then able to check back using historical internet scanning data to see which other IP addresses had returned the same response and he found 83 addresses which were recorded as having done so between October 2013 and April 2014. These included some IP addresses which were formally registered to NSO Group.

22. Dr Marczak labelled the historic list of sites 'version 1' and the sites found on the scan contemporaneously with the hacking of Mr Mansoor's phone as 'version 2'. He then used a period of months, or it may have been longer, to continue tracking the 237 IP addresses (version 2) found at the time that Mr Mansoor's phone was infiltrated. Whilst, no doubt to maintain maximum covert agility, many of these IP addresses are used only for a very short time, Dr Marczak noted that 3 of the 237 addresses came back into use at a later date with a new decoy trigger. By tracking this new decoy trigger in the same way and screening it across every IP address currently in use, he identified a further 1,091 IP addresses which he labelled 'version 3'.

23. Finally, and in a wholly different way, Dr Marczak has identified a particular idiosyncrasy of the Pegasus spyware based on the method used to forward data to subsequent servers. Dr Marczak labelled an earlier idiosyncrasy as the 'first fingerprint'. He has disclosed the detail of the first fingerprint and it forms part of the general process of detection that I have already described and which is already publicly available in articles and other papers that Dr Marczak has authored over recent years. Dr Marczak does not, however, understand that the further idiosyncrasy that he has spotted, and which forms his 'second fingerprint', is known to others and, particularly, not known to the NSO Group. It therefore has continuing investigative, and no doubt commercial, value to Dr Marczak and he has declined to disclose it openly in these proceedings.

24. Dr Marczak has also asserted the need for maintaining confidentiality over the identity of an individual, 'Mr X', whose telephone was, he asserts, hacked in the same time period as the alleged hacking of the phones of the mother, her solicitors and staff. I will turn in more detail to consider the evidence relating to Mr X's phone at a later stage. The purpose of referring to him now is to explain his relevance with respect to the decisions made relating to the overall fairness of the proceedings which have, indeed, been conducted on the basis that his identity has remained confidential as to the parties and the court.

25. Dr Marczak describes Mr X as 'a UAE activist'. In the summer of 2020 Dr Marczak was engaged in monitoring the internet traffic for several devices used by Mr X because

he suspected that Mr X might be targeted with spyware. Dr Marczak asserts that Mr X was previously targeted with Pegasus spyware in 2015 by the same State operator who targeted Mr Mansoor the following year. On 12 July 2020 and on 3 August 2020 Dr Marczak saw Mr X's iPhones download a substantial amount of encrypted data from servers pointed to by two domain names that he had identified as belonging to the version 4 group of NSO servers. In accordance with his usual practice Dr Marczak then followed up the lines of communication and sought to identify the IP addresses and other distinctive features of the attempted infiltration of Mr X's device. Once he had done so he then attempted to discover the identities of other victims that were communicating with these suspected Pegasus command and control proxy servers at the same time. This led Dr Marczak to spot the IP address of the firm of solicitors instructed in these proceedings by the mother, led by Baroness Shackleton, Payne Hicks Beach ('PHB'). An internet search of PHB led to news stories relating to the present proceedings involving the mother and the father. On 4 or 5 August 2020 Dr Marczak made contact with Mr Martyn Day, a London solicitor who was known to him.

26. Mr Day, in turn, made contact with Baroness Shackleton and informed her of his connection with Dr Marczak and the general area of Dr Marczak's work. He told Baroness Shackleton that Dr Marczak had identified someone at PHB as being possibly targeted by UAE directed spyware and that Dr Marczak had asked Mr Day to introduce him to PHB in order that, if they were interested, he would be able to advise them.

(b) Mrs Cherie Blair CBE QC

27. On the evening of the same day, 5 August 2020, Mrs Cherie Blair CBE QC received a telephone call from a senior member of the management team of NSO Group. Mrs Blair apparently acts as an adviser to NSO on business and human rights matters. Two witness statements from Mrs Blair have been filed in these proceedings. Mrs Blair states that the call from NSO in Israel took place at nearly midnight Israeli time. She was told that 'it had come to the attention of NSO that their software may have been misused to monitor the mobile phone of Baroness Shackleton and her client, Her Royal Highness Princess Haya.' The NSO senior manager apparently expressed great concern. Mrs Blair was told that NSO had taken steps to ensure that the identified phones could not be accessed again by their software. The NSO manager asked Mrs Blair to help in contacting Baroness Shackleton.

28. Mrs Blair was able to obtain the phone number for Baroness Shackleton and she made contact with her that evening. Again, it will be necessary to turn to more detail within Mrs Blair's evidence at a later stage.

29. It is, therefore, part of the mother's case that Baroness Shackleton was alerted to the possibility of phone hacking by two entirely separate mechanisms on 5 August 2020. The one, Dr Marczak, investigating signs of the consequence of any attempted hacking and the other, from NSO Group, originating from its source.

Dr Marczak as 'an expert witness'

30. Understandably the mother and those acting for her readily accepted Dr Marczak's offer of further advice and assistance in investigating the possibility that there had been phone hacking. Shortly after 5 August, Dr Marczak examined a number of phones said to be used by the mother and her staff, together with phones used by Baroness

Shackleton and others at PHB. He examined system diagnostic data ('sysdiagnose') from each phone together with the internet usage logs taken from the routers at the mother's London home and her home in Berkshire.

31. As a result of his investigation Dr Marczak produced a forty-two page 'witness statement' dated 7 September 2020 in which he concluded 'with high confidence' that the phones of the mother, Baroness Shackleton and Nicholas Manners (another solicitor, and since December 2020 a partner, at PHB) had been hacked by a single operator of NSO Group's spyware. On the basis that any such operator would be a nation State he concluded 'with medium confidence' that the government in question is the UAE Government. Further, there was evidence that the phones of the mother's Personal Assistant and two others on her staff had also been hacked.

32. The mother issued her application to this court seeking findings of fact on 7 September 2020. It is thus the case that Dr Marczak did not enter the proceedings in the manner conventionally used for the obtaining of expert evidence. He was not formally instructed in the manner required of the procedural rules before he began his work and by the time he had produced his written statement he had engaged in extensive and detailed communication with the mother, her security staff and those at PHB. Whilst, given the sequence of events that I have described, and given the need for the mother and her advisers to have the assistance of bespoke expertise in this narrow area of computer science, it is understandable that Dr Marczak entered the process and the application of the fact-finding were made in the way that they were and in the sequence that they were, that state of affairs generated a need for the court to adopt a careful strategy permitting the mother to deploy and rely upon the evidence of Dr Marczak, whilst, at the same time, conducting a process that was fair to the interests of the father and the children. In addition the process adopted was aimed at allowing the court to test the evidence which, at the start of the process, came from one source, Dr Marczak, supported at that stage to a degree by non-specific hearsay evidence originating from NSO and reported to the court subsequently in the statements of Mrs Blair.

Procedural Decisions

33. I have taken time to describe the procedural and evidential landscape as it existed prior to and at the time of the mother's application for a further fact-finding hearing in order to make sense of the procedural steps that were then undertaken which were as follows.

34. In order to meet the unusual circumstances generated both by the method by which the evidence was introduced into the proceedings, and by the scientific complexity and sophistication of its content, it was necessary for the court to consider a range of procedural steps with the aim of achieving a fact-finding process that was both viable and fair to all the parties. These included the following:

    (a) appointment of a confidential scientific adviser to the father and his legal team;

    (b) appointment of an independent Single Joint Expert ['SJE'];

    (c) communication between the court and NSO Group;

(d) appointment of independent counsel to review the extent of disclosure/redaction of all communications between Dr Marczak, the mother, her staff and her legal advisers;

(e) appointment of a second independent counsel to review information about Mr X;

(f) the presentation of the father's case.

35. I propose to describe each of these steps in turn.

(a) Instruction of a specialist scientific adviser to the father

36. During a case management hearing on 6 October 2020, Lord Pannick QC, leading counsel for the father, sought permission for the instruction of a cyber-security expert to advise the father and his lawyers on a confidential basis. In the circumstances, the application was not actively resisted by the other parties and permission was given. I dealt with the issue shortly in one paragraph in my judgment on that day:

> "So far as the father being able to instruct his own privileged expert for the purposes of informing him and his team of the technical aspects, there is really no objection to that. I give that course my blessing as a wholly exceptional course taken in these proceedings, because the nature of the question to be considered by any such expert is wholly outside the comprehension of any ordinary human being and can only really be understood by someone of immense and particular experience and knowledge."

37. Paragraph 15 of the order of 6 October set out the basis upon which permission had been given:

> "Subject to the following conditions the father shall have permission, in the wholly exceptional circumstances of this case, to obtain advice from an expert or experts on cyber security on a privileged basis for the purposes of considering Dr Marczak's witness statement. The conditions are:
>
> a) The name of the expert(s) must be made known to the court and parties before the instruction is effected;
>
> b) The expert(s) must provide an undertaking (in like form as provided by the father's expert on security costs) to the court as to confidentiality prior to receipt of any papers;
>
> c) The statement of Dr Marczak dated 7 September 2020 but no other court document may be disclosed to the expert(s).The statement may be provided in unredacted form save that all redactions as to the phone names, phone individual and phone numbers should remain redacted;
>
> d) None of the data supplied to Dr Marczak for analysis shall be supplied to the expert(s).
>
> e) Permission to the father to apply to the court in relation to c) and d) above for the restrictions to be removed or varied."

38. The appointment of a shadow technical adviser to the father, whose advice and opinion were not required to be disclosed into the proceedings, was a wholly exceptional step. It was in part justified by a need to level up the forensic playing field in the early stages of the case during which the mother had open access to expert advice from Dr Marczak, yet the father had none. In the light of the highly technical content of Dr Marczak's statement, it was important that the father and his advisers should have their own source of specialist advice to enable them to understand the detailed content of Dr Marczak's statement and to be advised upon it.

39. At all stages, and on a number of occasions, the court has made it plain to the father that it would favourably consider an application by him for the instruction of his own expert witness, but that that instruction would have to be on the ordinary basis involving full and open disclosure of both the process of instruction and any resulting expert opinion. The father has at all times declined to make such an application.

40. The father instructed a firm based in Israel, Sygnia, as the special technical adviser for which permission had been granted to him. Despite the clear boundaries upon the extent of that instruction established by the court's decision, Lord Pannick QC has consistently pressed for the disclosure of the core data in the form of sysdiagnose files extracted from the phones of the mother, her staff and her solicitors, together with the records of network logs and Dr Marczak's own records of IP addresses, domain names and applications which he asserts are relevant to the Pegasus software. Lord Pannick has been plain that the purpose of disclosure was not to inflate the status of Sygnia into an expert whose opinion would be open to the court and filed in the proceedings. Lord Pannick nevertheless asserted that it is a basic requirement of fairness for the father's adviser to examine the core material upon which Dr Marczak's opinion was based in order to provide confidential advice to the father and his lawyers.

41. The court has consistently refused the father's applications in this regard. Although sub-paragraph (e) of the order granted permission to the father to apply to vary the embargo upon disclosure, I have been clear that the unprecedented relaxation of the long established approach to the open instruction of expert witnesses, whilst necessary and proportionate at the time that leave was given in this case, should not be extended further. Refusal was justified firstly as a matter of ordinary principle, but secondly because, by then, the court had embarked upon the instruction of a SJE and thirdly because the father was fully able to apply for his own FPR 2010, Part 25 compliant expert witness, but chose not to do so.

42. The father's access to, and receipt of advice from, Sygnia has, so far as the court is aware, continued throughout the trial process. It was no doubt available to inform the questions raised by the father's legal team during the instruction of the SJE and at the expert's meeting. It was also available to inform the lines of questioning during the extensive cross-examination of Dr Marczak.

(b) Single Joint Expert

43. Finding a source of expertise with sufficient knowledge and experience to act as a SJE on the question of whether or not the Pegasus software had been deployed to hack the phones of the mother and others proved to be a most difficult task. The endeavour was no doubt complicated by my insistence that it should be taken in stages, with the expert

only being exposed to Dr Marczak's statement at the second stage, once they had conducted their own examination of the sysdiagnose files and other core data.

44. The first SJE that was instructed, IntaForensics Ltd, undertook the first stage of investigation and reported that there was no sign that any of the relevant devices had been the subject of surveillance. I pause there to observe that, if it is the case that any of these phones have been infiltrated by Pegasus software, it is no surprise that a search for viruses, spyware or malware produced a 'nil' return as a principal selling point of Pegasus is said to be that it leaves no trace.

45. However, when Dr Marczak's statement was disclosed to IntaForensics they quickly responded indicating that they were unable to continue with the instruction. This message was followed up in a report dated 16 March 2021, which stated that the findings in IntaForensics' previous reports should not be relied upon. The report confirmed that the unusually named apps identified by Dr Marczak and the behaviour observed in these apps attempting to access standard features on the phones had been observed by IntaForensics. There was evidence that five of the six phones may have been the subject of surveillance and/or interference from an unidentified source.

46. The court is grateful to IntaForensics for taking up the instruction and being prepared to act as the SJE in this case. Because of the staged level of disclosure that the court insisted upon, IntaForensics were not to know the scale and character of the task for which they were being recruited and they command the court's respect, rather than criticism, for flagging up their inability to complete the instruction as soon as the situation became clear.

47. Fortunately, it was possible to identify a replacement SJE who was able to take up the instruction and respond quickly within the court's wider timetable. The expert instructed was Professor Alastair Beresford, who is Professor of Computer Security at the Department of Computer Science and Technology in the University of Cambridge. Professor Beresford's research work examines the security and privacy of large scale networked computer systems, with a particular focus on networked mobile devices such as smartphones, tablets and laptops. He has worked on mobile computing platforms in either industry or academia since 1995.

48. Before his instruction Professor Beresford was told that the court was interested in understanding whether or not the phones concerned had been infiltrated by the Pegasus software and that the court had received expert advice from Dr Marczak (whose general work was known to Professor Beresford). Professor Beresford was not given access to Dr Marczak's statement at that stage. Following his initial report which, like that of IntaForensics, confirmed that there was no trace of the Pegasus software on the sysdiagnose files or network logs, Dr Marczak's statement was then disclosed to Professor Beresford and there followed a short period of written communication through further written statements or reports orchestrated at the court's direction and culminating in an expert's meeting conducted by Ms Melanie Carew of Cafcass Legal and at which questions submitted by all three parties were addressed by Dr Marczak and Professor Beresford.

49. Professor Beresford gave oral evidence at the fact-finding hearing and was cross-examined by counsel on behalf of both the mother and the father.

(c) NSO Group

50. A full account is given of the involvement of NSO Group in the proceedings at paragraph 94 to 110. In terms of process, during October and November 2020 the court made directions requesting NSO to provide an account of the investigation that it had assured PHB it was carrying out. In the event a letter dated 14 December 2020 was sent to the court, via CAFCASS, by NSO. The relevant content of this letter is described at paragraphs 102 to 105. Since receipt of that letter no party has applied for a direction seeking to engage further with NSO either by way of requesting additional information or otherwise. On the first day of the fact-finding hearing Lord Pannick suggested that NSO might be asked a narrow and specific question arising out of the letter that had been received over three months earlier. This was expressly a 'suggestion' and not an application for a direction. After observations from the court as to a possible wider question that might be asked of NSO, the suggestion was not pursued.

(d) Independent Counsel

51. In early December 2020 PHB disclosed details of the extensive communication that had taken place between the mother's staff and PHB with Dr Marczak. The communication, which was largely in the form of emails, text messages or other electronic communication, when committed to paper ran to some 900 pages. Whilst much of the content was open to be read, there was, nevertheless, a very substantial element that had been redacted. Basic codes had been attributed to each redacted section indicating the general reason said to justify non-disclosure. Whilst the father's legal team accepted that some redaction was justified, for example withholding the names of security staff or an individual's telephone number, they questioned the extent of the redaction that had been undertaken and the range of categories relied upon.

