Neutral Citation Number: [2020] EWHC 1620 (Admin)

Case No: CO/4688/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2020

**Before**:

**LORD JUSTICE FLAUX**

**-and-**

**MR JUSTICE SAINI**

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**Between:**

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| **THE QUEEN (ON THE APPLICATION OF CHARLOTTE CHARLES AND TIM DUNN)** | **Claimants** |
| **- and -** | |
| **(1) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS** | **Defendants** |
| **(2) CHIEF CONSTABLE OF NORTHAMPTONSHIRE POLICE** | |

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**Geofrey Robertson QC, Adam Wagner and Emilie Gonin** (instructed by **Howard Kennedy LLP**) for the **Claimants**
**Sir James Eadie QC, Ben Watson, Jason Pobjoy and George Molyneaux** (instructed by **Government Legal Department**) for the **First Defendant**
**Jason Beer QC** instructed by **East Midlands Police Legal Services** for the **Second Defendant**

Hearing date: 18 June 2020

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# Approved Judgment

Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 10:00am on Wednesday 24 June 2020.

**Lord Justice Flaux and Mr Justice Saini:**

Introduction

1. This case relates to the tragic death of the claimants' son Harry Dunn who was killed in a road traffic collision near RAF Croughton in Northamptonshire on 27 August 2019 when his motorcycle collided with a car being driven on the wrong side of the road by Mrs Anne Sacoolas ("AS"), the wife of Jonathan Sacoolas ("JS"), a member of the administrative and technical staff of the US Embassy based at RAF Croughton.

2. As was made clear at the outset of the hearing, this is a case management conference not the substantive hearing contrary to the impression created in some press reports. On 16 January 2020, Supperstone J, then Judge in Charge of the Administrative Court, ordered that there be what is called a rolled-up hearing, in other words a hearing where the court determines whether the claimants should have permission to apply for judicial review and if it determines they should, goes on to consider and determine the judicial review. The date for that hearing is not yet fixed but it is likely to be in the Michaelmas Term. At the present hearing the court was concerned with two applications by the claimants: (i) an application for specific disclosure of documents by the first defendant and (ii) an application for permission to adduce expert evidence from Sir Ivor Roberts, an eminent retired diplomat. At the end of the hearing we informed the parties that both applications would be refused, with written reasons to follow. These are those reasons.

Factual and legal background

3. In order to put in context the case management issues we have to decide it is necessary to set out some of the factual and legal background, which we have sought to do on as neutral a basis as possible.

4. The arrangements by which such administrative and technical staff are based at RAF Croughton were agreed between the UK and US governments in an Exchange of Notes in 1994 and 1995 ("the Exchange of Notes"), by which, at the request of the US Embassy, the Foreign and Commonwealth Office ("FCO") stated:

> "the Government of the United Kingdom are only willing to accept the remaining [x ] persons as members of the A&T staff of the United States Embassy in London with the privi1eges and immunities accorded to such staff pursuant to the provisions of Article 37.2 of the VCDR [Vienna Convention on Diplomatic Relations], on the understanding that the United States Government, by its reply to this letter, waives the immunity from criminal jurisdiction of these employees in respect of acts performed outside the course of their duties."

5. That condition was accepted by the US Embassy. There was a further Exchange of Notes in 2001 when the US Embassy requested that it be allowed to base additional

personnel at RAF Croughton. This was agreed on the basis of the same condition. It has recently emerged that there was a yet further Exchange of Notes in 2006 where a request for additional personnel to be based at Croughton was agreed on the basis of the same condition.

6. Article 37.2 of the VCDR provides:

> "(2) Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties."

7. Articles 29 to 35 include inviolability of the person (Article 29) and immunity from criminal jurisdiction (Article 31). Article 32 provides: "the immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State" but goes on to provide that "waiver must always be express".

8. Following Mr Dunn's death, the US Embassy stated that AS enjoyed diplomatic immunity under Articles 29, 31 and 37(2), since the Exchange of Notes does not contain any express waiver of immunity of a family member of a member of administrative and technical staff. Having initially had internal doubts as to whether she did enjoy immunity, the FCO concluded that the US Embassy was correct. It requested that the US waive immunity in respect of AS but the US declined to do so. AS and her family left the UK on 15 September 2019. She has refused to return to the jurisdiction voluntarily and extradition proceedings have been commenced by the CPS.

