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Case No: ZW20C00036

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2021

Before :

The President of the Family Division
and
Sir Duncan Ouseley

- -

Between :

LONDON BOROUGH OF BARNET

Applicant

- and -

AG and OTHERS

- and –

THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS

Respondents

- -
- -

Professor Dan Sarooshi QC, **Ms Hannah Markham QC**, **Ms Kate Tomkins** and **Mr Peter Webster** (instructed by **HB Public Law**) for the **Applicant**
Professor Jo Delahunty QC, **Mr Chris Barnes**, **Ms Lucy Logan Green** and **Professor Antonios Tzanakopoulos** (instructed by **Creighton and Partners Solicitors**) for the **Respondent Child**
Sir James Eadie QC, **Professor Vaughan Lowe QC**, **Ms Joanne Clement**, **Mr Jason Pobjoy** and **Ms Belinda McRae** (instructed by **Government Legal Department**) for the **Secretary of State**

Hearing dates: 2nd and 3rd March 2021

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Approved Judgment

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THE PRESIDENT OF THE FAMILY DIVISION AND SIR DUNCAN OUSELEY:

1. This is the judgment of the Court.

2. The London Borough of Barnet ('LBB'), as with other local authorities, has important powers and duties under Part V of the Children Act 1989 ('CA') for the protection of children in its area. There is no express exclusion from its Part V remit of the children of diplomats, who enjoy immunity or inviolability under the Vienna Convention on Diplomatic Relations, the VCDR. The material parts of this Convention, done in 1961, were incorporated directly into UK law by s2 of the Diplomatic Privileges Act 1964 ('DPA'), as set out in Schedule 1 to the Act, unchanged from the text of the VCDR.

3. In 2019 and continuing in to 2020, LBB had growing and serious concerns about the welfare of the children of a diplomat and his wife, who were living within its area. It took such steps as it could to protect the children, but the range of steps, including those which would have been the most effective, could not be taken because of the immunity enjoyed by the diplomat, his wife and children. An application for an interim care order came before Mostyn J in March 2020 who concluded that his hands were tied by the operation of s2 of the DPA. The interim care order could not be made when it otherwise would have been. He found that the treatment which the children experienced at the hands of their parents reached the threshold which would have breached the children's rights under Article 3 ECHR. He, understandably, was deeply troubled by the consequences.

4. Mostyn J saw one possible answer in a declaration of incompatibility between s2 DPA and Article 3 of the European Convention on Human Rights, ('ECHR'), under s4(2) of the Human Rights Act, 1998 ('HRA'). He gave permission for such proceedings to be brought. Those proceedings are now before us.

5. The declaration sought by LBB is as follows:

> "That to the extent the operation of s2(1) of the Diplomatic Privileges Act 1964 (DPA) and Articles 29, 30 (1), 31(1) and 37(1) and (2) of Schedule 1 to the DPA: (i) prevents a court from hearing and deciding an application for protective measures to be taken in respect of the children of members of a diplomatic mission where these children are suffering or at risk of suffering significant harm, and /or
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> (ii) prevents a number of authorities -including local authorities and the police- from acting, pursuant to ss.17, 31, 38, 43, 46 and 47 of the Children Act 1989 and s.11 of the Children Act 2004, to safeguard the children of members of a diplomatic mission where these children are suffering or at risk of suffering significant harm, then these provisions of the DPA are incompatible with Articles 1, 3 and 6 of the European Convention on Human Rights."

6. A few comments are apposite at this stage. First, the concept of "significant harm" in the Children Act will cover treatment which reaches the level of severity necessary for a breach of Article 3 ECHR, but is wider than that. Incompatibility could only arise

under Article 3 where that treatment reached that level. It was not in dispute that that level had been reached in this case. Second, the permission granted by Mostyn J did not allow for a declaration to be sought in relation to the Articles of the VCDR which deal with the "inviolability" of premises and person to be raised. Such a declaration was included by LBB only when it later formulated its application, to obtain as much guidance and clarity as it could from the Court. Third, the language of the declaration sought makes it clear that the true target of the declaration has to be the language of the VCDR itself.

7. One of the children, A, has been represented before us and we have read her witness statement, which supports the conclusions to which Mostyn J came about the circumstances of the children. She was represented pro bono by a legal team led by Professor Delahunty QC. We are very grateful to them for doing so and for their contribution to the submissions. We are also grateful to Mr Webster who unexpectedly, and at the last minute, found that he had to present the human rights arguments after Professor Sarooshi QC was taken ill; he took up the baton with great skill.

The chain of events

8. The diplomat and his wife lived in LBB with their 6 children: S aged 5, G aged 9, A aged 14, N aged 17, E and D aged 18. (Ages given at the time when LBB first applied to the Court for orders under Part V Children Act in January 2020.) A safeguarding referral of the younger children in November 2019 led to an investigation under s47 Children Act. An investigation under s47 is required where a local authority, among other circumstances, "have reasonable cause to suspect the child who lives …in the area is suffering, or is likely to suffer, significant harm …". The authority must then make such inquiries as it considers necessary to enable it to decide whether it should take action to safeguard or promote the child's welfare. The parents refused consent to LBB to speak to the children at home or at school, and objected to the school being asked to provide information, relying on their diplomatic immunity. The school had no safeguarding concerns. No allegation was made of injury to the children. No further action was taken.