52. Following full submissions from all parties, the court determined that the redaction process should be audited and checked by a senior member of the Bar, who had been security cleared for instruction in other cases as a special advocate, and who would act as independent counsel for this purpose (see judgment [2021] EWHC 156 (Fam)).

53. The court is grateful to Jennifer Carter-Manning QC for taking up instruction as the independent counsel and for the diligent manner in which she has plainly discharged her instruction. Whilst the arrangements put in place by the court allowed for any dispute between the independent counsel and PHB to be referred to me for final determination, in the event all matters were resolved without the need for my involvement. The result was that a substantial number of redacted passages were opened up and disclosed to the father's legal team, albeit only a few working days before the start of the hearing. This material was referred to extensively during cross-examination of Dr Marczak on behalf of the father.

(e) Mr X

54. Mr X, who features in Dr Marczak's analysis on the basis described at paragraph 24 above, is of relevance for two separate reasons. Firstly, irrespective of his underlying identity, Dr Marczak asserts that Mr X's telephone was targeted by Pegasus in a way that revealed the deployment of version 3 or version 4 IP addresses and the second fingerprint, domain names and apps that he attributes to Pegasus. The alleged hacking of Mr X's phone happened in precisely the same time window at the end of July and

early August as the asserted infiltration of the phones relevant to these proceedings. Mr X is therefore directly connected to Dr Marczak's analysis on the first question of whether or not the mother's and other phones in this case have been hacked. Secondly, Dr Marczak asserts that Mr X is a known 'UAE activist' and that the fact, as Dr Marczak asserts is the case, that his phone was hacked by Pegasus and that the same State operator was involved in hacking Mr X's phone and also the phones of the mother and those connected with her is, claims Dr Marczak, of relevance in attributing the identity of the hacking to the UAE.

55. The father has consistently sought an order requiring the disclosure of Mr X's identity. Dr Marczak is unwilling to disclose it without Mr X's consent. The mother contends that Mr X should be told who the parties are to these proceedings before he is asked whether or not he consents to the disclosure of his identity to those parties. The father refuses to agree to the disclosure of his identity to Mr X. There was, therefore, a standoff.

56. The court has no knowledge of the identity of Mr X over and above that which is stated in Dr Marczak's written statement. It is therefore simply not possible for me to assess what risk, if any, might open up for Mr X were his identity to be disclosed to the father and his advisers in the UAE were I to direct it. Whilst, at one end of the spectrum, disclosure may have no consequence for Mr X, at the other it is possible to contemplate exposing him to actions which might engage rights under Article 2 or Article 3 of the European Convention of Human Rights. Being mindful that Mr X's identity is irrelevant to the first question, namely whether hacking has taken place, which turns entirely on technical evidence, and given my preliminary view that Mr X's involvement and what is said about him can only be of peripheral probative value on the second question of attribution, I have consistently refused to require his identity to be disclosed into the proceedings. However, in order to at least provide some check on Dr Marczak's assertion that Mr X is 'a UAE activist', I sanctioned the instruction of a second independent counsel, Gareth Weetman, who was tasked with undertaking a search via Google and other public source material to see what was said about Mr X.

57. The court is most grateful to Mr Weetman for undertaking this role. He has provided a schedule recording each reference that he was able to find to Mr X and I will turn to that material in due course.

(f) The Father's Case

58. In contrast to the first fact-finding hearing, where the father instructed his lawyers to vacate the courtroom and play no part in the process, the father has been represented throughout the current process by a very substantial legal team of the highest quality. On the question of jurisdiction, the issue relating to FAS was pursued to a full appeal and an application of permission to appeal to the Supreme Court. In addition, the court has heard applications upon, and made determinations about, a wide range of procedural matters raised by the parties. None of the court's determinations has been the subject of an appeal.

59. Unusually in a fact-finding process, and in contrast to the first fact-finding hearing, the father has chosen not to file any evidence whatsoever on the issues. The only material filed on behalf of the father is open source media and other articles to which the court has not been specifically taken other than via limited reference during cross-

examination. In addition the court has received position statements and skeleton arguments which put the mother to proof of the allegations and which, from time to time, have made varying suggestions as to other States that may be responsible for any hacking that may be proved, other than the father or those acting on his behalf.

60. In his skeleton argument for the fact-finding hearing under the heading 'The father's response to the mother's allegations' it is asserted that 'the mother has not established on the balance of probabilities', the following matters in particular:

- that there has been surveillance of the relevant mobile phones,
- that such surveillance was carried out using NSO software,
- that such software was licensed to the UAE or Dubai,
- that the surveillance was carried out by the UAE or Dubai,
- that the alleged technical capabilities of the NSO software are established, and
- that the alleged surveillance occurred with the father's express or implied authority.

The case has been conducted on the basis that the father can neither confirm nor deny that the UAE (including Dubai) has or had any contract with NSO for the supply or use of the Pegasus system.

61. In circumstances where the father has filed no evidence at all in response to the allegations, where he has not sought leave to instruct his own open court expert, where there is effectively no substantial dispute between the evidence of Dr Marczak and that of the SJE and where the father does not seek to put forward a positive case before the court (other than to make various and varying suggestions), it might be possible to justify closing down or severely limiting the father's ability to contest the factual allegations. At this hearing, however, the court adopted the contrary course. Lord Pannick was permitted full and equal range to that attributed to Mr Geekie QC and the mother's legal team to advance arguments prior to the hearing and in closing submissions. Most importantly, Mr Andrew Green QC, on behalf of the father, conducted an extensive, most thorough and professionally adept cross-examination of Dr Marczak which was spread over two days and lasted at least seven hours.

The previous fact-finding judgment

62. The first fact-finding judgment, given in December 2019, made wide ranging findings against the father. These included the forced abduction of one of the father's older daughters, Princess Shamsa, from England in 2000 by those acting on behalf of the father, the restraint and house-arrest of another daughter, Princess Latifa, in 2002 and in the years following, the capture and forced return to Dubai of Princess Latifa from a boat in international waters off India by Indian Special Forces and the Dubai military in 2018 and her subsequent house-arrest, a campaign of fear and intimidation against the mother prior to her departure from Dubai in April 2019 and the campaign of harassment and threats that continued once she had arrived in England.

63. At paragraph 181 of the judgment I concluded that the findings established a consistent course of conduct by the father and those acting for him, over the course of two decades, 'where, if he deems it necessary to do so, the father will use the very substantial powers at his disposal to achieve his particular aims'.

64. It is not necessary to set out the earlier findings in more detail here, but before moving on from reference to the first fact-finding hearing it is necessary to correct a statement made by the father following the judgment in December 2019 and issued by his solicitors, Harbottle and Lewis. The father stated:

> 'As Head of Government I was not able to participate in the Court's fact finding process, this has resulted in the release of a "fact-finding" judgment which inevitably only tells one side of the story.'

That statement was at least disingenuous. It did not give a true account of the father's position before the court where, despite his position as Head of Government, the father had filed two full witness statements, where others named by the mother as being implicated could have given evidence on his behalf, and where he was represented by a large legal team who could (as at the present hearing) have been deployed to cross-examine the mother's witnesses and make submissions, but who were, on the father's instructions, simply withdrawn from the courtroom.

Fairness

65. Having described the various features of these proceedings which are to varying degrees unusual, it is possible to make the following observations as to fairness:

a) every single piece of evidence that has been admitted into the hearing has been fully disclosed to the father and his team. I, as the judge, have not seen any evidence that the father's lawyers and those acting for the children have not also seen. In so far as material has not been admitted into the hearing and has been withheld from disclosure to the father, it is not evidence in the case and forms no part of the material upon which I will make my decision.

b) In so far as Dr Marczak has examined and commented upon electronic data which has not been disclosed to the other parties and the court, that data has been fully examined and checked by both IntaForensics and Professor Beresford who, subject to minor corrections, have confirmed its accuracy.

c) In so far as Dr Marczak has relied upon data drawn from his investigations over the past five years and more, that data (including the 'second fingerprint') has been disclosed to Professor Beresford who, in turn, has reported upon its validity and accuracy in his evidence.

d) In so far as part of the content within the extensive records of communication between Dr Marczak and others relating to this case has not been disclosed to the court, the father or the children's guardian, that material has been fully considered and, where appropriate, challenged on the issue of disclosure by independent counsel instructed for that task.

e) In so far as the identity of Mr X has not been disclosed to the father, the children's guardian or the court, details of his identity have been given to the second independent counsel who has conducted searches of public facing material and reported to the court.

f) The father has at all times been able to apply to have his own openly instructed expert within the proceedings who would be instructed in accordance with the court rules and subject to the same stringent conditions as Professor Beresford.

g) Despite having filed no evidence at all and having not put forward a positive case before the court, the father has continued to enjoy all the rights of a party to participate in the proceedings including making full submissions through counsel and conducting a thorough and extensive cross-examination of Dr Marczak.

h) The fact-finding hearing, which was conducted entirely remotely over a Teams link, was open for the attendance of any UK accredited media representative. A number of media representatives attended throughout the hearing. In addition full transcripts of all of the interim and case management hearings which have taken place in the lead up to the fact-finding hearing have been made available for scrutiny by the media representatives.

Dr Marczak's written evidence

66. Dr Marczak is, on his own account, a computer scientist who has taken a particular interest in cyber security and covert surveillance. In particular he is the leading author of a series of articles published over recent years by 'Citizen Lab', an interdisciplinary laboratory based at the University of Toronto. The articles have sought to expose alleged abuses of spyware (in particular Pegasus) to target individuals (for example journalists or political activists). Dr Marczak's work in this regard has focussed on the Middle East and the UAE in particular. The father, rightly, submits that Dr Marczak entered these proceedings with a pre-established mindset and perspective on these issues. There is a danger, which I also accept, that Dr Marczak's goal was to establish that misuse of Pegasus software attributable to the UAE/Dubai had taken place. Lord Pannick, again rightly, submits that the court should be cautious both to avoid 'confirmation bias' in Dr Marczak's evidence and in the court's own approach to it.

67. Despite the unconventional route by which Dr Marczak's evidence has come before the court, I concluded at an early stage that it was right in these proceedings relating to children for it to be admitted. If the mother's case is right that her phone and those of others close to her have been hacked by this highly sophisticated surveillance software, it is almost inevitable that she would not know that this were the case unless either she were alerted by a whistle-blower within the operating organisation (which to a degree is her case) or she was alerted to the potential for hacking by an individual such as Dr Marczak who could only confirm the possibility that there had been hacking after he had examined all of the relevant devices and networks. In contrast to a more ordinary case where a party may make a factual allegation which is then investigated by an expert witness within the context of court proceedings, the mother in this case did not know

that she had an allegation to make until Dr Marczak had conducted his investigation and told her of his conclusions.

68. I have, however, been cautious to ensure that Dr Marczak is not regarded as an independent expert before the court. He comes to the court both as an individual who had reached his conclusions before the case commenced and one who is open about his interest in investigating covert surveillance activities which are attributable to the UAE. I have at all times been keen to follow and understand the science to identify such solid ground as there may be within it, rather than considering more general assumptions and assertions that Dr Marczak may make regarding the identity of the perpetrator.

69. Dr Marczak's evidence inevitably descended into a good deal of detail both as to the operation of the Pegasus software system and the various strategies that he has employed to detect it. Much of Dr Marczak's work in that regard is in the public domain. For that reason, for reasons of general public policy as to the disclosure of the workings of a system which is of importance to security services around the world and, most importantly, because it is not necessary to do so, I will not include such detail within this judgment.

70. I have already (paragraphs 20 to 23) described the basic method of investigation that Dr Marczak has developed to identify and track use of the Pegasus software over the years. I therefore turn to record the steps that he took once his invitation to assist PHB and the mother had been accepted in early August 2020.

71. Dr Marczak had noticed suspicious activity in mid-July and then again in early August on several devices used by Mr X. In particular he identified a number of domain names associated with IP addresses that he had previously identified as being connected with NSO in recent times ('version 4'). Also, the way in which Mr X's phones were made to communicate with the suspicious domain names, by sending a sequence of 'knocking' packets before it sent a request, rather than simply making contact, further suggested that covert surveillance was being undertaken. 'Knocking' in this sense is similar to a resident not answering the door to their home unless a knocker taps in a specific previously agreed pattern of knocks.

72. In addition, Dr Marczak observed that a number of unusually named applications ('apps') were active on the phones and were attempting to communicate with Pegasus command and control proxy servers. Dr Marczak assumed that these unusually named apps represented Pegasus spyware.

73. Initially, Dr Marczak provided PHB and the mother's staff with the IP addresses and domain names that he had observed on Mr X's phone as well as other IP addresses and domain names drawn from his wider research so as to enable those to be compared with data on the network logs at the mother's homes and at PHB. Dr Marczak then examined the sysdiagnose data from each of the relevant phones.

74. Examination of the phone attributed to Baroness Shackleton showed that an unusually named temporary app had connected with two IP addresses that were the same as those to which Mr X's phone had also linked. In addition the temporary app attempted to access three of the standard apps on the phone namely 'preferences', 'siri' and 'mail'. The 'mobile container manager' logs from Baroness Shackleton's phone also showed

several earlier cases where other apps with odd names had attempted to access the same standard apps on her phone without the user's permission.

75. The sysdiagnose from the phone attributed to Nicholas Manners showed that another unusually named temporary app had, between 3 and 5 August, attempted to communicate with six different IP addresses related to Pegasus domain names. Another temporary app had attempted to access the same three pre-installed standard apps on his phone together with a fourth one, 'notes'.

76. The network logs recording activity at the mother's Berkshire home showed that between 17 July and 3 August six attempts were made to access a particular domain name connected with Pegasus. Further, another Pegasus domain name and a further suspicious domain name uploaded 265 megabytes of data from the mother's phone. By way of illustration, that amount of data equates to some 24 hours of digital voice recording data or 500 photographs. It is a very substantial amount of data. Further, the sysdiagnose data from the mother's phone demonstrated that a temporary unusually named app had sought to communicate with the same four pre-installed applications as had been the case on Mr Manners' phone.

77. Signs of infiltration on the further three phones, namely those attributed to the mother's Personal Assistant and two of her security staff, were less specific in terms of directly connecting to Pegasus, however the same named temporary apps were found on those three phones and each of which had attempted to access the same pre-installed standard apps.

78. Dr Marczak stated his conclusions in his first witness statement as follows:

> "I conclude that the following phones were successfully hacked by NSO Group's Pegasus spyware between the dates indicated. I have "high confidence" in this conclusion, which means that I do not believe there are any plausible alternative conclusions that could explain the data I have gathered. The phones may not have been under continuous surveillance during the entire period, as the Pegasus spyware is not necessarily "persistent", i.e. turning the phone of and on again may remove the spyware and necessitate re-infection. It is also possible that additional phones were infected, or that the following phones were also infected on prior dates and there is insufficient log data in the sysdiagnoses to establish this. [he then listed the six phones]
>
> I conclude with high confidence that Nick Manners, Princess Haya and Baroness Shackleton were hacked by a single operator of NSO Group's spyware. I conclude with high confidence that this operator is a nation-state, because NSO Group's CEO asserted this in a sworn declaration and extensive reporting on NSO Group has yielded no evidence to the contrary. I conclude with "medium confidence" that the government in question is the UAE Government, meaning that I believe there are other conclusions as to the identity of the government that are within the realm of plausibility, but that the UAE Government hypothesis seems to be the most likely conclusion. The spyware

> on the phones of Nick Manners, Princess Haya and Fiona Shackleton communicated with some of the same IP addresses and domain names as the spyware on Mr X's phone. Mr X is a UAE activist who was previously targeted by the same Pegasus operator that targeted Ahmed Mansoor, a well-known UAE activist, in 2016. The UAE Government is known to be a customer of Pegasus.
>
> There is at present no technical evidence to suggest which government operator hacked the phones of Princess Haya's Personal Assistant [and the two unnamed members of her security staff] with Pegasus. However, given the lack of evidence of a second operator targeting individuals linked to Princess Haya, I conclude that it is more likely than not that these targets were hacked by the same operator as targeted Nick Manners, Princess Haya and Fiona Shackleton.
>
> It is hard to say for certain what data Pegasus exfiltrated from the hacked phones, though according to a 2016 analysis of Pegasus, its capabilities included: tracking: tracking the targets location; reading messages including SMS and email, and from a variety of apps including iMessage, Gmail, Viber, Facebook, WhatsApp, Telegram, Skype, Line, Kakaotalk, WeChat, Surespot, Imo.im, Mail.Ru, Tango, VK and Odnoklassniki; listening in on calls including phone calls, as well as calls placed through the WhatsApp and Viber apps; accessing the target's contact list, calendar, saved passwords, photos and other files, browsing history, and call logs; recording live activity by enabling the microphone; and taking screenshots and pictures through the camera."