The Grounds of Judicial Review

9. There are six grounds of judicial review raised by the claimants in their application for permission to apply for judicial review. On the afternoon before the hearing the claimants produced draft Amended Grounds expanding some of their allegations. Since permission to apply for judicial review has not yet been granted, the claimants would seem to be right that permission to amend is not required as CPR 54.15 only applies to applications to amend Grounds after permission to apply for judicial review has been granted in respect of the existing grounds. However, it is unsatisfactory that the Amended Grounds were not produced until the afternoon before the hearing. In the event, neither defendant objected to the amendments and, to the extent necessary, we gave permission to amend.

10. Ground 1 contends that the first defendant, the Foreign Secretary ("D1"), made an error of law in concluding that AS had diplomatic immunity under Article 37.2 of the VCDR. Thus, the issue, which is an issue of law, will be whether the waiver or condition in the Exchange of Notes covers family members notwithstanding the requirement in Article 32.2 that any waiver be express.

11. Ground 2 as proposed to be amended contends that it was unlawful for D1 to obstruct a criminal investigation by Northamptonshire Police, ("D2"), and/or to confirm to and/or advise D2 that AS and her husband JS had diplomatic immunity, alternatively that it was an abuse of power for D1 to have done anything other than inform the US that if its assertion of immunity was maintained that would have to be tested in the Courts.

12. Ground 3 contends that D2 abdicated its duty or fettered its discretion or breached a mandatory policy by accepting the advice of D1 or the Metropolitan Police that AS had immunity.

13. Ground 4, as amended, alleges that there has been a breach of Articles 2 and/or 6 of the ECHR, specifically of the duty to have a proper enquiry into Mr Dunn's death as a result of the defendants proceeding on the basis of the error of law that AS had immunity and D1 impeding the police investigation by allowing AS to leave the jurisdiction. Although Mr Geoffrey Robertson QC for the claimants sought to contend that Ground 4 was free-standing, it is clearly dependent upon Ground 1. If there was no error of law in relation to whether AS had immunity then it is difficult to see how Ground 4 can arise.

14. Ground 5 alleges that D1 had no power in domestic law to grant any immunity to the relevant US personnel at RAF Croughton, which is in effect an allegation that D1 had no power to accept their appointment as members of the administrative or technical staff of the mission because the only relevant powers for granting immunity were under the Visiting Forces Act 1952 and any grant of immunity needed but failed to comply with the procedural requirements of the Diplomatic Privileges Act 1964. It is contended that D1 exceeded the limited prerogative power by ceding sovereignty over a military base in the UK to a foreign state which could only be done by Parliament. By the proposed amendment to this Ground the claimants contend that RAF Croughton has at least since 2006 not been used for any form of diplomacy, but for military intelligence purposes.

15. Ground 6 alleges that by affording diplomatic immunity to family members of the relevant personnel D1 suspended the laws of the land without the consent of Parliament contrary to the Bill of Rights 1688.

The disclosure application

16. The claimants apply for specific disclosure by D1 of a number of categories of documents. The application was originally dated 10 January 2020 but was amended and supported by a statement dated 10 March 2020 of the claimants' solicitor Mr Mark Stephens. As explained in the first witness statement of Lorna Robertson of the GLD, since receipt of the claimants' pre-action letter of 25 October 2019, the GLD has undertaken a very extensive exercise of identifying and reviewing potentially relevant documents both relating to Mr Dunn's death and the FCO's response to it and to the arrangements made with the US about personnel based at RAF Croughton. She says about 17,400 electronic documents were identified for review, of which at the date of her statement, 24 March 2020, some 6,100 had been reviewed. The Exchanges of Notes

had already been disclosed with the response to the pre-action letter on 8 November 2019.

17. The Detailed Grounds of Resistance were served on 6 March 2020, together with a detailed witness statement from Mr Hugo Shorter, a senior official at the FCO, which had 30 exhibits, including documents sought in the claimants' 10 January 2020 disclosure application. On behalf of D1, Sir James Eadie QC submitted that this disclosed all relevant documents and information for the fair and just resolution of the issues, apart from some limited additional documentation not discovered at the time but since disclosed. He submitted that, if anything, it went further than required in order to provide context for the Court and the parties.