9. However, a second referral was received by LBB on 16 January 2020, this time from the school which G and S attended. LBB were told by the relevant team in the Metropolitan Police that diplomatic immunity prevented it undertaking an investigation. The police have emergency powers under s46 Children Act. By s46(1), where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may remove the child to suitable accommodation and keep him there. There are other powers as well. The constable has to inform the local authority, within whose area the child was found, of what has happened and provide such details to it that he has, and he has to take such steps as are reasonably practicable to inform the child's parents of what has happened.

10. LBB pursued its duty under s47, speaking to all four younger children at school and to E separately, by 20 January. The children made allegations which substantiated concerns that they had suffered, and were at risk of continuing to suffer, significant physical and emotional harm from the routine actions of both parents, excessively harsh and very severe in discipline and punishment, well beyond the point of cruelty, and sometimes requiring medical treatment for their children. The parents, contacted by

LBB, denied hitting the children and claimed their diplomatic immunity prevented it placing any information about the family before the court.

11. On 21 January 2020, LBB applied to the Family Court in Barnet for an emergency protection order under s 44 CA, giving the parents short notice of the application. The Court, before making such an order, has to be satisfied that there is reasonable cause to believe that the child is likely to suffer significant harm if not removed, that enquiries being made under s47 are being frustrated because of an unreasonable refusal to allow the authority to seek access to the child, and that the authority reasonably believes that access is required urgently. An emergency protection order operates as a direction, to anyone in a position to do so, to comply with a request to produce the child to the authority which applied for it; most commonly this would be the parents. It authorises the authority to remove the child to accommodation it provides and to keep him there, in order to safeguard his welfare, and gives the authority parental responsibility for the child to the extent of permitting it to take such steps as are reasonably required to safeguard or to promote his welfare. There are further powers relating to contact with named persons, and medical or psychiatric examination.

12. No order was made by Barnet Family Court and the case was transferred and listed before Mostyn J on 22 January 2020; the parents were served personally. A barrister attended to observe on behalf of the diplomatic mission. LBB issued an application for an interim care order under s31 CA. A care order, putting it very simply, places the child in the care of the local authority, for it to implement a care plan approved by the court, sharing parental responsibility for the child, making decisions in the child's best interests and keeping the child's welfare paramount when decisions about the child's welfare are made. A care order can only be made if a court is satisfied that the child concerned is suffering, or is likely to suffer, significant harm; it must also be satisfied that that is attributable to the care the child has received, or was likely to receive if the order were not made, and that that care is not what a reasonable parent would be expected to give, or is attributable to the child being beyond parental control: CA s31(2). A care order cannot be made with respect to a child who has reached the age of 17, or 16 if married.

13. An interim care order can be made under s38 CA when care order proceedings are adjourned, or when the court directs the authority to make an investigation of the child's circumstances, because it appears that a care order may be appropriate in respect of the child. It is an immediate remedy but can only be made where the court is satisfied that there are reasonable grounds for believing that the threshold criteria set out in s31(2) exist. The court may also make a child arrangements order in the course of care order proceedings, with respect to the child's living arrangements.

14. At the hearing of 22 January 2020, Mostyn J recognised the problem created by diplomatic immunity, which prevented an emergency protection order being granted; the application was withdrawn. An application for an interim care order was made and adjourned for the question of diplomatic immunity to be considered at a one day hearing on 3 March, with a direction that the papers be disclosed to the diplomatic mission and to the Foreign and Commonwealth Office ('FCO'), with each being given permission to intervene and to file skeleton arguments. The same was later ordered in respect of the Department of Education. A recital to Mostyn J's order, in his words from his later judgment of 16 March 2020, said:

> "…The parents were warned that their conduct towards the children, of which there was strong prima facie evidence contained in the documents before the court, must not be repeated. Further, there was a recital that expressed the opinion of the court that it would be reasonable for the children to be able to speak to the Local Authority's officers in private. These recitals would have been carefully noted by …counsel to the diplomatic mission, who had attended the hearing."

15. On 22 and 23 January, the two elder children emailed the social worker, withdrawing their allegations. The father cancelled a visit by social workers on the grounds of work obligations; this visit had been arranged for just before the parents returned temporarily to their home country.

16. For the first three or so weeks in February, the parents were away in their home country; the children remained at home in the UK in the care of E, one of their adult siblings. With the father's consent, LBB spoke to the children at their various schools. On their return, the parents initially refused to speak to LBB officers, but later did agree to meet social workers at the family home on 28 February 2020. The parents, the next day, signed an agreement with LBB consenting to it speaking to the children at their school and to making visits, both announced and unannounced to the family home. This LBB did. The agreement also required the parents not to hit their children or to use physical punishment, not to discuss the case with the children, and to communicate honestly with LBB. The parents did not accept that they had done anything wrong to their children.