79. Separately, Dr Marczak found that one of the phones attributable to the mother's security staff had a sysdiagnose which showed that on five dates in November 2019 three further Pegasus apps attempted to access software on the phone without success.

80. On 7 February 2021 Dr Marczak filed a second witness statement commenting upon the initial report of the first SJE, IntaForensics. It is not necessary to refer to the detail of that statement here. In a third witness statement dated 1 March 2021, Dr Marczak gave greater detail as to the process he had adopted when analysing the logs from the wifi system of the mother's home with particular reference to the phone that he understood was attributed to her. The statement included a table recording no fewer than eleven occasions when data had been downloaded and then uploaded between the mother's phone and destination IP addresses or domain names which Dr Marczak attributes to Pegasus. In particular, this includes the occasion already referred to when two hundred and sixty five megabytes of data was uploaded.

81. Dr Marczak's final witness statement, dated 28 March 2021 engages with specific points that had by then been raised by Professor Beresford. They are matters of detail and do not require recording here.

82. Finally Dr Marczak provided further information in two documents explaining his analysis of the purported targeting of Mr X's phone by Pegasus in 2015. In one of these documents Dr Marczak gives an extensive explanation of a method of calculating the approximate location of individual servers where the 'last-modified' header of an activity is either precisely the same, down to the last second, as GMT or is precisely and exactly a whole number of hours different (with no difference as to the minutes and seconds). Thus suggesting that the activity happened at precisely the same time, but was measured at a different clock time, precisely one hour different, because the clock of the proxy server was calibrated in accordance with local time in a different time zone. On the basis of this analysis Dr Marczak inferred that two of the suspicious Pegasus servers which appeared in links sent to Mr X in 2015 may have been run by the same Pegasus operator because all three IP addresses pointed to by these servers had a single inferred time zone of GMT+4 which is the time zone of the United Arab Emirates as well as other countries in that region.

Professor Beresford: written evidence

83. I have already set out Professor Beresford's academic post and his relevant experience in short terms at paragraph 47. In his first report dated 9 March 2021 he concluded:

> "I have found no evidence that the iPhones in question have been the subject of surveillance and/or interference. This finding is not necessarily in conflict with those of Dr Marczak since I lack the technical details of how recent versions of the Pegasus spyware operate and manifest themselves as evidence in sysdiagnose files and in network logs. Access to further information on the operation of Pegasus from Dr William Marczak or another source may allow me to identify such evidence."

84. By the time of his second report, 24 March 2021, Professor Beresford had reviewed the overall methodology used by Dr Marczak as outlined in his three witness statements as well as in the core data that had been provided to him. He concluded:

> "The overall approach taken appears sound and I have been able to confirm much of the technical detail."

85. Professor Beresford raised a number of detailed questions about precise entries and reference numbers in a small number of points recorded in the reports of Dr Marczak and Intaforensics. He sought clarification with respect to these various matters.

86. Professor Beresford described the proposed method of searching for command and control proxy servers as 'sound', however he observed it may produce incomplete results if connections from specific machines are blocked or techniques such as port knocking are required to elicit a response. Secondly, the method of scanning the entire internet is, he confirmed, 'a reasonable means to find servers which exhibit a response consistent with a C and C or installation server'. Professor Beresford had been sent underlying detail relating to Dr Marczak's 'version 3' fingerprint and he concluded that 'the overall setup used looks reasonable however a more detailed description of the method would be welcome.'

87. With regard to Dr Marczak's 'second fingerprint', details of which have been withheld from the court and the father's team, Professor Beresford said this:

> "(Dr Marczak) also describes a second fingerprint which Dr Marczak has developed. I have been supplied with the technical details of this fingerprint. The method is distinct from the approach used for fingerprinting version 1, version 2 and version 3 Pegasus infrastructure. The idea proposed appears sound however I have some technical questions on the degree to which the new method might lead to false positives (asserting that an IP address is part of the Pegasus infrastructure when it is in fact not) as well as false negatives (failing to notice that an IP address is part of the Pegasus infrastructure when it is). My questions are perhaps best used as discussion points with Dr Marczak if this is permitted."

88. With respect to 'version 1' and 'version 2' Professor Beresford advised:

> "The above methodology provides evidence that 'version 1' and 'version 2' responses were linked to NSO Group. While I have some outstanding questions in terms of checking the detail, the overall approach offers a route to demonstrate that the spyware installation intended for Mr Mansoor came from NSO group and therefore it is likely to represent their product Pegasus."

89. With respect to Mr X Professor Beresford was unable, on the information before him, to identify the domain name regarded as suspicious as being one connected to 'version 4' proxy servers.

90. In an addendum dated 28 March 2021 Professor Beresford confirmed that his investigation demonstrated that the methodology and more detailed arguments given by Dr Marczak on a discrete point in his second witness statement were sound. In a further addendum dated 4 April 2021 Professor Beresford returned to the topic of the 'second fingerprint' in the light of further information that he has been given. He concluded:

> "The effectiveness of this technique rests on the fact that the fingerprint produced is distinguishing in the sense that it is able to detect all instances of Pegasus proxy servers (i.e. no false negatives) and does not accidentally claim unrelated services are Pegasus proxy servers (i.e. no false positives). Given the set of tests Dr Marczak includes, the range of possible variants is large. Having reviewed the fingerprint information and the data from the rest of the scan I am satisfied that the fingerprint is distinctive and therefore the rate of false positives or false negatives will be low."

91. Following the experts' meeting Professor Beresford provided a further final report on 9 April tying up a number of details and, in particular, concluding that there was good evidence linking Dr Marczak's 'version 2' and 'version 3' servers.

The experts' meeting

92. An experts' meeting was held remotely on 6 April 2021. It was attended by Dr Marczak and Professor Beresford, and chaired by Melanie Carew of CAFCASS Legal. Detailed questions for the experts had been submitted by the legal teams for each parent prior to the meeting.

93. It is not necessary to rehearse the detail of this meeting, which included the resolution between the two experts of a number of matters of outstanding detail and resulted in a unanimity of opinion between them.

NSO Group

94. I have already described in summary terms how the NSO Group first sought to make contact with Baroness Shackleton via Mrs Cherie Blair QC. It is now necessary to record more detail of the unchallenged evidence of the Baroness and Mrs Blair in this regard.

95. In her first statement to the court Mrs Blair stated that she received a telephone call on the evening of 5 August 2020 from 'a senior member of the management team of NSO', who she was specifically asked not to name. She states:

> "I was told by the NSO senior manager that it had come to the attention of NSO that their software may have been misused to monitor the mobile phone of Baroness Shackleton and her client, Her Royal Highness Princess Haya. The NSO Senior Manager told me that NSO were very concerned about this and asked me to contact Baroness Shackleton urgently so that she could notify Princess Haya. The NSO Senior Manager told me they had taken steps to ensure that the phones could not be accessed again."

96. Mrs Blair was able to contact Baroness Shackleton and inform her of the information received from NSO. Baroness Shackleton told Mrs Blair that she had, on the same day, been contacted by a senior partner in another city law firm delivering a very similar message. After that call Mrs Blair spoke again to the NSO Senior Manager who 'confirmed that NSO had not contacted another city firm to approach Baroness Shackleton.'

97. Mrs Blair is clear that she has never been told the identity of the NSO customer suspected of carrying out this alleged surveillance. She does, however state:

> "It had always been my assumption that 'the country' (or the government agency/security agency within this country) was Dubai. This is because I assumed no one else would have an interest in targeting Princess Haya and Baroness Shackleton. I have not had any explicit confirmation from NSO who their client was. However, during a conversation with the NSO Senior Manager, I recall asking whether their client was the 'big state' or the 'little state'. The NSO Senior Manager clarified that it was the 'little state' which I took to be the state of Dubai."

98. At this point it is right to explain that, in terms of a 'State', the Emirate of Dubai is a constituent member of the sovereign State of the United Arab Emirates. Dubai is not therefore a sovereign State itself, it is a federal state within the sovereign State of the UAE. Loose use of language, including by the court in the earlier fact-finding judgment and elsewhere, has at times referred to Dubai as a State, which, in the sense of a sovereign State, is incorrect. NSO' Chief Executive Officer has made it clear that it only enters into contracts to supply Pegasus software to sovereign States.

99. On 11 August 2020, Cherie Blair spoke again on the telephone with Baroness Shackleton at PHB. The call was attended by two other members of the family team at PHB. An attendance note of that call made by PHB has been shown to Mrs Blair who has confirmed that it is consistent with her broad recollection. She did not, herself, take notes of the call. The note states that during the call 'CB confirmed it was the Emirate of Dubai, not UAE in general, who she was talking about.'

100. On 28 August 2020, solicitors directly instructed by NSO Group (Schillings) wrote to PHB confirming that their client was 'investigating this matter' and could not confirm any factual information at that stage. A subsequent letter from Schillings, dated 1 September 2020, stressed that the identity of NSO clients is strictly confidential and that Mrs Blair was not privy to the identity of any of NSO's clients. The letter also stated that 'since 5 August 2020…onwards our client has no reason to believe that its technology is being or can be, deployed in the UK by any government agency against those identified in your letter, either by name or by reference to their roles. Whether there had been any breach prior to this is the subject of our client's investigation.'

101. In response to a direct request made by the court, NSO provided a letter, dated 14 December 2020, setting out an account of its investigation and subsequent actions. The court is grateful to NSO Group, who are outside the jurisdiction of this court, for responding to its request.

102. The letter includes general background information including the following:

> "NSO's purpose is to create technology which is licensed only to government intelligence and law enforcement authorities to enable those intelligence agencies and authorities to identify, investigate and prevent serious crimes and terrorism, and otherwise protect public safety.
>
> NSO is committed to aligning with the UN Guiding Principles on Business and Human Rights ('UN Guiding Principles'). Human rights protections are integrated in all aspects of NSO's work. Our desire to implement the highest ethical standards is demonstrated by NSO's detailed Human Rights Policy, and Transparency Statement of Principles, whereby we publicly report on the effectiveness of our policies and procedures.
>
> NSO takes its responsibility for ethics and accountability very seriously. The Human Rights Policy, Transparency Statement, and Whistleblower Policies feature prominently on our website and undergo constant review.

...

> NSO does not condone, assist in or encourage the use of its software for purposes other than the agreed purposes specified and identified in the contracts it concludes with its customers on a lawful basis. Nor does it, or would it, agree with its customers to facilitate such use."

103. The letter later moves on, under a heading 'Relevant Background', to give the following account:

> "On 4 August 2020, NSO became aware of a possible use of the technology by a customer that was not in accordance with the contractual terms applicable to it, or which appeared to be beyond the purposes for which the technology was supplied... . As part of its review of this possible use, information was provided to NSO that raised the possibility that Baroness Shackleton's mobile phone, that of another unnamed member of her firm and that of her client (the Respondent Mother), may been compromised. At this stage, NSO did not know the full facts of whether phones belonging to other individuals may have been compromised. We cannot reveal confidential information or the methodology by which NSO seeks to verify that its technology is used strictly in accordance with the contractual terms on which it is licensed, for the purposes set out above. To do so would prejudice NSO's capacity to investigate future incidents."

104. The letter then gives an account of the investigation carried out by NSO before stating:

> "The activity of gathering information for the purposes of the Investigation itself concluded on or around 15 September 2020, although the post-investigative process which NSO follows in order to make a final determination has only recently concluded. While the Investigation could not make any determinative conclusions as to what in fact happened, the recommendation following the Investigation was that the contract with the customer should be terminated, and that the systems which that customer had contracts for be shut down."

105. The letter confirmed that the provision of services by NSO to the customer stopped completely as of 7 December 2020. In summary, the letter confirmed that, following its investigation, NSO had based its decision on the 'working assumptions' that 'the customer acted in breach of its contract with NSO' and that the phones of Baroness Shackleton, a member of her firm and the mother 'may have been compromised'. The following is then stated:

> "Following the investigation, NSO has not been able to establish any indication that the surveillance of the identifiers for (i) Baroness Shackleton and (ii) a member of her firm occurred prior to 7 July 2020. The investigation was also not able to

> establish when the surveillance of the identifier for (iii) the Respondent Mother began."

106. During the concluding section of the letter NSO confirmed that it was not able to reveal or confirm the identity of any of its customers. But it did confirm that 'our products are used exclusively by government intelligence and law enforcement agencies' and that therefore the father was not himself a customer.

107. That statement is consistent with a Declaration by Shalev Hulio, Chief Executive Officer of NSO Group, dated 16 April 2020, that has been filed in litigation in the USA. The court has seen a full copy of Mr Hulio's Declaration which includes the following statement:

> "NSO Group innovates cyber solutions that NSO Group does not itself use. NSO's only customers are sovereign states and the intelligence and law enforcement agencies of sovereign states…"

A subsequent Declaration by Mr Hulio, dated 13 May 2020, sets out further details of the steps to which NSO Group goes to ensure that its product is used exclusively by sovereign governments.

108. It is of note that the dates given for the assumed compromise of the three phones to which reference is made accords with the evidence of Dr Marczak.

109. The court has seen a copy of NSO's 'Human Rights Policy' dated September 2019. At a number of points the policy indicates the seriousness with which NSO will regard any serious misuse, or breach of contract by a customer. For example, paragraph xiii includes the following statement:

> "After either our own investigation or a state investigation, if we have sufficient grounds to believe that our products may have been misused we promptly take appropriate action. Ultimately where necessary, we may suspend or terminate use of the product or take other steps that may be warranted."

110. In the present case, as the NSO letter of December 2020 makes plain, after its investigation NSO has adopted the extreme remedy of terminating its customer's use of the Pegasus software. In commercial terms, this step is to be understood as having great significance. The court has been given general information, but it is plain that the contract price flowing from a customer to NSO for access to and use of the Pegasus software is measured in tens of millions of dollars. Further, termination of a customer's contract is likely, not only to affect the revenue flowing from the current licence term, but may well impact upon future revenue from that sovereign State in the years to come.

Mr X

111. Independent counsel, Mr Weetman, was provided with details of Mr X's identity, including various spellings of his name in English and Arabic. Armed with this information he was able to identify some 30 or more references to Mr X via internet

searches; the number is approximate as there is some potential duplication between English and Arabic articles.

112. Dating is by reference to a year only and a distinction is drawn between [Year] and 'Recent'. Mr Weetman was not invited to clarify this distinction. I have proceeded on the basis that 'Recent' indicates current activity in 2021, but [Year] indicates activity which is clearly limited to that year. I have not assumed that 'Recent' activity only commenced in 2021; the reference is taken simply as indicating that it is current.

113. The distinction between 'Recent' and any entry for [Year] or earlier is of importance. All of the 'Recent' entries relate to articles connecting Mr X with interest in the affairs of [another state], whereas the earlier references, including [Year], refer solely to interest in the UAE and do not refer to any other State (save for one [Year] reference to the justice system in [another state]). Finally, one 'recent' social media site is recorded as including recent comments by Mr X, or highlighting comments by him, regarding alleged human rights abuses in [another state], UAE, [four other states] [redacted].

114. The conclusion to be drawn from this material can only be that, insofar as he has publicly commented on matters, Mr X was, at least up until and during [Year], focussed on matters that were of concern to him in the UAE. More recently he has moved away from that focus and is now predominantly concerned with matters relating to [another state].