18. Since Mr Shorter's statement and exhibit were served GLD has provided three further tranches of disclosure on 7 May 2020, 5 June 2020 and 16 June 2020, as explained in Ms Robertson's second and third witness statements.

19. Although the claimants accepted that Mr Shorter's statement and exhibit satisfied 4 of their original 10 requests they pursue the other 6 and added to them so that in the letter from the claimants' solicitors dated 29 May 2020 and the schedule to it, the claimants were seeking some 15 categories of documents. In further written submissions served on the afternoon before the hearing with their proposed Amended Grounds, the claimants indicated that their request for disclosure was simplified to be limited to documents referred to directly or by implication in Mr Shorter's statement.

20. Before considering the various requests for disclosure made by the claimants, it is important to have in mind the applicable principles in relation to disclosure in judicial review cases. Judicial review is not like other civil litigation. Standard disclosure is not automatic. The principle is that stated by Lord Bingham in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650: *"the test will always be whether in the given case disclosure appears to be necessary in order to resolve the matter fairly and justly*". The continued application of this principle was recently confirmed by the Divisional Court in *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin).

21. There is a duty of candour on the parties which requires them *"to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide"* and to disclose materials *"which are reasonably required for the court to arrive at an accurate decision"*: see *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [50] and *Graham v Police Service Commission* [2011] UKPC 46 at [18].

22. In the context of an application for disclosure of documents referred to directly or by implication in Mr Shorter's statement, it is important to have in mind that CPR 31.14. which provides, *inter alia*, for inspection of documents referred to in a witness statement, does not apply in cases of judicial review. Paragraph 12.1 of the Practice Direction under CPR Part 54 applicable in cases of judicial review, provides: "Disclosure is not required unless the court orders otherwise."

23. Turning to the disclosure now sought by the claimants, the first category is historical documents referred to in paragraphs 28 and 32(2) of Mr Shorter's statement. This corresponds with category (g) in the schedule to the 29 May letter: "All documents from the FCO Archives that were delivered to FCO officials as a result of the search requested on 30 August 2019 and described at paragraph 32(2) of the witness statement of Mr Hugo Shorter". In that paragraph Mr Shorter explains that an official in the Protocol Directorate requested the retrieval from archive of any documents referring to the US Diplomatic Communications Relay Facility at RAF Croughton. As Sir James points out this would include many documents which have no bearing whatsoever on the issues the court will have to be determine. To the extent that the documents retrieved are relevant to Ground 1 then, as Ms Robertson explains at [7] of her second witness statement, they have been disclosed.

24. The answer which Mr Robertson QC sought to give in his submissions was that relevance is a subjective determination and the claimants should have an opportunity to consider for themselves documents considered irrelevant by D1 and government lawyers, on the basis that those who were seeking disclosure of the documents were the best judges of relevance. This is a thoroughly heterodox approach. Even in civil litigation generally, where a party deposes in a witness statement that all relevant documents have been disclosed, the CPR does not permit the opposing party to second guess that statement by demanding to inspect all the undisclosed irrelevant documents for itself. The statement that all relevant documents have been disclosed is conclusive unless there are some grounds for supposing the statement to be mistaken. That must be *a fortiori* the position in a judicial review where, as we have said, disclosure is limited to what is necessary for the fair and just determination of the issues. There is no conceivable justification for the claimants and their lawyers being entitled to trawl through the entire archive when Ms Robertson has stated all relevant documents have been disclosed and there are no grounds for disbelieving her statement.

25. The second category is contemporaneous documents said to be referred to indirectly at [20] of Mr Shorter's statement. That paragraph refers to discussions over the telephone between officials of the Protocol Directorate of the FCO and the US Embassy on 28 August 2019. The latest written submissions say that notes of these conversations are assumed to exist and should be disclosed. This appears to be a refinement of category (c), which was a wide-ranging and disproportionate request. Mr Robertson QC contended that these notes are necessary to determine Ground 4 (whether D1's actions taken as a whole caused AS to flee the country) and Amended Ground 2 (that D1's actions obstructed the police investigations). What Mr Shorter says in [20] is that during the conversations it was noted that the police might seek a waiver of diplomatic immunity in respect of AS, scarcely consistent with the allegations now made by the claimants that the FCO obstructed the investigation and caused AS to flee the country. What is said to have been discussed was wholly unexceptionable. If anything else had been said of relevance to the issues, we are satisfied that Mr Shorter would have referred to it and the notes (if there are any) would have been disclosed.