17. On 3 March, the hearing to consider how diplomatic immunity affected the application for an interim care order came before Mostyn J. The parents were represented but not present in person, because of advice received from their head of mission. A representative observed proceedings on behalf of the mission. The FCO and Department of Education did not appear or put in skeleton arguments. Five of the children were represented, three through their Children's Guardian.

18. On the facts, Mostyn J found at [21]:

> "Miss Markham QC rightly submits that this is a formidable case of deliberate historic harm and risk of future harm, both physical and psychological. It is true that the parents have deliberately chosen not to meet the case against them before the immunity issue has been determined. But even so, it seems extremely unlikely that they would be able to defeat an application for an interim care order which requires proof of no more than reasonable grounds for believing that the children have either suffered or are likely to suffer significant harm: section 38 of the Children Act 1989. Miss Markham QC also rightly submits that the signing of the working together agreements would in a case such as this be hardly likely to persuade the court not to make an interim care order. As she said, such agreements might be sufficient to see off an interim care application in a routine case of neglect but would be hardly likely to have that effect where there was such a strong case of the infliction of deliberate harm."

19. Mostyn J then considered the "seemingly irreconcilable clash between two international treaties incorporated into our domestic law by statutes", the VCDR incorporated by the DPA, and the ECHR with HRA. He expressed his surprise that neither the FCO nor the Department of Education had decided to intervene, and he thought that he would have been greatly assisted had they done so. The diplomatic mission had not yet been authorised to intervene by the sending State, though it regarded the proceedings as "extremely serious".

20. Mostyn J considered that it would be "a step too far for me to take", to use the interpretative provision in s3 HRA to interpret the provisions of the VCDR, incorporated into UK law, as subject to a further exception to immunity, where a public law application was made to protect children or vulnerable adults at risk within the diplomat's family forming part of his household, sympathetic though he was to that contention. S3(1) HRA provides: "So far as it is possible to do so, primary legislation ...must be read and given effect in a way which is compatible with the Convention rights." Mostyn J cited relevant authorities, notably *Re S (Care Order Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291. He was driven "regretfully" to his conclusion. For that purpose, he applied what Lord Sumption said in *Reyes v Al-Malki* [2017] UKSC 61, [2019] AC 735 about the interpretation of the DPA and VCDR, to which we shall come.

21. Mostyn J said at [38]:

> "…the innovation proposed…passes well beyond the boundary for interpretation…
>
> (i) It violates the plain, natural literal meaning of the words in article 31. The exceptions were framed after considerable debate and were obviously intended to be a finite list. The principle of construction inclusio unius exclusio alterius means that a construer cannot infer an additional tacit exception based on safeguarding children at risk.
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> (ii) The Convention must mean the same thing in all the 191 states that have signed it. The majority of these will not have subscribed to the European Convention. That majority would no doubt find it most surprising that there existed a tacit exception based on safeguarding children at risk. For the Convention to work as intended there must be global uniformity as to what it means.
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> (iii) The foundation of the Convention is the idea of reciprocity. As Lord Sumption says at [12(3)], a significant purpose of confirming diplomatic immunity on foreign diplomatic personnel in Britain is to ensure that British diplomatic personnel overseas enjoy corresponding immunities. If a tacit exception based on safeguarding the children of diplomats were to be excavated it would not be difficult to imagine another state, a theocracy for example, claiming that the teenage children of British diplomats were at risk because their parents allowed them to drink alcohol or to dress immodestly.

> (iv) The principle of immunity for serving diplomats and their families is one of the most important tenets of civilised and peaceable relations between nation states. It may be abused, but that is a price that must be paid in order to uphold the higher principle. As Lord Sumption says at [7] [in *Reyes*]:
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> 'Nor do I doubt that diplomatic immunity can be abused and may have been abused in this case. A judge can properly regret that it has the effect of putting severe practical obstacles in the way of a claimant's pursuit of justice, for what may be truly wicked conduct. But he cannot allow his regret to whittle away an immunity sanctioned by fundamental principle of national and international law.'"

22. He disagreed with the obiter views in *Re B (A Child) (Care Proceedings: Diplomatic Immunity)* [2003] Fam 16, of Dame Elizabeth Butler-Sloss, the then President, and *A Local Authority v X* [2018] EWHC 874 (Fam), [2019] 2WLR 202, in which Gwynneth Knowles J agreed with those views. We shall come to those later. He adopted the view of Professor Denza, whom he described as "the leading academic authority on the law of diplomatic relations", who stated in *Diplomatic Law* 4th ed (2016):

> "Immunity from civil and administrative jurisdiction covers not only direct claims against a diplomatic agent or his property but also family matters such as divorce or other matrimonial proceedings, proceedings to protect a member of the family of a diplomat by a care order or make him or her a ward of court …."

23. Mostyn J felt unable to and did not need to reach a view on whether there was a power, "in a genuine emergency", to enter the home of a diplomat to rescue a child at risk of imminent death or really serious bodily harm, presumably against the wishes of the diplomat. This was to him a "virtually insoluble dilemma."