Dr Marczak: oral evidence

115. Dr Marczak gave oral evidence over a video link from California. The court sitting time was adapted as much as possible to accommodate the time difference, but the court is grateful to Dr Marczak for making himself available at an early stage on the two days over which his evidence was heard.

116. In response to the firm submission made by Lord Pannick that it was inappropriate for Dr Marczak to give any evidence in chief in the light of the very full and technically complicated statements that had been filed, Mr Charles Geekie QC's short opening questions for the mother were confined simply to matters of housekeeping. Ms Fottrell QC on behalf of the children's guardian had no cross-examination. Mr Geekie had no re-examination.

117. Dr Marczak gave oral evidence for over 6½ hours. This period was almost entirely taken up by cross-examination from Andrew Green QC on behalf of the father. It is right to record that Mr Green demonstrated cross-examination skills of the highest professional order. The structure of the cross-examination and the content of the questions were designed to test Dr Marczak's testimony across a wide canvas, including not only matters of technical detail but also possibilities of bias or fixed mindset against the UAE and Dubai. In addition Dr Marczak was questioned closely on the detailed communications that had been disclosed of discussions that he had had with the mother's security staff and others during the course of his investigation. The questioning was entirely justified and, given the unconventional route by which Dr Marczak had been introduced into the proceedings, the court benefitted greatly from having these matters tested in such detail by an advocate who plainly had total command of his brief and the skill with which to deploy that information in the best

interests of his client, the father. Save for one aspect that did not require further elaboration, I do not think that I intervened at any stage to restrain or direct Mr Green in the questions that he sought to put.

118. For his part, Dr Marczak also demonstrated, as might be understandable, a thorough grasp of the detail (both technical and factual) upon which his evidence was based. He gave clear answers to each of counsel's questions and in all other respects co-operated with the cross-examination process fully.

119. The following aspects of Dr Marczak's oral evidence are of particular note:

(a) He began monitoring Mr X's phone around January 2020. Mr X was one of a dozen or so other activists he was also monitoring. The UAE was not the only State of interest in the monitoring process. Other States including Bahrain, Saudi Arabia, Ethiopia, South Korea and Tibet.

(b) Dr Marczak has a working 'victims list' which is a list of leads towards investigation. The list identifies the IP addresses of supposed victims. The source of information leading to inclusion on the 'victims list' does not come from examination of sysdiagnoses or the identification of a server. It comes from elsewhere. Dr Marczak accepted that the identification of others who may be on the 'victims list' could be of relevance to these proceedings, but he was not prepared to disclose the list.

(c) There were IP addresses registered to Jordan on the 'victims list'. Dr Marczak accepted that this was not mentioned in his report. Dr Marczak confirmed that there were potential Jordanian targets on his 'victims list'. He was not able to recall the precise number, but thought it may be ten or twenty, but subject to quite a margin of error.

(d) Dr Marczak had had no communication with the mother or anyone acting for her before the 4th August when he made contact with Martyn Day at Leigh Day.

(e) Network logs for PHB were never examined and, on his understanding, were simply not available.

(f) Dr Marczak did not know anything about the history of the phones. He was simply given access to the sysdiagnose and the devices and told that these were the phones of named individuals.

(g) Dr Marczak accepted that the 'mobile container manager logs' went back many months on the phones. If the sysdiagnose files had been altered in any way deliberately, that would be hard to detect.

(h) Dr Marczak confirmed that the phones of the mother's Personal Assistant, and the two security officers did not contain

> direct evidence of those phones trying to communicate with the Pegasus proxy server. The analysis nevertheless indicated that these three phones had been infiltrated was based upon the identification of distinct app names and the distinctive pattern of the security failure that exhibited in the mobile container manager logs for each of the phones that was similar to those which did communicate with Pegasus proxy servers.
>
> (i) Dr Marczak referred to a distinctive pattern of entitlement failure which involved specific apps trying to access preferences, Siri and mail, but failing. For Dr Marczak the pattern of accessing only those apps, combined with the fact that the requesting app has an unusual name is 'quite distinctive'. Most of the apps seen on iPhones are installed, as they have to be, through the AppStore controlled by Apple. The names of these apps are totally different from the format of App Store app names. The unusual behaviour is a combination of the unusually named apps, trying to access the same three or four ordinary apps, and no other, and doing so immediately after they log into the phone. This behaviour was observed on all of the suspect phones.

120. Towards the end of the first day of oral evidence, and at the beginning of the second, Dr Marczak was questioned about his analysis of the network logs at the mother's Berkshire home. He had examined the network log at the mother's London home, but had found no material evidence and had not, therefore, referred to that log in his written statement. During the initial search of the Berkshire home network log Dr Marczak's invoice records that he 'reverse engineered…to extract dates and times at which four unidentified Pegasus victims called devices' at the home. It went on to state 'Goal is to ID these additional victims linked to the case'. Dr Marczak explained that these individuals could not be said to be 'identified'. At that stage he had simply identified an overlap between the proprietary information on his 'victim list' and communications noted on the mother's network logs to or from those named IP addresses. When first giving evidence about this he could not recall whether they had eventually been identified. He did not regard this as being a particularly important part of the process.

121. On further questioning Dr Marczak had not included this information in his written statements because the information was based on his 'list' and he did not wish to reveal the content of the list or its source. Because the provenance of IP addresses on the list may be variable, Dr Marczak did not 'feel comfortable' saying with any level of certainty 'look, there are these additional victims'. He accepted that, with hindsight, he might have referred to this in his statement.

122. In his evidence at the start of the second day Dr Marczak explained that he had a number of lists with Pegasus servers, or probable Pegasus servers, identified on them. There was a list drawn from Mr X. There was also a wider list of Pegasus servers and then there was a 'victims list' referring to the specific servers in this case. Only the 'victims list' has any detail about victims, the other lists show detail about IP addresses and domain names linked to Pegasus servers. When he had referred to Jordanian IP addresses at an earlier stage of his evidence, he had been referring to addresses on the 'victims list' associated with Pegasus servers linked to this particular case.

123. Dr Marczak confirmed that the home network log identified an IP address of a supposed Pegasus victim connecting with the mother's home network. As far as he could recall this data referred to one of the six phones on the list, but he could not be 100% sure.

124. Dr Marczak explained that the IP addresses that were seen on the home network log were not users of the home wifi system, they were IP addresses that were being communicated with, for one reason or another, from users inside the home. He therefore questioned the relevance of each of these links. He also questioned of how useful this information might be given that it might indicate a false positive or a false negative connected with the victims list. The firmer evidence, he suggested only came when one examined the phones and saw what was on the sysdiagnose. He therefore only referred to individual devices in his first witness statement if any earlier information was also confirmed by examination of the sysdiagnose.

Professor Beresford: oral evidence

125. Professor Beresford's written reports demonstrated a meticulous demeanour with a commendable obsession for detail which had enabled him to spot small typographical errors in various IP addresses, app and domain names (some of which are long and complicated) contained in Dr Marczak's various statements. This attention to detail was further demonstrated throughout his oral evidence. I formed the clear impression that he was an extremely careful witness who was keen not to say anything unless he had confidence in the accuracy of his answer.

126. Professor Beresford confirmed the contents of his reports by being taken to the specific headline points by Mr Geekie. In particular, with regards to the 'second fingerprint', he confirmed that he had had full access to it and had discussion with Dr Marczak about it. As a result he was satisfied that Dr Marczak had successfully identified the version 4 Pegasus servers.

127. Professor Beresford expressly confirmed Dr Marczak's analysis of the sysdiagnose from the six phones. He confirmed Dr Marczak's conclusion that the phones of the mother, Baroness Shackleton and Mr Manners showed infection by Pegasus as being 'a proper conclusion to come to'. And that a lesser degree of specificity applied to the other three.

128. Professor Beresford had the following exchange with Mr Geekie:

> "Q To be clear, there are four phones, Mr X, Baroness Shackleton, Her Royal Highness and Mr Manners, that you are satisfied are infected with Pegasus software and it is the same operator?
>
> A Yes, based on the material I have been provided with and the extra checks that I have performed, yes."
>
> "Q There was also - you were satisfied because you could see the data for this – 265 megabytes of data were taken from Her Royal Highness' phone and communicated to a Pegasus server?
>
> A Correct, that is what the logs I have been provided with show.

> Q As you have acknowledged today and have acknowledged in your written reports, there are some, I would suggest relatively small, areas where, for reasons explained by you and Dr Marczak, it has not been possible for you directly to verify the steps taken by Dr Marczak?
>
> A No, there are a number of areas where I am reliant on Dr Marczak. They include for example the provision of some of the data and that that data has been collected correctly, and there is an appropriate chain of custody around those data items, yes.
>
> Q So in relation to that set of material, just concentrating on that set of material, you are satisfied as to the methodology he has applied, you just have not been able to look at the primary data yourself and followed it through in the way that you have in many other areas?
>
> A Dr Marczak has often provided me with the primary data, so for example the data from …(examples given)… of course I am still reliant on him having collected that correctly similarly with the sysdiagnoses I am reliant on those having been collected from the correct handsets and provided. A few other areas for example in the case of the analysis of the version 9 servers, the origin input files, the pcap files are not available. Given the time that has passed it is not possible for me to collect them again, so I am reliant on Dr Marczak there. There are a number of areas where we are reliant on his data collection process.
>
> Q Yes, that is set out very clearly, both by you and Dr Marczak. Just to confirm, with that caveat in mind, so far as the methodology is concerned, you are content with the methodology he has applied?
>
> A I am content with the approach taken, yes."

129. In cross-examination Professor Beresford confirmed that he had never been asked to look at the Pegasus system before or otherwise been involved with it. He had not conducted a full worldwide internet scan to check Dr Marczak's evidence on this point. He said that it would now, probably, not be possible to do so.

130. Professor Beresford confirmed that in his first report he had not identified the unusually named apps relied upon by Dr Marczak as not being issued by Apple. He accepted that maybe he should have seen them and if he had they would have struck him as odd.

131. Professor Beresford confirmed that he had conducted his own independent research around the data associated with Dr Marczak's 'version 1' servers. In his second report he had set out the reasons why he considered there were links to NSO Group. He also confirmed the existence of the link working backwards from version 4 through versions 3 and 2 to version 1.

132. It was explained that evidence of the presence of Pegasus software on a phone did not, of itself, establish that the person connected with that phone was the primary target of any surveillance operation or a subsidiary means of getting to a different primary target connected with that person who may make contact with them and has communications with them and could be observed when they did so. Professor Beresford responded:

> "So, I guess there is evidence from multiple phones here. I guess if the centrepoint was somewhere else, then I guess the interesting question is: would you expect to see the same pattern of phones targeted in this case or not? So some other person let us call them 'Mr Z', so if Princess Haya was somehow related to Mr Z, would it also make sense for some of the other phones in this case that we have seen to also be targeted if the central focus was Mr Z or not?
>
> ...
>
> So, one of the problems with this sort of line of reasoning is that if you compromise the people associated with the victim you get a lot less data. You are only going to get information if Mr Z is talking with the phones that you have hacked. Whereas if you want, for example, the archive of photos off the device, you are not going to get that via another third party. There are significant advantages for attempting to hack the actual target rather than associates."

133. Following that explanation, Professor Beresford nevertheless accepted that he could not say that the mother in this case was the primary target from the information that he had seen.

Conclusions

(i) The Fact of Hacking by Pegasus software

134. Having now referred in detail to the evidence, it is possible to set out my conclusion on the first issue, namely whether the six mobile phones of the mother, her solicitors and her staff have been the subject of unlawful surveillance, or attempts to achieve such surveillance, in July and August 2020 and that the means of surveillance, or attempted surveillance, was via NSO Group's Pegasus software.

135. In approaching Dr Marczak's evidence I have exercised a great deal of care. He does not come into the case as an expert in the conventional sense. He stepped forward to offer assistance to the mother and her team which they readily took up. It was only after that that he became a potential witness. The assistance that he gave meant that he was in very close communication with the mother's staff and solicitors during his investigation. That route into the litigation does not render him automatically biased or irreversibly partisan, but it must be a matter for concern that that may be the case and it has therefore been a matter upon which I have maintained a keen eye throughout.

136. Further, Dr Marczak has an acknowledged interest in tracking the use of the Pegasus software by the UAE (including Dubai). He states that the episode in July 2020 that put

him on notice of this case, originated from his relationship with Mr X. He stated that he had reached the conclusion, before contacting Martyn Day, that Mr X's phone was being infiltrated by Pegasus and that, because of Mr X's interests as 'a UAE activist', this was likely to be via an operator in the UAE. To this extent, and it is an important factor, Dr Marczak does not stand above the fray. He is not a disinterested academic who simply monitors events from a distance, he is actively on the lookout for potential abuse of the Pegasus system. He is known as such to activists and, as evidence about Mr Mansoor and Mr X suggests, it is to him that activists turn if they are suspicious that they are being targeted. It is therefore entirely right that Lord Pannick advises the court to be on the guard for 'confirmation bias' in Dr Marczak's evidence.

137. Despite these important caveats and the justified need for caution, during the course of Dr Marczak's oral evidence I was progressively more and more impressed. His grasp of the detail of the Pegasus system and his own researches, previous encounters with it and published articles was to be expected, but it was, nevertheless, impressive and was maintained without significant falling off or error over the course of the two days. He was equally clear and firm in the detailed knowledge and recall that he had of his investigation for this case. He presented foremost as a scientist, who worked strictly within the confines of the data and the principles of computer science. His opinions, both micro and macro, were carefully built upon and supported by the data and the underlying engineering of the complex systems with which he works. I did not detect any occasion when he might be seeking to stretch the science to fit a pre-determined conclusion in relation to the fact of hacking and the identification of Pegasus software.

138. Despite being properly and thoroughly tested at every turn by the intelligent and probing questioning of Mr Green, Dr Marczak gave measured, clear and full answers to each question. Where there was a need to do so, he conceded matters or readily accepted corrections. As each stage of the cross-examination proceeded, I became more and more impressed with the witness.

139. Dr Marczak was, in short, an impressive witness who presented a detailed, logical account, supported by the core data that he had found, which led to the conclusion that there was strong evidence that the three principal phones had been hacked by Pegasus software and that it was probable that the other three phones, which exhibited some but not all of the suspicious features, had also been infiltrated. It is not necessary in this conclusion to go back through the detail that I have already set out, leading from Mr Mansoor to versions 1 to 4 and the second fingerprint. Despite very close analysis, there is no break in that chain which links the alien apps and the IP addresses found in the sysdiagnose and network logs in this case with the deployment of NSO Pegasus spyware.

140. The court has been most fortunate both to have located Professor Beresford and to find that he has been able to meet our extremely tight time-table. Whatever may be said about Dr Marczak's standing as an interested party and player in the relation to tracking down the use and abuse of Pegasus spyware, the same cannot be said of Professor Beresford, who has more than 25 years experience in the narrow field of computer security, but who comes to the Pegasus system having had no prior direct involvement with it. His independence from having any attraction to one outcome or another was clear, as was his expertise in this narrow and highly complex field. Professor Beresford adopted an approach to the case which demonstrated a meticulous attention to detail, and a need to have issues or assertions fully clarified before he was prepared to sign-

off on them and move on. That approach was amply demonstrated both in his written reports and in his oral evidence. I am fully satisfied that the court can place substantial weight on Professor Beresford's endorsement both of Dr Marczak's overall approach to this analysis and his detailed conclusions on the core data.

141. The evidence from Dr Marczak and Professor Beresford, which is supported to a degree by confirmation from IntaForensics, is based on detailed, logically developed, analysis which itself (in Dr Marczak's case) arises from research in this precise field going back over six or more years.

142. Dr Marczak has explained his process of analysis to the court in detail. He has been fully open with Professor Beresford in explaining what lies beneath it in computing terms and he has expressly disclosed details of his second fingerprint. After an apparently meticulous audit, and some research of his own, Professor Beresford has pronounced Dr Marczak's method and conclusions as 'sound' and he has found no reason to challenge them insofar as they establish hacking via the Pegasus software.