26. The third category of documents of which the claimants seek disclosure is the documents impliedly referred to in [41] and [42] of Mr Shorter's witness statement concerning the meeting between officials of the Protocol Directorate and US Embassy officials on 13 September 2019. This request corresponds with initial categories (a) and (b). Category (a) of the documents sought is "All notes and written records of the meeting on 13 September 2019, discussed at Paragraphs 41 and 42 of Mr Shorter's witness statement, in which US Embassy officials stated that Anne Sacoolas would be leaving the country immediately unless there were strong objections, as well as any communications in whatever form both in preparation for and consequent upon that meeting". Category (b) is "the precise wording of the objections "in strong terms" that were purportedly provided by the Foreign and Commonwealth Office to US Embassy Officials at the meeting on 13 September 2019, together with the US Embassy Officials' response to those objections". The schedule to the solicitors' letter contends that category (a) is relevant to Grounds 1, 2 and 4 and category (b) is relevant to Ground 2. When pressed by the Court as to why it was necessary to have disclosure of any notes of the meeting in circumstances where the claimants had been able to set out their case on Grounds 2 and 4 in detail in the Amended Grounds, Mr Robertson QC submitted that the claimants were entitled to fuller detail of what was summarised in Mr Shorter's statement, which was in any event hearsay or hearsay on hearsay.

27. We agree with Sir James Eadie QC that these documents are not relevant for the fair and just determination of these grounds. Ground 1 raises a pure issue of law as to whether the waiver or condition in the Exchange of Notes covered AS as a family member, given the terms of the VCDR, so it is difficult to see what relevance the further documents sought have to that issue. Indeed, since the latest submissions do not contend that these documents are relevant to Ground 1, that allegation of relevance has apparently been abandoned. Likewise Ground 4 which alleges breaches of Article 2 and Article 6 depends upon the answer to Ground 1 so it is difficult to see what additional documents are required to resolve that Ground. Ground 2 as originally formulated concerned a factual issue of what the FCO said to the police and a legal issue as to whether what was said was unlawful. It is now said that the FCO unlawfully obstructed D2's criminal investigation. However, nothing in Mr Shorter's description of what the FCO officials said to the US Embassy officials even begins to support the case now sought to be made. He says the FCO officials objected in strong terms when the US officials said the Sacoolas family would be leaving the next day and repeatedly emphasised that the FCO wanted the family to cooperate with the UK authorities. There is no reason to disbelieve Mr Shorter when he says that that was what was said by the FCO officials, which is wholly inconsistent with the FCO either causing AS to leave the jurisdiction or obstructing the police investigation. Even if there are notes of the meeting, no further detail of what was said is necessary for the fair and just determination of the Grounds, whether as originally formulated or as amended.

28. The fourth category of which the claimants seek disclosure is documents relating to the meeting between FCO officials and US Embassy officials on 5 September 2019 referred to in [37] to [39] of Mr Shorter's statement. This corresponds to original categories (h) and (i) in the schedule to the letter of 29 May 2020. Since they were duplicative it is only necessary to refer to category (h): "All notes taken of the meeting between the FCO

and the US Embassy on 5 September 2019 discussed at Paragraph 37 of the witness statement of Mr Hugo Shorter as well as any communications in whatever form both in preparation for and consequent upon that meeting." In the schedule to the 29 May 2020 letter these two categories are said to be relevant to Ground 4. It is also said: "It is a ground of claim that the 1st Defendant stymied, it would seem deliberately, the criminal investigation into Harry Dunn's death. It is necessary for the full factual matrix to be understood in relation to this." This extremely serious allegation was not pleaded at that time. The recent amendments made now allege that D1 did obstruct the police investigation although they stop short of alleging that this was done deliberately. Although in his oral submissions Mr Robertson QC submitted that the claimants were entitled to disclosure of these documents in order to establish whether the obstruction was deliberate, as Sir James Eadie QC pointed out, there is no plea of misfeasance in public office. This is no more than a fishing expedition to see if a more serious allegation can be made out. We have little doubt that if there were any documents which showed or suggested that any obstruction was deliberate, the GLD would have disclosed them as they would clearly be relevant. Furthermore, as Sir James submitted, it is absurd to suggest that D1 was trying to stymie the police investigation by asking the US to waive immunity, which is what the FCO officials asked for at the meeting on 5 September 2020.