24. Accordingly, he stayed the proceedings, observing that they would not be dismissed because the question of a waiver of immunity remained unresolved. He observed that the local authority could write to the FCO, inviting it to take the diplomatic steps available, including seeking a waiver of immunity or the expulsion of the diplomat and his family so that protective measures for the children could be taken in the sending state.

25. Finally, he observed that no application had been made for a declaration of incompatibility under s4 HRA. But his "very provisional" view, as he described it in this judgment, not having heard any specific argument, was that Articles 31 and 37 VCDR were irreconcilable and therefore incompatible with Articles 1 and 3 ECHR, and probably also with Articles 6 and 8, to the extent that they prevented protective measure being taken in respect of diplomats' children at risk. But such a declaration would "likely be no more than symbolic given that the British government would not be in a position unilaterally to amend the terms of the Convention."

26. The declaration of incompatibility hearing established by Mostyn J has now been set down to be decided by this court. We agree with all that Mostyn J had to say about the importance of the issue and we endorse each of the procedural steps that he took.

27. LBB then did ask the FCO to seek a waiver of diplomatic immunity from the sending state. On 19 March, the Secretary of State invited the sending state to waive the diplomatic immunity of father and family from civil jurisdiction so that the proceedings under Part IV of the Children Act could take place. This waiver was refused but the sending state formally recalled the father with immediate effect, but his physical return was delayed by Covid restrictions. On 6 April 2020, the Secretary of State informed the sending state that the father and his dependent family, including the mother and all six children were personae non grata, and were required to leave the UK at the first opportunity, which was to be by charter flight on 18 April.

28. Meanwhile, and shortly after the judgment of 16 March 2020, a further incident occurred and was supported by evidence from one of the older children. He and his sister E, the 18 year olds, told the social worker that their parents were physically and verbally abusive and the two had decided to leave home and to claim asylum, which on 9 April 2020 they did, to be joined shortly afterwards in that by N and A, aged 17 and 14 respectively. In a further judgment on 14 April 2020, Mostyn J held that the reasonable period of time in which to leave, to which diplomats were entitled, would not expire before 18 April. The FCO certified the diplomatic exchanges as recorded above. On 18 April, the parents left the UK with G and S, aged 9 and 5 respectively. On 20 April, Mostyn J made an interim care order in respect of A.

29. There was a permission hearing before Mostyn J on 18 May 2020 into whether the application for a declaration of incompatibility should be allowed to proceed. The application was opposed by the Secretary of State for Foreign and Commonwealth Affairs. It does not appear that the application had been formulated other than in the most general terms, but it was generally taken to be about immunity: see [3] and [17]. Inviolability leading to incompatibility does not seem to have been raised at all. In his judgment of 28 May 2020, Mostyn J rejected the argument that the application should not be allowed to proceed because it was academic. He accepted the need for caution, particularly so in s4 HRA cases, and where the conclusion was that there was an incompatibility could have far-reaching consequences for the UK's diplomatic relations.

30. However, he thought that there was good reason in the public interest to hear the application. His reasons were: (i) the subject matter, the protection of children at risk, was of the utmost importance and was one of the principal functions of the state, buttressed by international obligations in the 1990 United Nations Convention on the Rights of the Child, UNCRC; (ii) his judgment of 16 March conflicted with two earlier Family Division authorities on the point; (iii) there were 23,000 people in the UK who benefited from diplomatic immunity, and that figure would include a not insignificant number of children. The merits arguments were for another day, but he granted permission for the application for a declaration to proceed. There was no appeal from that judgment.

The evidence from LBB

31. It is convenient to refer here to the evidence submitted on behalf of LBB by Ms Popely, Head of Service for the Duty and Assessment Service and the Intervention and Planning Service of LBB, and a qualified social worker. She said that in the last 6 years there had been 8 families with diplomatic immunity in her area where there had been safeguarding concerns. In some, LBB had been able to work effectively with the

families, but not always nor in all serious cases. The police were also limited in the powers they could exercise, for the same reason, by diplomatic immunity: they could not enter the home, interview the child, arrest the alleged perpetrators, or ask them to leave the home. The police had in fact exercised their powers in this case when the two older children, adults, went to them, alleging parental abuse and seeking help. Diplomatic immunity also would prevent a child being medically examined for signs of physical abuse, and then provided with treatment.

32. The FCO, on its advice and help being sought, reminded LBB that children and other family members could not be interviewed without a waiver of immunity from the sending state. An application by the FCO for a waiver of diplomatic immunity was not as swift as the urgent circumstances of child protection often required. All this created serious problems for an authority carrying out its child protection duties.

33. Mr Munday, LBB's Executive Director of Children and Family Services, explained the statutory powers and duties of local authorities, and how they were underpinned by statutory guidance under CA, "Working Together to Safeguard Children", 2018, for the achievement of effective safeguarding for children. There is nothing in CA, or the lengthy statutory guidance to which he drew our attention, which bore upon the interaction between diplomatic immunity and child protection, nor in the 2013 statutory guidance for Directors of Children's Services.