143. Separately, the court has the evidence from NSO, both in the form of the account given by Cherie Blair QC and in the NSO letter. It is clear from Mrs Blair's account that, from Day One, NSO had sufficient information that its software had been used against Baroness Shackleton and the mother to cause the senior management to take steps to make contact, during the night, to alert PHB that this was apparently the case. Thereafter NSO state, and I have no reason not to accept, that they undertook a full investigation, including visiting the customer State. Whilst the letter is written in careful terms, the 'assumption' that this hacking had indeed occurred was sufficient for NSO to terminate the customer's contract. That is a step which NSO documentation describes as only being taken 'ultimately where necessary'. It is a step with very significant commercial consequences for NSO and, I am entitled to assume, would only be taken if there was a clear basis for doing so.

144. There is a need for caution. The court cannot attach the weight to the NSO letter as would be open to it were the NSO investigator to have filed a full report with the court and been available to give oral evidence. To an extent, despite the letter, the court still looks at this side of the evidence through a glass darkly, hence my reference to the Delphic quality of the letter soon after its receipt. That said, it is a letter from a source which is extremely well placed to be able to say whether or not its software has been used, as it assumes has been the case. On its own, the letter might be sufficient to prove the first factual allegation. I do not have to determine that proposition as it is not on its own, it is but one part of the overall evidential picture on this issue.

145. Standing back, therefore, and looking at the overall picture, the evidence in favour of a finding of hacking comes from two distinct sources and travels in two separate directions. One source, the phones and network logs focus on evidence of the hacking event at the receiving end. The other source, namely that from NSO, involved an investigation of activity at the command and control, or sending, end. In their separate ways, using differing methods, both sources support a positive finding.

146. I see no reason to question the evidence and conclusions of Dr Marczak and Professor Beresford (supported by IntaForensics), on this first issue. That evidence alone establishes very clearly, and well beyond the tipping point of the balance of probabilities, that hacking by Pegasus of these 6 phones took place. That state of affairs

is fully supported by the evidence that has originated from NSO and goes further to strengthen the firmness of my conclusion on the first issue.

147. I therefore find that all six of these phones have either been successfully infiltrated, or at least the subject of an attempted infiltration, by surveillance software. I find that the software used was NSO's Pegasus software. In relation to the mother, it is clear that the attempt succeeded with a very substantial amount of data (265 MB) being covertly extracted from her phone. It is also probable, and I so find, that there was successful hacking of the phones of Baroness Shackleton and Mr Manners. The finding in relation to the other three phones is that there was an attempt to hack into them and that this was part of the same attack by Pegasus software as that affecting the principal three phones.

148. In setting out these findings I have used 'attempted' on a number of occasions. This arises because, unless there is evidence of data being transmitted from the phones, signs that alien software has been at work within them but, on a number of occasions, has 'failed' to connect with, for example, the 'mail' app, proves that there was a successful infiltration of the phone but does not prove that any data was actively extracted on those occasions. My understanding is that if the alien app is successful in accessing the phone's standard apps this event will not appear in the phone's memory manager log; thus only the failures are recorded. Thus, where I have used the word 'attempted' that is at least what has occurred, rather than the limit of the activity.

149. It is also necessary to explain that the sysdiagnose from the phones themselves do not apparently record whether any data has been extracted or not; the fact of connection with a proxy server is recorded, not the content of any transmission over that connection. Dr Marczak was able to say that on one occasion 265MB of data was extracted from the mother's phone because of records in the network log at her home, not from information on her phone itself. PHB did not have a network log at this time, hence it is simply not possible to know what and how much data, if any, was harvested from the phones of Baroness Shackleton or Mr Manners during this period.

150. Finally, in terms of clarifying matters, whilst the fact that 265MB can be stated as the amount of data taken from the mother's phone on one occasion, it is not possible to identify what this data was (save that it was a very substantial amount). The summary copied from Dr Marczak's report at paragraph 78 above describes just how wide the Pegasus software can reach in capturing an individual's personal data from a phone.

151. On the basis of those findings, and in further reliance upon the evidence of Dr Marczak, supported by Professor Beresford, I also find that one of the mother's security staff's phone had earlier been the subject of at least an attempt at hacking on five dates in November 2019.

(ii) Attribution: who originated the hacking?

152. Turning to the second and final set of findings, relating to attribution, the starting point is the firm and clear account from NSO that only a sovereign State, or the security services of a sovereign state, can purchase a licence to use the Pegasus software.

153. In the context of this case, as the Emirate of Dubai is not a sovereign State, Dubai could not, therefore, be the customer.

154. Moving on, standing back from the detail of the evidence and asking the question 'who would have an interest in hacking the phones not only of the mother and her staff, but also (and at the same time) the solicitors who are instructed to represent her in these proceedings?', the father and those acting for him in Dubai must fall for prominent consideration. No one has a closer interest in these proceedings than the two parents and the children. Whilst others, the Press, commentators, the general public may be aware of the case and may be interested in it, that interest is on an altogether different plane to that of the father and mother.

155. Although Dubai could itself not be the customer, the sovereign State of the UAE could be. The father is the Prime Minister of the UAE and Head of Government. The court is entitled to assume that the father and those acting for him must have the ability to instruct those in the security services of the UAE to take action on his behalf. The findings of fact previously made with respect to Princess Latifa establish that the father is prepared and able to use the government security services for his own family needs, and that this has occurred in the recent past. When one adds the father's natural and proven interest in these proceedings, which far outweighs anyone's save for the mother and the children, to the need for the perpetrator of the hacking to have access to the levers of control in a sovereign State sufficient to order its security services to act on his behalf, the prospect that it is the father comes yet more clearly into focus.

156. Lord Pannick, at preliminary hearings, has raised the prospect that the court may be in the position of contemplating a number of potential originators of the hacking. The court has been reminded that an individual may only be considered as a potential perpetrator if there is a 'real possibility' that this is the case. The father's case is, however, that if there is a pool of perpetrators then the evidence is insufficient for him to be in that pool. In other words that there is no 'real possibility' that he is the originator. It is a submission that has been repeated on more than one occasion. It is one that I find is impossible to accept. In the circumstances of this case, it is beyond contemplation that the court, or indeed any rational person acquainted with the facts, could say that there is no 'real possibility' that the father originated the hacking of his former wife, her staff and her lawyers. No conclusion other than that there must be a real possibility that it is him is tenable.

157. Establishing a 'real possibility' is not, however, the relevant test of proof. It does not establish a pseudo-burden of proof on the father to point to someone else. The right question, as Peter Jackson LJ identified, is 'does the evidence establish that the individual probably' acted as it is alleged that he did.

158. I do not place any reliance upon evidence from Dr Marczak on the issue of attribution. On that issue, however, it is necessary to evaluate the degree of weight, if any, that can be attached to what is said about Mr X.

159. For the reasons that I have already given, I accept Dr Marczak's evidence that the indications of hacking activity on Mr X's phone in July 2020 are of a piece with that found on the phones in this case. I also accept his evidence that NSO issues each of its customers with access to separate, bespoke, proxy servers. I am satisfied that the proxy servers with which Mr X's phone was communicating were replicated on the phones in England. I am therefore satisfied, on the balance of probability, that Mr X, the mother, her staff and her solicitors were all subject to infiltration from the same State government's operation of Pegasus software.

160. The independent counsel's internet searches regarding Mr X have limited probative value. The court does not itself know anything of Mr X and must be cautious. With those caveats in mind, the independent counsel's researches do indicate that, until recently, and certainly during [redacted], Mr X continued to demonstrate an established critical interest in human rights and other activities within the UAE and that he was not, at that stage, publicly interested in the activities of other States. The hacking took place in July or August 2020.

161. To a degree it is possible to make a case, and Mr Geekie seeks to do so, that late July 2020 was a particularly busy and financially interesting time in these proceedings, with the build up to key hearings relating to the mother's long-term financial claims for herself and the children. I am not, however, able to put any weight on this factor. Dr Marczak's evidence demonstrated that the Pegasus software is to a degree opportunistic in the sense that it will become very active, and will capitalise upon, the haphazard opening up of gaps in the security software protecting phones which lead to 'exploits' arising which, as that label suggests, are then exploited. It is also clear from Dr Marczak that he had observed a good deal of Pegasus activity in this very period and was trying to check out a range of potential 'victims'. That is how he found PHB and became connected with this case. I do not therefore consider that the date of the hacking arises from the fact that there was something of interest in July to gain information about in this case; rather the opening up of an exploitive window gave the operators the chance to do so, which they plainly took.

162. Whilst the father does not have to prove anything, it is the case that he has chosen not to attempt to do so. The court does not therefore have any evidence to put in the balance against a finding that the originator was the UAE on his authority. That state of affairs does not, I repeat, prove the case; it is simply an acknowledgement that there is no evidence to the contrary.

163. What the father has done is to float various suggestions before the court to the effect that another sovereign State is, or may be, the originator of the hacking. These have changed from hearing to hearing. At various times the states of Iran, Israel and Saudi Arabia have been suggested. In the main hearing itself, the suggestion being pushed was that it may be the State of Jordan. In the past Lord Pannick has proffered the idea that it would be in the interests of another State to undertake the hacking in order for the mother and for the court to jump to the conclusion that the father was the culprit. The purpose, it was suggested, of this subterfuge being to embarrass the father and thereby somehow further the interests of the originating State. Nothing was said as to the mechanism by which the mother or the court might find out that this highly sophisticated software had been used against her, or why another State might risk losing its very valuable contract with NSO, in order just to embarrass the father in this way even if NSO ever discovered that hacking had occurred. These various propositions were not pursued at the final hearing.

164. The suggestion now, very lightly laid out in cross examination and submissions, is that the State of Jordan may be responsible. The fact that Dr Marczak's 'victims list' may contain 20 or so Jordanian IP addresses and the possibilities that it may be that some unidentified individuals may have communicated with the mother's home using hacked phones and that they may be Jordanian, are referred to. The current apparent political and familial unrest in the ruling class in Jordan is also referred to.

165. These shifting suggestions, none of which is backed up by any evidence, are so insubstantial as to be without consequence in the evaluation of the question of attribution. If the standard of proof were 'beyond reasonable doubt', they might have some traction, but to my mind, where the standard of proof is the balance of probabilities, they have none.

166. One small piece of evidence, which is unchallenged, is Mrs Blair's account in her statement for the court of her conversation with the NSO senior manager:

> "However, during a conversation with the NSO Senior Manager, I recall asking whether their client was the 'big state' or the 'little state'. The NSO Senior Manager clarified that it was the 'little state' which I took to be the state of Dubai."

This evidence, like others, should not carry more weight than is reasonable, but it is a considered account in a witness statement from a source upon which the court is entitled to rely for care and accuracy on a point such as this. It proves, as I find, that the NSO manager did speak in this way and refer to the 'little state' as opposed to the 'big state'. That conversation is compatible, and I place no greater reliance upon it, with the two 'States' being Dubai within the bigger State of the UAE.

167. Drawing these matters together, of those to which I have referred, I regard two elements of the overall evidential canvas to be of particular weight.

168. Firstly, it is obvious that the father, above any other person in the world, is the probable originator of the hacking. No other potential perpetrator, being a person or government that may have access to Pegasus software, can come close to the father in terms of probability and none has been put forward other than via transient and changing hints or suggestions.

169. Secondly, as the previous findings of fact establish, the father, who is the Head of Government of the UAE, is prepared to use the arm of the State to achieve what he regards as right. He has harassed and intimidated the mother both before her departure to England and since. He is prepared to countenance those acting on his behalf doing so unlawfully within the UK.

170. The evidence concerning Mr X and from Mrs Blair is entirely compatible with, and is not contrary to, a conclusion that the source of the hacking was the UAE.

171. The previous findings of fact and the evidence adduced at this hearing, as I have described it, taken together are more than sufficient to establish that it is more probable than not that the surveillance of the six phones that I have found was undertaken by Pegasus software was carried out by servants or agents of the father, the Emirate of Dubai or the UAE and that the surveillance occurred with the express or implied authority of the father.

The children's welfare

172. Having stated my conclusions on these factual matters, the focus of the court will, at last, turn fully to the welfare of the two children. In this context, I note that in a Position Statement dated 2 October 2020 the father stated that 'it is hard to see how the hacking allegations make a substantial difference' to the issue of the father's contact with the

children. The court will return to this aspect in detail at the welfare hearing, but to assist the father at this stage I wish to make it plain that I regard the findings that I have now made to be of the utmost seriousness in the context of the children's welfare. They may well have a profound impact upon the ability of the mother and of the court to trust him with any but the most minimal and secure arrangements for contact with his children in the future.

173. It does not take long to contemplate just how an individual would react to discovering that their personal phone, and those upon whom they rely for confidential advice, support and protection, have been infiltrated by the most sophisticated spyware that is available, and to know that a very substantial amount of personal data has been stolen, yet not knowing precisely what. It is often said that the most important thing that a house-burglar steals is the peace of mind of the householder. The same must surely be true of phone hacking.

174. The court has, on many occasions, stressed to the father since the start of these proceedings that the most important goal should be to build up 'trust', so that the mother and the court, and indeed the children, can trust him – in particular trust him not to take unilateral action to remove the children from their mother's care. The findings made in this judgment prove that he has behaved in a manner which will do the opposite of building trust. The findings represent a total abuse of trust, and indeed an abuse of power, to a significant extent. It is an abuse which has been compounded by the manner in which the father has contested these allegations and instructed his lawyers. Despite the weight of evidence, the fact of hacking was never conceded, nor was the fact that such hacking had been by Pegasus. At no stage has the father offered any sign of concern for the mother, who is caring for their children, on the basis that her phones have been hacked and her security infiltrated. Instead he has marshalled a formidable forensic team to challenge the findings sought by the mother and to fight the case against her on every point. It is of course the right of a litigant to contest proceedings as they see fit, but to do so may not be without consequences for the relationships of trust and mutual understanding that the court has been keen at all stages to see developing.

Neutral Citation Number: [2021] EWCA Civ 890

Appeal Ref: B4/2021/0610

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Wednesday, 9th June 2021

Before:
LORD JUSTICE MOYLAN
LORD JUSTICE DINGEMANS
Remotely via Microsoft Teams

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Between:

HIS HIGHNESS MOHAMMED BIN RASHID AL MAKTOUM — **Appellant**

- and -

HER ROYAL HIGHNESS HAYA BINT AL HUSSEIN — **Respondent**

- -

LORD PANNICK QC, MR. RICHARD SPEARMAN QC, MR. SUDHANSHU SWAROOP, MR. NIGEL DYER QC, MR. DANIEL BENTHAM, MR. STEPHEN JARMAIN, MR. GODWIN BUSUTTIL, MS. PENELOPE NEVILLE and MR. JASON POBJOY for the Appellant

MR. TIMOTHY OTTY QC, MR. GUGLIELMO VERDIRAME QC, MR. JUSTIN RUSHBROOKE QC and MS. KATE PARLETT for the **Respondent**

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Approved Judgment
In Private
Re Permission to Appeal

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd
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LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an application for permission to appeal against the judgment of the High Court Family Division [2021] EWHC 660 (Fam) dated 19th March 2021, which followed a hearing on 10th and 11th February 2021. I directed an oral hearing of the application so that this court could determine whether to grant permission to appeal and whether the appeal should be heard in private, if permission was granted. In deciding whether to grant permission to appeal, the issue for this court pursuant to CPR 52.61 is whether the appeal has a real prospect of success or whether there is some other compelling reason why the appeal should be heard.

Background

2. For the purposes of this judgment, it is necessary only to set out some of the background facts. The father is His Highness Sheikh Mohammed Bin Rashid Al Maktoum. The mother is Her Royal Highness Princess Haya Bint Al Hussein. They have two children. The father is the Ruler of the Emirate of Dubai and Prime Minister and, therefore, Head of Government of the United Arab Emirates. He commenced proceedings on the inherent jurisdiction of the High Court seeking the return of the two children from this jurisdiction. The father also commenced an application for interim child arrangements.