29. It is said in the latest submissions that it is important for the claimants to gain a full picture of what was being said on both sides about their understanding of the limited Croughton immunity and what the US officials said about withdrawing the family, a threat that if made should have been notified to the police. However, given that Mr Shorter says that the impression which the FCO officials had from the discussion was that "it was that the US was unlikely to grant more than a limited waiver in respect of Mrs Sacoolas (and possibly none at all in respect of her child), and that it was probably only a question of time before the US Embassy withdrew the Sacoolas family from the UK", it is difficult to see how any further disclosure is necessary for the fair and just determination of the issues. The claimants have sufficient information from the statement to advance their case that if the FCO officials thought that it was only a question of time before the US Embassy withdrew the family, that is something that should have been passed by D1 to D2. Yet more detail is not required for the fair and just determination of the issues.

30. The fifth category relates to the text message referred to in [46] of Mr Shorter's statement. This corresponds with original Category (j) which is: "The full chain of messages passing between an FCO official and a US Embassy official discussed at paragraph 46 of the witness statement of Mr Hugo Shorter as well as any other such communications in whatever form". In [46] of his statement Mr Shorter said: "a Protocol Directorate official sent one of the US Embassy officials a text message which stated: "I think that now the decision has been taken not to waive, there's not much mileage in us asking you to keep the family here. It's obviously not us approving of their departure but I think you should feel able to put them on the next flight out…". Sir James Eadie QC confirmed that the remainder of the text and other texts in the chain had not been disclosed because there was nothing of relevance in them. As Ms

Robertson had confirmed in her first statement, the text and other texts in the same run had been reviewed and there was nothing else relevant to be disclosed.

31. The sixth and final category of which the claimants seek disclosure is of any responses to the Information Notes to ministers referred to in [29] and [36] of Mr Shorter's statement. As regards [29] that corresponds to original category (f): "Any responses received to the Information Note to Ministers dated 30 August 2019 and disclosed as Exhibit HS12 to the witness statement of Mr Hugo Shorter". In the schedule to the 29 May 2020 letter, this is said to be relevant to Ground 1 but for the same reasons as in relation to the other contemporaneous documents, it is difficult to see how any response from a minister is relevant to the issues of law raised by Ground 1. It is said in the skeleton argument that D1 is being evasive and the target of the claim is the Foreign Secretary but, as Sir James rightly pointed out, no part of the claimants' pleaded case depends upon any action or omission by D1 as an individual. There either was or was not an error of law and what he did or did not say in response to the Information Note is of no possible relevance to the determination of that issue.

32. In the latest written submissions, Mr Robertson QC contended that the submissions for D1 ignore the other grounds of claim, specifically Ground 4 and the allegation that D1 and his officials facilitated AS fleeing the jurisdiction. This is scarcely surprising since on being asked to which Ground each category related, in the schedule to the 29 May letter, the claimants only identified Ground 1 in relation to this category. It is said by the claimants that the Court should have the full picture and it is a breach of the duty of candour not to disclose it. The GLD has said that there was no substantive response in relation to the Information note referred to in [29] of Mr Shorter's statement, which was confirmed by Sir James, who also assured us that there was no substantive response to the Information Note referred to in [36]. We are quite satisfied in any event that it is not necessary for the fair and just determination of the issues in this case that the responses from D1 or other ministers be disclosed.

33. For all these reasons, as we indicated at the hearing, none of the disclosure sought is necessary for the fair and just determination of the issues and the application for such disclosure is refused.

The expert evidence application

34. By an Application Notice dated 13 January 2020, the claimants apply for an order pursuant to CPR Part 35.4 granting them permission to rely upon a report of Sir Ivor Roberts as expert evidence on the basis that it is reasonably required to resolve the proceedings. There are in fact now two reports from Sir Ivor which are the subject of the application made at the CMC. The first report is dated 26 November 2019 and this has been supplemented by an addendum report, dated 11 June 2020.