34. It was LBB's view that the children of diplomats were not excluded from the protective scope of the Act and guidance. A pan-London safeguarding partnership gave operational guidance in its 2020 Pan-London Child Protection Procedures document as to how safeguarding of diplomat children should be achieved. There should be a referral to children's social care, but legal advice about the particular immunity and diplomatic rank of the family and children had to be sought from the outset and before a child was removed, even in an emergency. It would be advisable generally to remove the child from school or elsewhere rather than from the diplomatic residence. It summarised correctly the extent of the immunities. It continued: the inability to enforce an order did not mean that the local authority or police had neither power nor duty to act as appropriate.

35. Mr Munday was concerned that the VCDR was being interpreted or applied in such a way that the local authority could only take steps to protect a child where the FCO, foreign mission, and diplomat co-operated, which could inhibit or prevent the authority stepping in, even in the most serious cases of abuse or torture. He saw the following powers as potentially curtailed by diplomatic status. Assessment was the starting point for the child protection process. He questioned whether the FCO was right to advise that a social worker could not speak to the children, without a waiver of immunity; he regarded this as rather a one-off stance, as the FCO in the present case had actively encouraged the local authority to speak to the family to try to resolve its concerns. Second, the duty to protect could involve physical removal of the child from their residence, pursuant to a court order if the parents did not consent; but for a diplomat, there would be immunity from a court order, and the police could not use s46. Asking a state to waive immunity was intrinsically too slow for emergencies. LBB did not have high rates of children in need of protection, but it had 228 houses exempt from council tax on the grounds of diplomatic immunity. He was increasingly aware of children who were in need of protection but were left without it because they were members of a diplomat's household. Clarity in their position was required.

The provisions of the Diplomatic Privileges Act 1964 and the Vienna Convention on Diplomatic Relations 1961

36. S2 DPA provides that, subject to the reciprocity provisions of s3, the Articles of the VCDR set out in Schedule 1 "shall have the force of law in the United Kingdom and shall for that purpose be construed in accordance with the following provisions of this section." There is nothing of assistance in them.

37. The preamble is not included in the Schedule but we note parts of it here, for convenience: it recalls that "peoples of all nations from ancient times have recognised the status of diplomatic agents", it bears in mind the principles concerning the sovereign equality of States, the maintenance of international peace and security and the promotion of friendly relations among nations, to which it believes an international convention would contribute, irrespective of the parties' differing constitutional and social systems. The preamble realised "that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states", and affirms the continuing role for the rules of customary international law governing questions not expressly regulated by the Convention. The origin, nature and purpose of diplomatic privileges is therein summed up.

38. The VCDR confers different degrees of immunities and privileges on different individuals, depending on their status and function. It divides persons entitled to immunities and privileges into three categories: diplomatic agents, administrative and technical staff, and service staff, from the highest to the lowest level of immunities and privileges. This case concerns the highest level, diplomatic agents. Article 1 defines these as "the head of the mission or a member of the diplomatic staff." They enjoy three principal groups of privileges and immunities: inviolability of the person, Article 29; inviolability of his or her property and residence, Article 30; and immunity from jurisdiction, Article 31. By Article 37(1), "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving state, enjoy the privileges and immunities specified in Articles 29 to 36." The children here were members of the family of a diplomatic agent, forming part of his household.

39. The Articles in Schedule 1 are set out verbatim using the text of the Convention itself. Article 22 provides:

> "(1) The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of mission.
>
> (2) The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."

Article 30 provides:

> "(1)The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

> (2) His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability."
>
> (3) [This provides for the inviolability of the mission and property in it from search.]

40. Article 29 provides:

> "The Person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

41. Article 31 provides:

> "(1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: [circumstances immaterial here concerning private immovable property, succession claims in which he is involved as a private person, and actions relating to professional or commercial activity exercised by him in the receiving state outside his official functions].
>
> (2) A diplomatic agent is not obliged to give evidence as a witness.
>
> (3) No measures of execution may be taken in respect of a diplomatic agent [outside the exceptions specified above and provided those measures do not infringe the inviolability of his personal residence].
>
> (4) The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."

42. Article 32 provides:

> "(1) The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.
>
> (2) The waiver must always be express.
>
> (3) The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 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 judgment, for which a separate waiver shall be necessary."

43. Article 37 provides:

> "(1) The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
>
> (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 one of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 36, paragraph 1, in respect of articles imported at the time of their first installation."

44. Under Article 39, a person's entitlement to privileges and immunities begins on arrival in the receiving State to take up his appointment or, if already here, on notification to the Foreign Office. They cease, where the person's functions have ceased, when he leaves the country, but remain with respect to acts already done in the course of his functions.

45. The nature and importance of the VCDR has recently been considered by the Supreme Court in *Al-Malki v Reyes (Secretary of State for Foreign and Commonwealth Affairs intervening)* [2017] UKSC 61 and we make no apologies for quoting extensively from the judgment of Lord Sumption. The case concerned a domestic worker employed by a diplomat and his wife at the mission's official diplomatic residence in London. The worker claimed compensation before an Employment Tribunal for discrimination on the grounds of race, failure to pay the minimum wage, and mistreatment. She also alleged that she was the victim of trafficking. One issue was whether, once the diplomat had left the UK, and remained immune only in respect of acts done in the course of his official functions, the commercial activities exception applied to the employment of the claimant.