3. The mother issued applications to make the children wards of court and prevent their removal, for a forced marriage protection order and for a non-molestation order. The mother made a claim for financial provision for the children under the Children Act 1989.

4. In the skeleton argument the father reports that he has waived immunity for that application and made what he calls a substantial open offer. The full background of the proceedings are set out in other judgments of the Family Division. It is sufficient to say that both mother and father have at times asserted immunities and have at other times waived immunities.

5. The mother has now issued two applications against the father for financial support for herself and the children under Part 3 of the Matrimonial and Family Proceedings Act 1984 and an application under the inherent jurisdiction for financial support for herself and the children.

6. The father claimed immunity from jurisdiction in respect of these two applications and this was on the basis that he asserted that customary international law confers immunity on Heads of Government, in respect of civil proceedings relating to personal and private matters.

7. The High Court held that he did not have such immunity and the High Court accepted that a Head of Government may have immunity from criminal jurisdiction from execution of any civil and criminal judgment and inviolability in respect of civil and criminal proceedings. The High Court held that the father had not established to the requisite standard a rule of customary international law conferring immunity from civil jurisdiction on Heads of Government in respect of non-official acts. The mother

claimed that in any event the father had waived any immunity. The court held that if the father did have immunity, he had not waived it in respect of the two applications. The mother has made it clear that if the father is granted permission to appeal she will seek to cross-appeal.

8. The ground of appeal is that the High Court was wrong in law in finding that the father had not established the existence of a rule of customary international law conferring immunity from civil jurisdiction on Heads of Government in respect of non-official acts. Permission to appeal was refused below on the basis that given the extent of the disagreement on the scope of immunity from jurisdiction enjoyed by Heads of Government under customary international law, an appeal would have no real prospect of success and there was no other compelling reason why an appeal should be heard.

The respective submissions

9. In the skeleton arguments and oral submissions today, there were said to be five reasons for showing that there was a real prospect of success and I will deal with the reasons first before turning to compelling reasons which were advanced to hear the appeal.

10. The first reason and much of the argument in the written and oral submissions before us has turned on whether the High Court took an overly narrow approach to the interpretation of the case concerning the arrest warrant of 11th April 2002 reported as *Democratic Republic of Congo v Belgium* ICJ reports page 3, and known as the *Arrest Warrant* case. There is a need for particular examination of paragraph 51 of the judgment on which both parties rely. The father asserts that the proper reading of paragraph 51 is that the ICJ said that it is firmly established that Heads of Government enjoy immunities from jurisdiction in civil matters.

11. The second reason was the analogy between Heads of Government and diplomatic agents which was said to have been drawn by the ICJ in the *Arrest Warrant* case. The father asserts that the analogy drawn means that Heads of Government have immunity from jurisdiction in civil matters. In oral submissions, Lord Pannick QC emphasised that the ICJ had decided the *Arrest Warrant* case on principle which supported the proposition that a Head of Government would have the same immunities available to diplomats and Heads of State, and it was submitted that it would be a surprising result which lacked any principled justification, if the Head of Government was not equated with the Head of State for those purposes. Mr. Otty QC reminded the court of the limit of Article 31 of the Vienna Convention on Diplomatic Immunities and that it applied only to the diplomat when in the receiving State.

12. The third reason advanced as showing why there was a real prospect of success was that it was said that the High Court had failed to have regard to the fact that the Head of State did have immunity and, again, the analogy drawn by the International Court of Justice between Heads of Government and Heads of State in the *Arrest Warrant* case.

13. The fourth reason was that it was said that decision was inconsistent with the *Arrest Warrant* case because the High Court had drawn an unprincipled distinction between the functional basis for immunity from civil jurisdiction and immunity from execution

and inviolability. Lord Pannick emphasised that the International Court of Justice had relied on the mere risk of impeding the functions of the Minister for Foreign Affairs and that the same must apply to a Head of Government. In oral submissions, Lord Pannick particularly relied on Lord Sumption's explanation of the need for immunity from civil proceedings for diplomats to ensure that they are protected from baseless claims to enable them to perform their functions.

14. Finally, and in the fifth reason set out in the written submissions, it was said that the court had failed to have proper regard to State practice relied on by the father. The State practice relied on by the father related to proceedings which were commenced in New York by the Prime Minister of India, in California against the Prime Minister of Singapore and in New York again, against the Prime Minister of Grenada and his wife. Written submissions in those cases on behalf of the United States Government have made it clear that the Head of Government had immunity from civil proceedings and those written submissions relied in particular on the *Arrest Warrant* case. Reliance was also placed on academic writings. The mother submitted that none of the reasons were sustainable and that the High Court had come to the right result on the issue of immunity.

No real prospect of success

15. It is common ground that there is no international treaty governing immunities for Heads of Government. The scope of the immunities is therefore governed by customary international law. It is established that "to identify a rule of customary international law, it is necessary to establish that there is a widespread representative and consistent practice of State on the point in question, which is accepted by them on the footing that it is a legal obligation", see *Benkharbouche v The Embassy of the Republic of Sudan* [2019] AC 777. There is no need for complete uniformity, but there is a need for substantial uniformity.

16. The father's concentration on the judgment of the International Court of Justice in the *Arrest Warrant* case is understandable. This is because judgments of the ICJ are pursuant to article 92 of the UN Charter, authoritative as to the content of customary international law because the ICJ is the principal judicial organ of the United Nations. As Lord Pannick stressed today, it was accepted by the High Court that such a judgment had to be read in context.

17. In the *Arrest Warrant* case, a Belgian investigating judge of a Tribunal of First Instance had issued a warrant for the arrest of the Minister for Foreign Affairs of the DRC. The DRC had objected on the grounds of absolute inviolability and immunity from criminal process, see paragraphs 12, 21 and 47. No part of the argument engaged the issue of immunity from civil proceedings. The ICJ held that the Minister for Foreign Affairs enjoyed full immunity from criminal jurisdiction and inviolability. This applied to public and private acts when customary international law accorded those immunities to Ministers for Foreign Affairs, not for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective states. The ICJ referred to the fact that exposure to legal proceedings could deter the Minister from travelling.

18. As to the first reason relied on by the father, paragraph 51 of the *Arrest Warrant* case stated 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 ... enjoy immunities from jurisdiction in other States, both civil and criminal."

19. The statement was repeated in *Djibouti v France* in the ICJ reports 2008. This dicta was an accurate statement of public international law. This is because Heads of Government do enjoy immunities from jurisdiction in other States in both civil and criminal matters, and Mr. Otty, in oral submissions, referred to the fact that a Head of Government has immunity from civil proceedings in relation to official acts.

20. In my judgment, this statement in the ICJ was an introductory remark, as is apparent from the way it was repeated in *Djibouti v France*. The *Arrest Warrant* case was concerned with criminal immunity and the inviolability of the Minister of Foreign Affairs. The wording in paragraph 51 of the judgment of the ICJ was a reference to the fact, which is established, that there are immunities. The ICJ did not say, and it would have been very surprising given the issues in the case if they had said, that there was immunity from civil jurisdiction for the private acts of the Head of Government.

21. As Mr. Otty emphasised in oral submissions, the last sentence of paragraph 51 makes this clear by saying that "for the purposes of this 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". This means that reliance is being placed, in my judgment, on an oblique reference in the *Arrest Warrant* case and it is clear that this is not a way to develop principles of public international law and customary international law in national courts.

22. As to the second reason, I do not accept that the reference to diplomatic agents in paragraph 51 in the *Arrest Warrant* case can bear the weight placed on it by the appellants, even where, as Lord Pannick rightly emphasised, the ICJ had referred to an analogy with diplomatic agents. The need for a specific treaty to protect diplomats who may be located in an unfriendly state is well-known and derived from long-standing public international law practice. The ICJ held that the Vienna Convention on Diplomatic Relations 1961, provided useful guidance on certain aspects of immunity but did not define immunities enjoyed by Ministers for Foreign Affairs, still less in my judgment did it define the immunities enjoyed by Heads of Government. The ICJ did not equate Heads of Government with diplomatic agents for all purposes.

23. As to the third reason, I do not accept that it can be fairly said that the High Court failed to have regard to the fact the Heads of State have immunity. The High Court was well aware of this point, but there is no exact equivalence between a Head of Government and Head of State, no matter how logical a development that might be. It is fair to state that the same distinction is made in statute, in that the State Immunities Act which refers only to Heads of State. The court below specifically referred to Lord Millett's statement in this respect in *Pinochet* at paragraph 30.

24. As to the fourth reason, namely that the decision was inconsistent because the court had drawn an unprincipled distinction between the functional basis for immunity from civil jurisdiction and immunity from execution and inviolability, in my judgment, the

point is there is a distinction between Heads of State, Ministers for Foreign Affairs and Heads of Government. The High Court was entitled to explain what those distinctions might be. This really was another way of emphasising that the ICJ had, so far as the father was concerned, altered public international law in this respect. In my judgment, for the reasons given earlier, paragraph 51 had not had the effect contended for by the father.

25. As to the final reason, less emphasis was placed on that in the oral submissions before us but it was fully addressed in writing. I agree with the High Court that US State practice and the academic writing are not sufficient in my judgment to establish customary international law on this point. This is because, as the High Court rightly stated, there is a marked lack of consensus in this area. As Mr. Otty referred in oral submissions, there is, at most, evidence of some seven States adopting the practice relied on by the father and, in my judgment, this is a very long way short of the proof required.

26. For those reasons, in my judgment, the High Court was right to find that there was no immunity from civil jurisdiction for the private acts of the Head of Government and, moreover, there is no real prospect of success on the appeal. That, of course, is not the end of the matter, because permission to appeal can be granted if there is a compelling reason to hear the appeal and Lord Pannick did start this morning's submissions by referring to the compelling submission.

No compelling reason

27. In writing, the compelling reason for hearing the appeal was said to be that the appeal raises issues of principle of considerable importance with far-reaching implications for foreign relations around the world. It is said there is a strong public interest in the definitive resolution of this issue and that the court below has reached a conclusion which was inconsistent with that adopted in a number of other States, including the United States.

28. In oral submissions, Lord Pannick emphasised that whether the Head of Government enjoys immunity in respect of civil claims was a matter of importance, the High Court judgment would be cited around the world and on an international matter of such importance, it was important that the court should be fully addressed in relation to these matters. It was submitted that this, alone, was sufficient to grant permission.

29. In oral submissions, Mr. Otty noted that the case was about whether the father had discharged the burden of proof, but as Lord Pannick fairly pointed out, the High Court had made a decision on a point of law.

30. I do not accept that there is a compelling reason to hear this appeal. The legal position at least at this moment is, in my judgment, clear and there is no immunity for Heads of Government from civil proceedings in respect of private acts. I see force in the father's position that things might change, but I am also conscious of the warning from Lords Hoffmann in *Jones v Ministry of Interior* [2007] 1 AC 270 at paragraph 63 when he said:

> "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."

31. Finally, I should say that the court has been treated to excellent written and oral submissions, succinct and focused on the issues involved. I am very grateful for those submissions, but a willingness, even a desire, to hear more of them is not a principled basis to grant permission to appeal. For all these reasons, I do not grant permission to appeal.

LORD JUSTICE MOYLAN: Thank you. I agree.

(For continuation proceedings: please see separate transcript)

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Neutral Citation Number: [2021] EWCA Civ 900

Case No: B4/2021/0833

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
THE PRESIDENT OF THE FAMILY DIVISION
[2021] EWHC 1162 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2021

Before :

SIR JULIAN FLAUX
CHANCELLOR OF THE HIGH COURT

-and-

LADY JUSTICE KING

- -

Between :

HIS HIGHNESS MOHAMMED BIN RASHID AL MAKTOUM	**Applicant**
- and -	
HER ROYAL HIGHNESS HAYA BINT AL HUSSEIN	**Respondent**

- -
- -

Lord Pannick QC, Richard Spearman QC, Andrew Green QC, Godwin Busuttil, Daniel Bentham, Stephen Jarmain, Penelope Nevill and Jason Pobjoy (instructed by **Harbottle & Lewis LLP**) for the **Applicant**
Charles Geekie QC, Timothy Otty QC, Sharon Segal and Daniel Burgess (instructed by **Payne Hicks Beach LLP**) for the **Respondent**
Deirdre Fottrell QC and Tom Wilson (instructed by **Cafcass Legal**) for the **Children's Guardian**

Hearing date: Wednesday 9 June 2021

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Approved Judgment

Sir Julian Flaux C:

1. By this application, His Highness Sheikh Mohammed Bin Rashid Al Maktoum (to whom I will refer as "the father") seeks permission to appeal against the judgment of the President of the Family Division dated 5 May 2021 following a fact-finding hearing. By an Order dated 18 May 2021 I ordered that the application for permission to appeal should be determined at an oral hearing given the nature of the case and the issues raised.

2. King LJ and I heard the application in a remote hearing using Teams on the afternoon of 9 June 2021. The oral advocacy for the father was presented by Lord Pannick QC and for the respondent mother by Charles Geekie QC. We also heard short oral submissions from Deirdre Fottrell QC. I am conscious that on all sides the written submissions and the preparation for the hearing were the responsibility of substantial teams of barristers and solicitors. I am grateful to all the legal representatives for the clear and focused way in which the submissions were presented.

3. At the heart of the proposed appeal is the contention that, despite what Lord Pannick QC acknowledged were the scrupulous steps taken by the President to put in place safeguards to ensure that the proceedings were fair for the father, in the somewhat unusual circumstances of the case as described in his judgment, there was nevertheless procedural unfairness to the father.

4. It is submitted on behalf of the father in relation to Ground 1 that the evidence of the experts (Dr Marczak on behalf of the mother and Professor Beresford, the court-appointed single joint expert) that the six phones in issue were hacked, was reliant on the sysdiagnose data and the so-called "second fingerprint" methodology devised by Dr Marczak. However, although that data and methodology was disclosed to Professor Beresford, it was not disclosed to the father. Dr Marczak was not prepared to disclose what he regarded as his commercially confidential workings to the "shadow" expert instructed by the father, Sygnia, or to the father and his legal representatives. The judge in effect upheld that objection. Lord Pannick QC's primary complaint is that this was unfair to the father because it deprived him of the opportunity to take expert advice upon the data and methodology used by Dr Marczak and to cross-examine Dr Marczak about that data and methodology which had been central to his conclusion that the relevant phones had been hacked.

5. The principal answer to this ground advanced by Mr Geekie QC for the mother (supported by Ms Fottrell QC for the guardian) was that, as the President had said at the hearing on 12 March 2021 (as reflected in [8] of his judgment from that hearing), if the father had instructed his own expert whose report was then served in accordance with Part 25 of the Family Procedure Rules, the data and methodology of Dr Marczak could and would have been disclosed to that expert and thus to the father and his legal team. What the President was quite correctly not prepared to countenance, Mr Geekie QC submitted, was disclosure of this confidential material to the father's shadow experts, Sygnia, who were outside the jurisdiction and whose expert views would remain confidential to the father and would not be disclosed to the mother or to the court.

6. This submission that, in effect, the father is the author of his own misfortune, has some force at first blush. However, I consider that the contrary argument by Lord Pannick

QC, that the entitlement of the father and his legal representatives to disclosure of the data and methodology which was critical to the expert opinion expressed by Dr Marczak, in which Professor Beresford concurred, should not be contingent upon the father agreeing to call his own expert, or at least to serve a report from his own expert under Part 25, is fully arguable.

7. In particular, there seems to me to be force in the point Lord Pannick QC made that such a limitation on the entitlement to disclosure in other jurisdictions, for example the Commercial Court, would be unthinkable. He submitted that, in commercial litigation, if the disclosure of critical technical material by a party to the other party were contingent on the other party calling its own expert, one would have no hesitation in saying that that was procedurally unfair and Lord Pannick submits, the real question here was whether there was something about the present proceedings which meant that a different standard had to be applied in relation to disclosure in the Family Division. He also submitted that any issues about the confidentiality of the data and methodology could addressed by a confidentiality ring such as is regularly put in place where necessary in litigation in the Business and Property Courts.