35. Sir Ivor is a distinguished former British diplomat with substantial experience as an ambassador. He is not a lawyer but is the editor of a leading text, *Satow's Diplomatic Practice*. The claimants wish to rely upon his reports in support of only one of their

grounds, Ground 1: whether D1 erred in law in deciding that AS enjoyed diplomatic immunity (described more fully at para.[10] above).

36. The defendants oppose the application and argue, in summary, that the principal issue addressed by Sir Ivor in his reports is not an issue of relevant expertise; and that it is in fact the ultimate issue for the Court which concerns the proper interpretation of the Exchange of Notes, in the light of the terms of the VCDR. Before addressing the submissions we will summarise, in broad terms, the substance of what Sir Ivor says in each of his reports.

37. Sir Ivor explains in his first report that his instructions were "to consider and report on whether diplomatic immunity attaches to Mrs. Anne Sacoolas in relation to the crash which caused the death of Harry Dunn". He goes on in that report to make a number of arguments and submissions about the interpretation of the VCDR and of the text used in the Exchange of Notes. Sir Ivor expresses the view that it is "clear" that the Exchange of Notes "may have been drafted carelessly". Sir Ivor then proceeds to speculate that at least some of those involved in drafting the letters had what he calls "an underlying assumption" that the waiver "applies not only to officials but also members of their family forming part of their household". He concludes: "This is the interpretation that I and, I expect, most diplomats would put on this exchange". It is clear, however, that Sir Ivor is not purporting to give evidence in relation to "state practice" as that term is understood in international law. We return to this matter below.

38. In his supplemental report Sir Ivor seeks to draw support for the views he expresses in his first report from a Ministerial Submission dated 23 May 1995. He says that "[p]roperly interpreted, in my opinion this document helps to explain the meaning of the terms used in the Exchange of Notes, and the circumstances in which the agreement was concluded". The claimants rely upon that Ministerial Submission by way of travaux préparatoires.

39. Turning to the substance, the first question is to identify the basis for the application. It is right to observe, as submitted by Mr Beer QC for D2, that the claimants have not been consistent as to the basis upon which the application is made and the basis appears to have changed between the date of the application and the oral hearing before us.

40. The original basis of the application (as identified in the supporting witness statement) was that Sir Ivor could give evidence about "state practice". It was said that "…international law involves consideration of State practice – primarily the practice of diplomats – and it is their understanding of the reason of the exclusion of any reference to family members which will inform the interpretation that the court must ultimately give to the agreement". To the same effect, in the claimants' Skeleton Argument prepared for the purposes of the original Directions Hearing, it was said that Sir Ivor could give evidence as to state practice. Specifically, it was argued that Sir Ivor, as editor of *Satow's Diplomatic Practice* and former holder of UK ambassadorships, was best placed to give evidence to the court as to how diplomats understand the 1995 agreement and as to "state practice" in relation to the immunity of diplomatic agents and their families.

41. There is an obvious problem with this basis for the application: Sir Ivor does not give evidence as to state practice. As is well-established (and subject to details which are not presently relevant), there are two sources of international law: customary international law and treaties. As to the former, a rule of customary international law is established by two elements: (a) state practice - a general practice of States; and (b) *opinio juris* - an acceptance that this practice is a legal obligation. As to the latter, a treaty is "…an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument, or in two or more related instruments and whatever its particular designation" (Article 1 of the Vienna Convention on the Law of Treaties "VCLT"). However, at the hearing before us there was no suggestion that customary international law was relevant. Accordingly, the state practice issue is also not relevant. That is no doubt why Sir Ivor did not address it.

42. In these circumstances, the claimants appear to have modified their position and now argue for relevance and admissibility of Sir Ivor's evidence on a different basis. Both orally and in writing, they submit that the Exchange of Notes was a "treaty" for the purposes of Article 2(1)(a) VCLT, and that Sir Ivor can assist the Court in determining the meaning of the treaty, and the object and purpose of the treaty. It was also argued by Mr Robertson QC, by way of a supplementary submission, that Sir Ivor can assist the Court by explaining what the "technical" language used in the Exchange of Notes would mean to diplomats.