46. A brief history of the legal immunity of diplomatic agents is contained between [5-7]:

> "5. The legal immunity of diplomatic agents is one of the oldest principles of customary international law. Its history can be traced back to the practices of the ancient world and to Roman writers of the second century. "The rule has been accepted by the nations," wrote Grotius in the 17th century, "that the common custom which makes a person who lives in foreign territory subject to that country, admits of an exception in the case of

ambassadors": *De Jure Belli ac Pacis*, ii.18. But, although recognition of diplomatic immunity is all but universal in principle, until relatively recently both states and writers differed on the categories of people to which the immunity applied and its precise ambit in each category. In particular, they differed on the existence and extent of any exceptions. In Britain, the matter was dealt with by the Diplomatic Privileges Act 1708, which conferred absolute immunity on ambassadors and their staff from civil jurisdiction, in accordance with what British authorities regarded as the rule of international law. In *Triquet v Bath* (1764) 3 Burrow 1478, 1480, Lord Mansfield described the Act as declaratory of the law of nations, and it remained in force until 1964. The United States adopted the British Act in 1790, and France adopted a corresponding rule by legislation in 1794. In other countries, however, exceptions of greater or lesser breadth were recognised, among others for private transactions relating to title to real property, certain employment disputes and liabilities arising out of business activities in the receiving state. There were also differences about the application of the immunity to diplomatic agents of a sending state who were nationals of the receiving state.

6. These differences gave rise to a number of attempts during the 19th and 20th centuries to codify the law of diplomatic relations with a view to achieving a common set of rules and enabling them to operate on a reciprocal basis. The Havana Convention among the states of the Pan-American Union (1928) and the influential draft convention drawn up by the Harvard Law School (1932) were notable examples. But there was no universally accepted code before 1961. The Vienna Convention on Diplomatic Relations, which was adopted in that year, has been described by Professor Denza, the leading academic authority on the law of diplomatic relations, as "a cornerstone of the modern international order": *Diplomatic Law*, 4th ed (2016), 1. It has been perhaps the most notable single achievement of the International Law Commission of the United Nations. The text was the result of an intensive process of research, consultation and deliberation extending from 1954 to 1961. Draft articles were submitted to the governments of every member state of the United Nations, and were subject to detailed review and comment. Eighty-one states participated in the final conference at Vienna in March and April 1961 which preceded the adoption of the final text. Since its adoption, it has been ratified by 191 states, being every state in the world bar four (Palau, the Solomon Islands, South Sudan and Vanuatu). A number of states ratified subject to declarations or reservations, but none of these related to the articles which are primarily relevant on this appeal. As it stands, the Convention provides a complete framework for the establishment, maintenance and termination of diplomatic relations. It not only codifies pre-existing principles of

customary international law relating to diplomatic immunity, but resolves points on which differences among states had previously meant that there was no sufficient consensus to found any rule of customary international law.

7. As the International Court of Justice has pointed out (*Democratic Republic of the Congo v Belgium (Arrest Warrant of 11 April 2000)* [2002] ICJ Rep 3, at paras 59-61), diplomatic immunity is not an immunity from liability. It is a procedural immunity from the jurisdiction of the courts of the receiving state. The receiving state cannot at one and the same time receive a diplomatic agent of a foreign state and subject him to the authority of its own courts in the same way as other persons within its territorial jurisdiction. But the diplomatic agent remains amenable to the jurisdiction of his own country's courts, and in important respects to the jurisdiction of the courts of the receiving state after his posting has ended. I do not under-estimate the practical problems of litigating in a foreign jurisdiction, especially for someone in Ms Reyes' position. Nor do I doubt that diplomatic immunity can be abused and may have been abused in this case. A judge can properly regret that it has the effect of putting severe practical obstacles in the way of a claimant's pursuit of justice, for what may be truly wicked conduct. But he cannot allow his regret to whittle away an immunity sanctioned by a fundamental principle of national and international law. As the fourth recital of the Vienna Convention points out, "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of diplomatic missions as representing states."

47. Principles applicable to the interpretation of the VCDR were set out in [10-12]:

"10. It is not in dispute that so far as an English statute gives effect to an international treaty, it falls to be interpreted by an English court in accordance with the principles of interpretation applicable to treaties as a matter of international law. That is especially the case where the statute gives effect not just to the substance of the treaty but to the text: *Fothergill v Monarch Airlines Ltd* [1981] AC 251, esp at pp 272E, 276-278 (Lord Wilberforce), 281-282 (Lord Diplock), 290B-D (Lord Scarman).