8. Whether or not these submissions on behalf of the father do establish that, notwithstanding the careful procedural safeguards put in place by the President, there was such procedural unfairness that the President's decision on hacking cannot stand, will be for the full Court, but I consider that Ground 1 has a real prospect of success and grant permission to appeal accordingly.

9. Ground 2 raises an issue of alleged procedural unfairness in relation to the President's decision attributing the hacking of the relevant phones to the father. Lord Pannick QC pointed out that this decision was based on circumstantial evidence and the drawing of inferences. The complaint is that there was no disclosure to the father or to the court of information to which Dr Marczak had access, namely the contents of his so-called "victims list". In circumstances where the President decided, as he did at [168] of his judgment, that no other potential perpetrator, whether a person or government having access to the Pegasus software, came close to the father in terms of probability, Lord Pannick QC submitted that there had been procedural unfairness because the father and his legal representatives had not had access to the contents of the victims list, which may have enabled them to put forward a stronger case than they could that the perpetrator was Jordan.

10. Mr Geekie QC submitted that the father's written and oral submissions betrayed a misunderstanding as to the nature of the victims list. It was not a list of individuals or of their devices, but only a list of IP addresses through which one or more mobile devices may have communicated with Pegasus servers. Whenever a phone connected to a different WiFi network, for example at home, at work or in a café, it would use three different IP addresses so that an IP address in itself did not necessarily tell you anything about whose phone was using it. Dr Marczak made it clear in his evidence that the victims list was vague and indefinite. He was not prepared to look at it as identifying victims of hacking, but only as a series of "leads". Contrary to Lord Pannick QC's submissions, having the contents of the victims list would not enable the father to make connections between the different IP addresses on the list.

11. Again, there is considerable force in the submissions on behalf of the mother. I rather doubt to what extent access to the contents of the victims list would enable the father

to advance his case that the perpetrator of the hacking may have been someone other than the father himself. If the only complaint of procedural unfairness was that in Ground 2, I would be disinclined to give permission to appeal. However, since there was arguable procedural unfairness as set out in Ground 1, in relation to which I will give permission to appeal, I will also give permission to appeal on Ground 2, so that all the issues of alleged procedural unfairness are before the full Court.

12. Ground 3 concerns the substance of the President's decision that the hacking of the relevant phones is to be attributed to the father. Lord Pannick QC submitted that the President had made a number of errors of principle (i) in concluding that on the material before the Court no other person than the father might have been responsible for the hacking; and (ii) in determining that the previous findings of fact made in his fact-finding judgment dated 11 December 2019, that the father had harassed and intimidated the mother and was prepared to use the arm of the State to achieve his aims, together with the evidence before him on this occasion, were more than sufficient to establish that it was more likely than not that the hacking was carried out with the express or implied authority of the father.

13. In my judgment, in the event that the appeal on Grounds 1 and 2 were dismissed, there is no basis upon which the full Court would interfere with the President's conclusions on attribution, which were quintessentially matters for his evaluative judgment as trial judge. As Mr Geekie QC submitted, the father's attempt to float the possibility that the perpetrator of the hacking was the security services of Jordan, for which State the mother is a diplomatic agent, overlooks completely that NSO's reaction to learning of the hacking of the relevant phones was to terminate the contract with the State in question, because this was improper hacking, that is to say, not for intelligence or national security purposes, and therefore in serious breach of contract. Lord Pannick QC sought to meet this point by suggesting that NSO might have terminated the contract with Jordan because the relevant surveillance had taken place outside Jordan. I did not find that argument at all convincing.

14. Surveillance by the security or intelligence services of any particular State for national security reasons may well take place outside the relevant State. The hypothesis upon which the suggestion that the Jordanian security services may have been the perpetrators of the hacking was based on the assertion that Jordan would have been interested in the substantial sums paid by the mother to her brother, who in turn may have been implicated in a coup attempt against the Jordanian government. Had this justification for the hacking of the phone of the mother and her associates been explained to NSO, it is highly unlikely that NSO would have concluded that there had been a breach of contract by Jordan, let alone one sufficiently serious to justify termination of the NSO contract.

15. I also agree with Mr Geekie QC that the Jordanian theory does not begin to provide a coherent explanation as to why the Jordanian security services would wish to hack the phones of Baroness Shackleton and Mr Manners from Payne Hicks Beach, the mother's solicitors. On the other hand, the father has an obvious motive for hacking the mother's and her security staff and solicitors' phones.

16. Lord Pannick QC was critical of the President's reliance on the father's previous conduct, as found in his 11 December 2019 judgment, as supporting his conclusion that the hacking of the phones had been carried out with the father's actual or implied

authority. He submitted that the two sets of acts were completely different. In the first judgment the President had found harassment and intimidation, whereas the hacking of the phones was surreptitious, but not harassment or intimidation. Given that these were distinct activities, there was no question of the previous conduct being similar fact evidence.

17. I cannot accept Lord Pannick QC's analysis of the two sets of acts. I agree with Mr Geekie QC that, if the hacking was at the behest of the father, it was not only another example of his being prepared to use the arm of the UAE State to achieve his own aims in relation to the women in his family, but also further evidence of harassment and intimidation. Hacking of phones is clearly harassing or intimidatory conduct. In the circumstances, if the conclusion that the father was responsible for the hacking was justified, the President was clearly entitled to take the previous harassment and intimidation into account in determining responsibility for the hacking: see PD12J of the Family Procedure Rules and the recent decision of this Court in *Re HN* [2021] EWCA Civ 448.

18. In the circumstances I refuse permission to appeal on Ground 3 whilst recognising that, if the full Court allows the appeal on Grounds 1 and/or 2, it may well determine that the case should be remitted to the Family Division for retrial of all the issues determined by the President including attribution.

19. Accordingly, I would allow permission to appeal on Grounds 1 and 2 and refuse it on Ground 3.

Lady Justice King

20. I agree.

Neutral Citation Number: [2021] EWHC 915 (Fam

Case No: FD19P00246

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Friday, 12th March 2021

Before:

THE PRESIDENT
Remotely via Microsoft Teams

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Re Al M

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LORD DAVID PANNICK QC, MR. ANDREW GREEN QC, MR. RICHARD SPEARMAN QC, MR. NIGEL DYER QC, MR. DANIEL BENTHAM and MR. STEPHEN JARMAIN (instructed by **Harbottle & Lewis LLP**) for the **Father**

MR. CHARLES GEEKIE QC, TIM OTTY QC, MR. NICHOLAS CUSWORTH QC, MS. SHARON SEGAL, MR. DANIEL BURGESS and MR. NICHOLAS WILKINSON (instructed by **Payne Hicks Beach**) for the **Mother**

MS. DEIRDRE FOTTRELL QC and MR. TOM WILSON (instructed by **CAFCASS Legal**) for the **Children**

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APPROVED JUDGMENT
IN PRIVATE

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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THE PRESIDENT:

1. I deal first with paragraph 9. I am plain that there needs to be an experts' meeting. That would be the normal course. This is highly complicated material and the more that any distinction and dispute that there may be between the two experts can be flushed out, acknowledged, explained and then committed to paper or video before the hearing the better. It will enable us all to engage with it more effectively at the hearing.

2. The alternative is for there to be no experts' meeting, for Dr. Marczak to give his evidence and for us then separately to hear what Professor Beresford may have to say about what he has said. The development of the whole concept of expert meetings arose because of the unsatisfactory nature of that process.

3. The main objection is that, on the father's case, Dr. Marczak is seen as entirely partisan, he does not come to the court, on their submission, as a free-standing independent expert who has been instructed for the proceedings. The basis of those submissions are well-understood and they will no doubt feed in to submissions about how reliable his evidence is for me to consider at the final hearing. I will look forward to hearing those submissions at the time and they are to be given full weight. However, that is for then.

4. I do not think that those matters cut across the expert meeting process being valuable in itself. Dr. Marczak comes to that process, certainly with my eyes wide open as to where he comes from in terms of his origins into the proceedings. But, provided the experts' meeting can be recorded in full in the way that we have now canvassed, I am comfortable with it taking place and with there being no opportunity for there to be any surreptitious subversion or whatever the father is concerned about of one expert of another, and certainly with all of us being able to see what goes on and for it to be the subject of comment questioning and submissions in due course.

5. The experts' meeting is, therefore, to take place. It is to be recorded on video. I do not share the lack of confidence in the ability for that to be done. If it really cannot be done, it cannot be, but I would expect it to be recorded on video, and as has been discussed, almost immediately after the hearing, as soon as possible (so that is within 24 hours) a transcript of the experts' meeting is to be disclosed to the father with any redactions for any confidential references during the meeting taken out of the written transcript. As soon as possible thereafter, an adequately redacted copy of the video recording is also to be made available to the father. Hopefully, that deals with the experts' meeting.

6. I now refer to paragraph 12. So far as the father's application for disclosure of the material upon which Dr. Marczak and now Professor Beresford will have given their reports, I refuse the father's application. I am prepared to give a more detailed judgment if required in writing, but in essence, the position I take is one of high principle. It was a wholly exceptional course for the court to take to permit the father to disclose the written material in the case to a shadow expert and, in particular, for that expert to be based outside the jurisdiction of this court. I did so for good reasons, as I saw them to be, and I maintain the view that that was the right and fair decision to take.

7. Because of the complicated nature of material in this case, the father and his legal team are entitled to have someone who is technically and scientifically sighted in respect of that material to help them understand what is said in the report and to inform the shape of their further enquiries and any challenges they wish to make within the court process, but it goes no further.

8. It was never the court's intention that that instructed agency, Signia, as it has turned out to be, would develop into a separate expert who would have access to the underlying material and conduct their own assessment of it. It has always been open to the father to make an application under Part 25 of the Family Procedure Rules for leave to instruct his own free-standing expert and for that then to be conducted in the ordinary way with everything the expert has and everything the expert says open and transparent within the process. That has not happened. That is not the role of Signia, and it is not right now for Signia to be brought forward to undertake that role, particularly as there is no indication that Signia's report on the underlying material would be disclosed into the court proceedings, in any event.

9. What I have given permission for, acknowledging the difficulties in the case and acknowledging the need for a fair process, is the instruction of a single joint expert and the court and the parties have been tasked with the difficult operation of (a) finding an expert and now (b) finding a second one. We have persevered with that, precisely to try to meet the fair trial needs of the process, and to do so in an open way where all involved in the court process can see what is going on and can see how that expert opinion is first given and then developed by the staged process that I put in place as that expert has exposure to Dr. Marczak's report.

10. I have now sanctioned a further stage in that transparent and, as I see it, fair process in approving the arrangements for the experts' meeting that I have done, but the disclosure of the raw material to Signia is way beyond any line that is required for fairness and is wholly without principle in terms of the way that the courts in this jurisdiction, certainly in the family jurisdiction, approach the instruction of experts. I would be able to give more detail in relation to that judgment if that is required, but I stand on high principle and simply say ‘no’ and I therefore refuse that application.

11. Moving on, I think 14 and 15 are to do with Mr. X and so is 16. Again, this is a matter that has been raised a number of times. There are clear sensitivities here and a balance has to be struck, but I am fully satisfied that it would not be proportionate to require Mr. X's name to be disclosed. Mr. X, his contribution, as it were, sits within Dr. Marczak's overall analysis. Mr. X is part of that analysis, but he is not the only factor relied upon. The fact that his identity has not been disclosed to the father may affect the degree of weight that is to be put upon that element of Dr. Marczak's analysis. That is a matter that will have to be visited during any fact-finding process, but I am persuaded that the detriment to Mr. X in disclosing his identity to the father, particularly if that is done in a way that is not going to allow him to know that that is happening, and where the father refuses to permit Mr. X to be told the identities of the parties in these

proceedings before he is invited to give consent to the disclosure of his name, in my view is not justified and is not fair to Mr. X.

12. Equally, the father's knowledge of who Mr. X is, in my view, of only marginal importance in the case. The overall case will stand or fall, to a very large extent, upon Dr. Marczak's approach, his methodology, the basic evidence upon which he relies, of which Mr. X is a part, but is not the whole. The mother is not going to prove her case solely because Mr. X is a feature of it, equally, it may not fail because of what is said about Mr. X. He is a satellite element within the whole, rather than at the core of the case and it is therefore disproportionate, in my view, to require the disclosure of his identity now.

13. The proposed course of action is for the independent counsel who has been instructed to be given information so that she can conduct some basic screening check of the material. That seems to me a proportionate step to take and we see what the response is from that.

14. This is an issue that can be revisited as we move forward, but at the moment, I am very clear that I am not persuaded that Mr. X's identity is to be disclosed, other than to independent counsel, for her to undertake that step.

15. Moving on to the difficult question of whether a request is made to the litigants in the pending litigation in Israel, for them to send a copy of what is referred to as a contract that is at the centre of that litigation. The mother's team wish that to happen in circumstances where there is an inability to access directly material from the UAE with respect to the use or otherwise of the Pegasus software. This other information is referred to in the public domain and may indicate that Dubai and/or another State in the UAE is a customer of the Pegasus software. If so, this is potentially relevant and has substantial potential importance in the case. I clearly understand that and I am sympathetic to the request.

16. The father's case is not that the request is unmerited as a matter of principle, his prime concern is for the children and that this request will lead to the dots being joined, as Lord Pannick described in his oral submissions, very quickly, with certainly the international Press, if not the Press here, being able to publish something that indicates the nature of the dispute which currently is being litigated before this court in confidential proceedings. The mischief that the father seeks to avoid is for the children then to learn that there are phone-hacking allegations by that media disclosure and be upset by it and hear about it in an uncontrolled way.

17. Again, obviously I understand that and the father's submission, through Lord Pannick, is that what is to be gained forensically by the disclosure of any contract is not so important and weighty in the case as to justify the risk of harm to the children's welfare by the potential for disclosure which I have described. That is a long-winded way of saying it is disproportionate, therefore, to sanction the request being made.

18. A further difficulty has been identified, rightly and helpfully, by Ms. Fottrell, in submissions, which is that the agency who makes the request from this court,

Cafcass, the court itself, or Payne Hicks Beach, is likely to give a heavy hint as to what the case involves, and the widely reported accounts in the Press of there being a dispute between these parents about these children will readily lead to an understanding in Israel of why the contract is being sought, and again I understand that.

19. The position I am left in is that I do consider that the request for the disclosure of the document from Israel is justified and that it is proportionate. I think, provided the requesting agency from this court is sufficiently neutral, the risk of it leading to Press reports asserting that there is a phone-hacking allegation between these parents, which is being litigated in this court, is relatively remote, and the risk of the children hearing about it in an uncontrolled and unexpected way in the media is relatively small. It cannot be ignored, but relatively small. It is nowhere near as high as the father, through Lord Pannick, was describing, provided the agency that makes the request is not one that, of itself, identifies the nature of the dispute.

20. Of the various options, I think the most likely to be seen as neutral and not give any hint as to the underlying litigation is for the independent counsel to be used as a post-box, as Mr. Geekie submitted, for counsel and her chambers, if she is willing to do this, simply to be the source of the request, the point of contact, and for the letter sent by counsel to be drafted by Cafcass, no doubt approved by the other parties.

21. That is, as it were, where I am on that tricky point at the moment. If independent counsel cannot undertake this function, it will have to be reconsidered. I do think that of the other options, using the Clerk to Peter Jackson LJ is probably the least likely to indicate the underlying nature, but there may be, when we have had time for thought, other options which are similarly neutral and non-identifying. I give leave for the request to be made and, subject to those observations, I sanction the use of independent counsel to undertake the task.

22. I think all of the rest of the order relates to the timetable. I am just going to switch to ----

MR. GEEKIE: I believe it does, but in relation to the letter to Israel, there is the draft, if whether by now or Monday you can say whether that is approved or not ----

THE PRESIDENT: I need to read that. I will deal with that.