43. The defendants dispute whether the Exchange of Notes amount to a treaty and argue that they are in fact a form of Memorandum of Understanding between the UK and the US. However, for present purposes it is unnecessary to resolve that issue and we shall proceed below on the assumption that they do amount to a treaty.

44. The claimants rely strongly upon the terms of the VCLT and referred at the hearing to Articles 31and 32 VCLT which are in the following terms:

> "**Article 31**
>
> **General rule of interpretation**
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> **Article 32**
>
> **Supplementary means of interpretation**
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

45. In interpreting a treaty, the language used by the parties is of primary relevance: see Article 31(1) VCLT, *R v SSHD ex parte Adan* [1999] 1 AC 293 per Lord Lloyd of Berwick at 305 and *R v Asfaw* [2008] 1 AC 1061 per Lord Mance at para 125.

46. More specifically, in *Deep Vein Thrombosis & Air Travel Litigation* [2006] 1 AC 495 Lord Steyn observed:

> "[31] …Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This is the starting point of treaty interpretation to which other rules are supplementary: see article 31.2; 31.3;

> 31.4; and 32. The primacy of the treaty language, read in context and purposively, is therefore of critical importance".

47. We were also referred (by all parties) to *Czech Republic v European Media Ventures SA* [2008] 1 All ER (Comm) 531 where Simon J identified the relevant principles as follows:

> "[16] It is clear that the proper approach to the interpretation of Treaty wording is to identify what the words mean in their context (the textual method), rather than attempting to identify what may have been the underlying purpose in the use of the words (the teleological method). The disadvantages of this latter approach have been described by Sir Gerald Fitzmaurice KCMG QC (former Legal Adviser to HM Foreign and Commonwealth Office, Judge of the International Court of Justice and Judge of the European Court of Human Rights) as follows,
>
> > One method (and perhaps the one that has the most direct natural appeal) is to ask the question, 'What did the parties intend by the clause?' This approach has, however, been felt to be unsatisfactory, if not actually unsound and illogical, for a number of reasons …
>
> One of the reasons that the approach is unsatisfactory is that,
>
> > It ignores the fact that the treaty was, after all, drafted precisely in order to give expression to the intentions of the parties, and must be presumed to do so. Accordingly, this intention is, *prima facie*, to be found in the text itself, and therefore the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended.
>
> Another reason is that,
>
> > … the aim of giving effect to the intentions of the parties means, and can only mean, their *joint* or *common* intentions … This means that, faced with a disputed interpretation, and different professions of intention, the tribunal cannot in fact give effect to any intention which both or all the parties will recognise as representing their common mind.
>
> [17] The search for a common intention is likely to be both elusive and unnecessary. Elusive, because the contracting parties may never have had a common intention: only an agreement as to a form of words. Unnecessary, because the

> rules for the interpretation of international treaties focus on the words and meaning and not the intention of one or other contracting party, unless that intention can be derived from the object and purpose of the treaty…
>
> [19] The proper approach is to interpret the agreed form of words which, objectively and in their proper context, bear an ascertainable meaning. This approach, no doubt reflecting the experience of centuries of diplomacy, leaves open the possibility that the parties might have dissimilar intentions and might wish to put different interpretations on what they had agreed. When considering the object and purpose of a Treaty a Court should be cautious about taking into account material which extends beyond what the Contracting Parties have agreed in the Preamble or other common expressions of intent, see Art 31.2(a) and (b)".

48. Also of particular relevance in the present case is *Reyes v Al-Malki* [2017] 3 WLR 923, in which Lord Sumption observed:

> "[11] The primary rule of interpretation is laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The principle of construction according to the ordinary meaning of terms is mandatory ("shall"), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must, as the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for determining the parties' intentions.
>
> [12] In the case of the Convention on Diplomatic Relations, there are particular reasons for adhering to these principles:
>
> (1) Like other multilateral treaties, the text was the result of an intensely deliberative process in which the language of successive drafts was minutely reviewed and debated, and if necessary amended. The text is the only thing that all of the many states party to the Convention can be said to have agreed. The scope for inexactness of language is limited.
>
> (2) The Convention must, in order to work, be capable of applying uniformly to all states. The more loosely a