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. Nor can the requirements of functional efficiency be considered simply in the light of conditions in the United Kingdom. The courts of the United Kingdom are independent and their procedures fair. It is difficult to envisage that exposure to civil claims would materially interfere with the efficient performance of diplomatic missions. But as the Secretary of State for Foreign and

> Commonwealth Affairs pointed out, the same cannot be assumed of every legal system in every state. The threat to the efficient performance of diplomatic functions arises at least as much from the risk of trumped up or baseless allegations and unsatisfactory tribunals as from justified ones subject to objective forensic appraisal. It may fairly be said that from the United Kingdom's point of view, a significant purpose of conferring diplomatic immunity of foreign diplomatic personnel in Britain is to ensure that British diplomatic personnel enjoy corresponding immunities elsewhere.
>
> (4) Every state party to the Convention is both a sending and receiving state. The efficacy of the Convention depends, even more than most treaties do, on its reciprocal operation. Article 47.2 of the Convention authorises any receiving state to restrict the application of a provision to the diplomatic agents of a sending state if that state gives a restrictive application of that provision as applied to the receiving state's own mission. In some jurisdictions, such as the United States, the recognition of diplomatic immunities is dependent as a matter of national law on their reciprocity. As Professor Denza observes, *op cit*, 2 -
>
> "For the most part, failure to accord privileges or immunities to diplomatic missions or their members is immediately apparent and is likely to be met by appropriate countermeasures"
>
> In the graphic words of her introduction to the Vienna Convention on the United Nations law website, a state's "own representatives abroad are in a sense hostages who may on a basis of reciprocity suffer if it violates the rules of diplomatic immunity": http://legal.un.org/avl/ha/vcdr/vcdr.html."

48. There was a disagreement among the Justices about the interpretation of the phrase "commercial activity" and whether immunity would have applied had the diplomat still been in the jurisdiction. Baroness Hale, Lord Wilson and Lord Clarke were not as sure as were Lord Sumption and Lord Neuberger that the employment of the claimant would not have been such activity so as to fall within an exception to the diplomat's immunity. At [68], Lord Wilson said:

> "68. The other perceived problem is that an international treaty calls for international interpretation "by reference to broad principles of general acceptation" (*Stag Line, Ltd v Foscolo, Mango and Co, Ltd* [1932] AC 328 at 350); and never more obviously than when every state despatches its diplomats abroad in expectation of their protection under it. So it would be a strong thing for this court to diverge from the US jurisprudence set out in the *Tabion* case, cited in para 23 above, and to adopt the robust interpretation of article 31(1) for which Ms Reyes contends. On the other hand it is difficult for this court to forsake what it perceives to be a legally respectable solution and instead to favour a conclusion that its system cannot provide redress for an

> apparently serious case of domestic servitude here in our capital city. In the event my colleagues and I are not put to that test today. Far preferable would it be for the International Law Commission, mid-wife to the 1961 Convention, to be invited, through the mechanism of article 17 of the statute which created it, to consider, and to consult and to report upon, the international acceptability of an amendment of article 31 which would put beyond doubt the exclusion of immunity in a case such as that of Ms Reyes."

49. The operation and importance of the VCDR was elaborated in the witness statement of Ms MacMillan MVO, Deputy Director of the Protocol Directorate and Assistant Marshal of the Diplomatic Corps at what became in June 2020 the Foreign, Commonwealth and Development Office ['FCDO']. In her long career in the diplomatic service, she had "come to appreciate the vital role that the VCDR plays on a day-to-day basis in facilitating the peaceful and enduring conduct of international affairs." It safeguarded the "efficacy and security of the apparatus through which States interact with one another." It provided the structure for the daily interactions of the Diplomatic Missions and International Organisations Unit, which she oversees, with foreign diplomatic missions and their staff.

50. Just as importantly:

> "It also governs the operations of UK diplomatic missions abroad, as well as the conduct of the UK diplomatic staff who served those missions throughout the posting, (from appointment and accreditation to the termination of their diplomatic functions). The immunities and privileges that the VCDR confers allow diplomatic staff to carry out their essential work without fear of reprisal, no matter how unpopular their mission, and no matter how difficult the conditions in the receiving state. From the FCDO's perspective, this protection is one of the most valuable elements of the VCDR in practice, and one that is rigorously upheld by the UK even in times of crisis."

51. Ms MacMillan made an important point about reciprocity. The VCDR, by Article 47(2), permits a restrictive application of a provision by a receiving state where the sending state has applied such a restriction on the receiving state's mission. She added that the failure of a state to respect the immunities of diplomatic staff in its own territories might expose its own diplomats to "harsher treatment abroad, by way of reprisal".

52. Her evidence also highlighted remedies available to the receiving state for the misconduct of the sending state's diplomatic staff. Article 14 VCDR obliges diplomats to observe the laws of the receiving state. If they do not, the receiving state may: (i) ask the sending state to waive that person's immunity, which the UK presses for in practice, so that criminal or civil proceedings can take place in the UK; (ii) expel the member of the diplomatic staff, at any time and without explanation, as persona non grata, which would leave the person open to proceedings in the sending state; (iii) express its displeasure in a variety of ways such as by imposing a cap on the size of the mission, and ultimately (iv), by breaking off diplomatic relations, and closing the foreign mission.