MR. GEEKIE: Thank you.

THE PRESIDENT:

23. The timetable, as we all recognise, is concertinaed, now, as I think we all realised it would be, to achieve the necessary steps which still have to be undertaken as quickly as possible, but in the a way which gives the parties sufficient time before the hearing starts on Tuesday, 13th April, to put their cases before the court. I think there is now agreement as to the dates on which Professor Beresford will file his report, which is expected to be 21st March,

realistically and if Dr. Marczak needs until Tuesday, the 30th, then one day is not going to alter matters there. The key thing is the experts' meeting, and it is agreed that that should take place on 6th July. The question is when the father is to file a statement of his case? That is not a statement from the father, but it is a statement from his team setting out what his case is. It is accepted that that will not be his case or his final case on the technical matters, which will still be churning through the report and expert meeting process which still has time to run. But it is acknowledged that the father is likely to be putting forward a secondary case, his primary case being simply to say to the mother, "prove it" and his case being that she will be unable to prove it both as to the issue of the phones being hacked -- and Lord Pannick rightly points to the fact that currently the two single joint experts who have been instructed have not found any evidence of hacking on the raw material that they have examined of itself -- and secondly, even if hacking is proved, the link between the hacking and the father will not be established, so the case simply is to prove it.

24. Within that process, the father is likely to assert a number of matters, no doubt, the principal theme of which will be that even if there has been hacking, it does not follow as night follows day that it must be on the father's instruction that other agencies, particularly those from other States in the Middle East, who may have a negative mindset towards Dubai, the United Arab Emirates or politically against the father, could undertake hacking and make it look like the father if the Pegasus software is used.

25. As I have indicated during submissions, it is not enough simply for that to be raised in argument, the ground has to be laid and that is accepted. So the question is what date the father has to put in the statement of his "secondary case", as I called it during submissions, the non-technical part of his case and any underlying material. The mother submits that should be by next Friday, 19th March. The father seeks for that to be the following Friday, the 26th, but is prepared for the court to say, for example, it should be two or three days earlier, on the Wednesday, and indeed it slipped -- no, it did not slip, it was the Wednesday.

26. I firmly take the view that the father has known that this fact-finding process has been underway, he has a legal team of very substantial proportions acting for him. They were entitled to raise the issue of Act of State, and that has rightly gone up through the appeal process in this jurisdiction, but has now ended with the Supreme Court refusing permission to appeal. But that has always been one strand in the father's case, and the need, should that fail, to put forward any other case, must have been understood by those acting for the father, right back that the autumn, if not August when this all started, but at least by October, six months or so ago. Indeed, the nature of the submission that I have just described in relation to other States has been raised by Lord Pannick on a number of occasions. It was, therefore, well open to the father to prepare his case on this long before this week and I find it very hard to contemplate that that has not been done.

27. I, therefore, direct that the father files the statement setting out his secondary case by Friday, 19th March, a week from today, in the confidence that that can

be done despite the hard work that it may involve some undertaking in the ensuing seven days.

28. The mother is entitled, and the court is entitled, and the Guardian is entitled, to know what the father is to say. It is very unusual litigation in relation to any fact-finding process for the party who is contesting the allegation not to have been required to put their case before the court a long time before now. I have, for good reason, not required the father to take that step pending the playing out of the necessary consideration of the foreign Act of State element of his case, but that moment has now passed and the time therefore is long overdue for the father's case to be put before the court.

29. In terms of filing of skeleton arguments, I think that is the only other matter that has been left. This is where the rock and the hard place of the timetable do collide with each other and the need for the court to have the father's skeleton argument, but to allow time for him to take on board the outcome of the experts' meeting on 6th April could not be more tightly constrained.

30. I am grateful for, and accept, Lord Pannick's offer for the filing to take place on Sunday, 11th April, and I direct that the father's skeleton argument for the fact-finding hearing, which will, obviously, encompass his case on the technical matters, is to be filed by 4.00 p.m. on Sunday, 11th April.

(For continuation of proceedings: please see separate transcript)

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Neutral Citation Number: [2021] EWHC 660 (Fam)

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

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Re Al M (Immunities)

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- -

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.
>
> 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).

In the High Court of Justice
Family Division

No: FD19P00246, FD19P00380, FD19F05020 and FD19F00064

The Children:

Sheikha Al Jalila bint Mohammed bin Rashid Al Maktoum (a girl, D.O.B. 02/12/2007)

Sheikh Zayed bin Mohammed bin Rashid Al Maktoum (a boy, D.O.B. 07/01/2012)

ORDER MADE BY THE PRESIDENT OF THE FAMILY DIVISION

The Parties

The applicant father is His Highness Sheikh Mohammed bin Rashid Al Maktoum (represented by Harbottle & Lewis LLP).

The respondent mother is Her Royal Highness Princess Haya bint Al Hussein (represented by Payne Hicks Beach LLP).

The children, named above, are represented by CAFCASS Legal by the children's guardian

The interested media organisations are Guardian News & Media Limited, Associated Newspapers Limited, the BBC, The Financial Times Limited, Sky Plc, Reuters News and Media Limited, PA Media, Telegraph Media Group Limited and Times Newspapers Limited ("the media")

RECITALS

UPON the Orders of the President of the Family Division, Sir Andrew MacFarlane, in these proceedings dated 25 May 2021and 16 September 2021

AND UPON the Court not having granted permission for the reporting of any of the hearings taking place in private before Moor J concerning the financial claims for the mother and the children pursuant to Schedule 1 of the Children Act 1989 and Part III of the Matrimonial and Family Proceedings Act 1984 ("the Finance Proceedings")

AND UPON the Court having made a Reporting Restriction Order by Order of the President of the Family Division dated 21 February 2020 in respect of the identity of the person named in Confidential Schedule 1 to that order

AND UPON the identity of Mr X having been withheld in the proceedings by paragraph 11 of the Order of the President of the Family Division dated 12 March 2021

AND UPON the identity of Director 1 (whose name is for the avoidance of doubt set out in Confidential Schedule 1 to this Order) having been ordered to be withheld in the Finance Proceedings by order of Moor J dated 9 September 2021 and directions having been given for his evidence to be given at the hearing commencing on 25 October 2021 subject to the imposition of special measures to protect his identity.

AND UPON the Court of Appeal directing by paragraph 3 of its Order dated 25 June 2021 (in relation to the Immunities and FAS appeals) and by paragraph 3 of its Order dated 10 August 2021 (in relation to the Fact-Finding appeal) that the issue of publication of the Court of Appeal's judgments in respect of these appeals (Judgments (iv), (viii), (x) and (xi) below) be determined by the President of the Family Division.

AND UPON the application of the media by notice dated 15 September 2021

AND UPON the following judgments being the "Unpublished Judgments" for the purposes of this Order:

(i) The Foreign Act of State Judgment dated 29 October 2020 with neutral citation [2020] EWHC 2883 (Fam);
(ii) The Non-Molestation Judgment dated 9 December 2020 with neutral citation [2021] EWHC 3305 (Fam);
(iii) The Legal Services Order (LSO) Judgment dated 13 January 2021 with neutral citation [2021] EWHC 303 (Fam);
(iv) The Court of Appeal Foreign Act of State Judgment dated 8 February 2021 with neutral citation [2021] EWCA Civ 129;
(v) The Case Management Judgment of the President dated 12 March 2021 with neutral citation [2021] EWHC 915 (Fam);
(vi) The Immunities Judgment dated 19 March 2021 with neutral citation [2021] EWHC 660 (Fam);
(vii) The Fact-Finding Judgment dated 5 May 2021 with neutral citation [2021] EWHC 1162 (Fam)
(viii) The Court of Appeal Immunities (permission to appeal) Judgment dated 9 June 2021 with neutral citation [2021] EWCA Civ 890;

(ix) The Lives With Judgment dated 10 June 2021 with neutral citation [2021] EWHC 1577 (Fam)

(x) The Court of Appeal Fact-Finding (permission to appeal) Judgment dated 15 June 2021 with neutral citation [2021] EWCA Civ 900; and

(xi) The Court of Appeal Fact-Finding Judgment dated 5 August 2021 with neutral citation [2021] EWCA Civ 1216.

AND subject to any directions of the President as to timing of the steps ordered below with regard to the urgent need for the guardian to meet with the children

AND UPON the Court considering the skeleton arguments of the parties and the media and hearing Lord Pannick QC, Richard Spearman QC, Godwin Busuttil and Stephen Jarmain on behalf of the father, Charles Geekie QC, Justin Rushbrooke QC and Sharon Segal on behalf of the mother, Deirdre Fottrell QC, Tom Wilson and Marlene Cayoun on behalf of the Children's Guardian, and Sarah Palin on behalf of the media

IT IS ORDERED THAT:

1. Subject and without prejudice to paragraph 7 of this Order below, permission is given:

   (i) for the Unpublished Judgments and the corresponding orders to be made public.

   (ii) to journalists who have been present at any relevant court hearings to report what they observed at those hearings insofar as it is directly related to the Unpublished Judgments, save that there be no reporting of any information relating to anything said or written in argument or in evidence relating to other aspects of the welfare of the children, including but not limited to their experiences, their health and education, or their views about publication, or the history of contact between them and their father ("Welfare Information");

   (iii) to journalists who accessed the transcripts of the hearings held in private on 6 October 2020, 21 October 2020, 23 October 2020, 30 October 2020, 17 November 2020, 20 November 2020, 9 and 10 December 2020 and 13 January 2021 and without media attendance to publish material arising from those transcripts (as noted by the journalists) insofar as it is directly

related to the Unpublished Judgments, save that there be no publication of (a) any Welfare Information, or (b) any of the information set out in the left hand column of the table at Annex A (attached to the mother's opening documents dated 7 April 2021 for the fact finding hearing), under the heading 'server' and 'Pegasus Apps' or (c) the expressions set out in Confidential Schedule 2 to this order;

(iv) for the skeleton arguments and other written submissions directly related to the Unpublished Judgments ("the Skeleton Arguments") to be made available to duly accredited journalists and for those journalists to report the contents of those written submissions insofar as they are directly related to the Unpublished Judgments, save that there be no reporting of (a) any Welfare Information or (b) any of the information set out in the left hand column of the table at Annex A (attached to the mother's opening documents dated 7 April 2021 for the fact finding hearing), under the heading 'server' and 'Pegasus Apps'; with liberty to apply in respect of such reporting or (c) the expressions set out in Confidential Schedule 2 to this order;

(v) for the judgments of the President in respect of any application for permission to appeal the Unpublished Judgments of the President, and the corresponding orders, to be made public, save that there be no publication of any Welfare Information;

(vi) to journalists who were present at the hearing of the media's application before the President on Wednesday 29 September 2021 to report what they observed at that hearing save that there be no reporting of any Welfare Information or the matters discussed at the hearing that relate to the arrangements for the welfare hearing scheduled to be heard on 6-10 December 2021 including in particular the observations of the President in relation to the involvement of the Father in that welfare hearing; and

(vii) for the skeleton arguments served on the media by the parties for the purposes of the hearing of the media's application on 29 September 2021 to be reported save for (i) the fifth sentence of paragraph 4; (ii) sub-

paragraphs 4(i)–(x); (iii) the first sentence of paragraph 5; and (iv) paragraph 6 of the skeleton argument filed on behalf of the Guardian under the section headed 'The Guardian's position on Publication', the publication and reporting of which remains strictly prohibited.

2. Permission is given to the lawyers for the media organisations who have given undertakings to the Court in respect of the Unpublished Judgments and the skeleton arguments served on the media by the parties for the purposes of the hearing of the media's application on 29 September 2021 to release those judgments and skeleton arguments to nominated journalists under a strict publication embargo of 24 hours in advance of their publication on the Bailii website.

3. The orders referred to in 1(i) and (v) above, the Skeleton Arguments as defined above, and the copies of the skeleton arguments filed on behalf of the parties in respect of the appeals, and the father's applications for permission to appeal to the Supreme Court and the Notices of Objection, and any orders (or judgments) made in respect of those applications, all as in the bundle supplied to the court and the parties at 7.27pm on 27 September 2021, shall be provided by the mother's solicitors to the media in electronic form and with a watermark applied to each page by no later than the start of the embargo period.

4. The provisions of paragraph 1 above shall not take effect until the publication of the Unpublished Judgments on the Bailii website at 4pm on Wednesday 6 October 2021. Permission is also given to Derek Gill, Clerk to the President of the Family Division, to release the Unpublished Judgments to those journalists present at the hearings but not represented by Mr Andriano subject to (i) any journalists requesting the judgments from Mr Gill proving to the President's satisfaction that they were present at the hearings; (ii) the same strict publication embargo as those represented by Mr Andriano.

5. Upon publication of the Unpublished Judgments:

   (i) the lawyers for the media organisations who have given undertakings to the Court in respect of the judgments and the Material (as defined in those undertakings) are released from those undertakings; and

   (ii) for the avoidance of doubt, the restrictions imposed by paragraphs 11 to 13 of the Order of the President of the Family Division dated 26 February 2021 shall not apply to prevent communication of any information which, by virtue of this Order, the Court has permitted to be made public, and:
      a. paragraph 6(i) of the Order of Lord Justice Peter Jackson dated 8 September 2020 is discharged;
      b. paragraph 6(iii) of the Order of Lord Justice Peter Jackson dated 8 September 2020 is discharged in relation to information which, by virtue of this Order, the court has permitted to be made public and paragraph 21 of the Order of the President of the Family Division dated 6 October 2020 are discharged; and
      c. save as provided by the Order of Lord Justice Peter Jackson dated 8 September 2020 (as amended by this order), paragraph 21 of the Order of the President of the Family Division dated 6 October 2020 is discharged.

   (iii) the prohibition under s97(2)(b) of the Children Act 1989 on publishing any material likely to identify the Berkshire address of the Children is revoked.

6. There shall be no publication of (i) any information derived from the proceedings likely to identify Mr X as a person concerned in the proceedings or (ii) any information likely to identify Director 1 as a person concerned in the proceedings, or which otherwise contains material which is liable to, or might lead to, the identification of Director 1 in any such respect, provided that nothing in this Order

shall prevent the publication, disclosure or communication of any information which is contained in the Unpublished Judgments.

7. Nothing in this order shall prevent:
   (a) any person from publishing information relating to any part of a hearing in a court in England and Wales in which the court was sitting in public and did not itself make any order restricting publication;
   (b) any person from publishing information which before the service on that person of this Order was already in the public domain as a result of publication by another person based in this jurisdiction in any newspaper, magazine, sound or television broadcast or cable or satellite programme service, or on the internet website of a media organisation based in this jurisdiction;
   (c) Mr X from giving his written consent to being identified by name; and
   (d) publication of the information in 1(iii)(b), (iii)(c), (iv)(b) and (c) provided that it is not derived from these proceedings.

8. Confidential Schedule 1 to this order shall only be served on (a) the media and (b) any other person with the permission of the court, the mother having been given notice of any such application. For the avoidance of doubt Schedule 1 shall not be served on the father or his representatives.

9. Confidential Schedule 2 to this order shall only be served on (a) the media and (b) any other person with the permission of the court, the mother having been given notice of any such application.

10. The father shall pay the mother's costs of and incidental to the Lives With Application agreed in the sum of £225,000 plus VAT, with credit being given for funds paid by the father pursuant to the legal services orders.

11. The father shall pay the mother's costs of and occasioned by the publicity issue in the sum of £560,000 plus VAT, with credit being given for funds paid by the father pursuant to the legal services orders.

12. There be liberty to apply for the purposes of carrying the above Order into effect and generally.

DATED this 29th day of September 2021

RL

Please address all communications for the Court to The Family Division of the High Court, 1st Mezzanine, Queen's Building, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number in the top right hand corner of this form. The Court Office is open between 10.00 a.m. and 4.30 p.m. on Mondays to Fridays.

Confidential Schedule 1

[The name of Director 1.]

Confidential Schedule 2

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