> multilateral treaty is interpreted, the greater the scope for damaging divergences between different states in its application. A domestic court should not therefore depart from the natural meaning of the Convention unless the departure plainly reflects the intentions of the other participating states, so that it can be assumed to be equally acceptable to them. As Lord Slynn observed in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 509, an international treaty has only one meaning. The courts "cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Convention.
>
> (3) Although the purpose of stating uniform rules governing diplomatic relations was "to ensure the efficient performance of the functions of diplomatic missions as representing states", this is relevant only to explain why the rules laid down in the Convention are as they are. The ambit of each immunity is defined by reference to criteria stated in the articles, which apply generally and to all state parties. The recital does not justify looking at each application of the rules to see whether on the facts of the particular case the recognition of the defendant's immunity would or would not impede the efficient performance of the diplomatic functions of the mission…"

49. In our judgment, an application of the principles we have set out establishes that Sir Ivor's reports are irrelevant and inadmissible. Our reasons for this conclusion are as follows:

    (i) It was common ground before us that the question of whether a person has diplomatic immunity is a question of law for the Court to determine. The primary task of the Court is to ascertain the "ordinary meaning to be given to the terms of the treaty in their context" (Article 31(1) VCLT) and in light of the "object and purpose" of the treaty (Article 31(1) VCLT). It is an exercise to be carried out by the Court applying established rules. We do not consider this to be a skilled exercise for diplomats where any special expertise is in play.

    (ii) The material parts of Sir Ivor's report which we have summarized above involve exactly the type of exercise criticised by Simon J in *European Media Ventures* and by Lord Sumption in *Reyes*. That is, Sir Ivor seeks to identify what may have been the underlying purpose of the drafters in their use of language. He also expresses inadmissible views as to whether or not the enjoyment of immunity ensured the efficient performance of the functions of the mission.

(iii) Further, with respect to him, Sir Ivor's speculations about the unspoken assumptions of the drafters of the Exchange of Notes are irrelevant. The Court will not be assisted by his view that he (and, he expects *"most diplomats"*) would interpret the Exchanges of Notes in a particular way.

(iv) Sir Ivor, who had no involvement in the drafting of the Exchanges of Notes, is not in a position to provide expert evidence on the "*ordinary meaning*", "*context*" or "*object and purpose*" of the Exchange of Notes. His views also involve the type of broad ranging inquiry as to the parties' intentions which the Courts have cautioned against.

(v) In oral submissions it was argued by Mr Robertson QC that the language in the Exchange of Notes is of a technical nature and that is an established basis for expert evidence to be provided to a Court. We of course accept that as a matter of general principle expert evidence may be reasonably required where, for instance, a term has a particular technical meaning in a particular context but that does not apply in the present case. However, neither Mr Robertson QC, nor Sir Ivor, identify any specific term in the Exchanges of Notes which is ambiguous or unclear, or which has a particular technical meaning. Nor has there been identified any diplomatic rule or practice which could conceivably bear upon the ordinary meaning of any of the terms in the Exchange of Notes.

(vi) Insofar as Sir Ivor's evidence is said to identify some form of "unreasonableness" or "absurdity" in the FCO's construction, it is a matter for the Court to determine whether there are such vices. We cannot identify any specific expertise that Sir Ivor enjoys which would place him in a better position than the Court when it considers the language in the Exchange of Notes and the consequences of differing constructions. Sir Ivor's submissions as to claimed irrationality and absurdity are simply the types of arguments which Counsel for the claimants will no doubt make at the substantive hearing.

(vii) Finally, as regards the supplemental report in which Sir Ivor analyses internal documents passing within the FCO (in particular the submission to the Minister of 23 May 1995 and the recollections of the relevant government minister at the time, Sir Tony Baldry QC) we do not accept that these documents are travaux préparatoires. Documents which are properly travaux préparatoires pursuant to

> Article 32 VCLT, cannot include the internal papers of the FCO. We refer in this regard to what was said in *Fothergill v Monarch Airlines* [1981] AC 251 per Lord Wilberforce at 278C and in *Effort Shipping v Linden Management (The Giannis NK)* [1998] per Lord Steyn at AC 605 at 623D. These were not public and accessible documents pointing to an indisputable intention.

50. We dismiss the application to serve expert reports from Sir Ivor Roberts.