53. Ms MacMillan expressed her concerns at the possible consequences of the proceedings, if the Claimant were successful, which she considered "likely to be significant and far-reaching." First, a unilateral modification in the way in which the VCDR were applied in the UK would create a high risk of similar restrictions being imposed in the 280 posts in 175 countries where diplomatic staff and their families served:

> "whether by way of reprisal, or for reasons of their own political convenience. Equally, other States Parties to the VCDR are likely to register their concern with Her Majesty's Government, and potentially take a pre-emptive restrictive stance, refusing to recognise the right to immunity or inviolability, even if their diplomatic staff or their diplomatic property have not yet been personally affected."

54. She also anticipated that any unilateral change to the scope of the VCDR's privileges and immunities would substantially impair FCDO's overseas network. She expected:

> "that the risk of reprisals or reciprocal restrictions would materially affect the confidence with which our diplomatic staff carry out their work, and possibly their willingness to serve the UK abroad, particularly in riskier environments. I note in this respect that the protection afforded by VCDR is an element of the contractual arrangements between Her Majesty's Government, the FCDO, and certain other Government Departments, and staff who serve overseas."

55. Ms Macmillan highlighted two important aspects of the potential risk to safety and security, adumbrated by Mostyn J:

> "(1) The first is the reality that many of the 192 States Parties to the VCDR are not equipped with fair, effective and independent judicial systems and law enforcement agencies. Our diplomatic staff (and their families) could face politically motivated charges (and possibly arrest and detention), which would both put their safety and security at risk, but also prevent them from carrying [out] their vital work on behalf of the UK. This would be a particular risk if the mission or instructions were politically unpopular in the relevant receiving State, or if the conditions in that State deteriorated. These sorts of risks are precisely what the rules enshrined in the VCDR were intended to avoid.
>
> (2) Secondly, an exception to inviolability or immunity made unilaterally on one basis (for example, child welfare) could easily be extended to encompass other factual situations (for example, public security, public morality or blasphemy) and other provisions of the VCDR, not just by the courts and legislature in the UK, but also by those of other States."

56. Ms MacMillan then identified three further consequences, at least, which could arise from a change to the scope of inviolability and immunity conferred under UK domestic law. (1) If the UK courts interpreted the VCDR in a manner inconsistent with its terms,

the UK would be placed in breach of international law. If a change in the VCDR were necessary, amendment should be proposed for negotiation and adoption rather than unilateral modification. (2) A unilateral change to the scope of the VCDR's provisions would mean that its rules ceased to be readily and uniformly understood by those who applied them on a daily basis in international diplomacy. (3) A unilateral amendment to the scope of privileges and immunities would weaken the underlying principles of the VCDR, notably the fundamental principle that waiver belongs to the sending State and is exclusively for its decision.

The Human Rights Act 1998 and the ECHR

57. The European Convention on Human Rights was signed in 1950, and entered into force in 1953. Article 1 requires the parties to it to "secure to everyone within the jurisdiction the rights and freedoms defined in Section 1 of this Convention."

58. That section contains Article 3:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

59. Article 6 contains the fair trial rights:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …." (The public and press may be excluded from a trial in a variety of circumstances).

60. There is no provision which deals with diplomatic immunity and the Convention rights.

61. The preamble to the ECHR records that it considered the 1948 Universal Declaration of Human Rights, which in Articles 5, and 10, contains provisions which are the precursors to Articles 3, and 6 ECHR, in very similar language. The International Covenant on Civil and Political Rights, adopted in 1966 by UN General Assembly resolution and entering into force in 1976, contains very similar provisions in Articles 7, and 9. Neither Declaration nor Covenant contain any provision reconciling their provisions with the immunities of diplomats, although the former was declared when customary international law provided for the immunities now codified in the VCDR, and the latter post-dated the VCDR. Nor does any other international instrument which we were shown.

62. S1 Human Rights Act provides that the provisions of the ECHR set out in Schedule 1 are to have effect for the purposes of the 1998 Act. These include Articles 3, and 6. S3(1) provides that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." S4 deals with declarations of incompatibility. S4(2) states: "If the court is satisfied that the provision [of primary legislation] is incompatible with a Convention right it may make a declaration of that incompatibility." There is in s10(2) a special procedure for the more rapid remedying of an incompatibility, after its final determination by a domestic court: a Minister may make an order amending the legislation in question if he or she "considers that there are compelling reasons for

proceeding under this section." There is no relevant reservation in the Act to a Convention right.

The Vienna Convention on the Law of Treaties 1969

63. As so much of the debate during the oral hearing concerned the interpretation of the ECHR and VCDR together, it is necessary to refer to the Vienna Convention on the Law of Treaties 1969 ('VCLT'), in force in 1980. Article 31 contains the general rule of interpretation in the following terms.

> "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: [immaterial to this case].
>
> 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."

64. There was no suggestion that the ordinary meaning of the VCDR contained an explicit exception to immunity or inviolability, or one necessarily to be implied, for the protection of the child members of the household in the receiving state. There was nothing in the context to suggest that, or that any special meaning had been given to any term so as to encompass such an exception. Instead, the practice subsequent to the VCDR continued the practices which had become so well established as to become customary international law, then codified in the VCDR. We have been shown no rule of customary international law which provides for any such an exception. The Declaration and Covenant on Human Rights do not do so. The parties to the ECHR do not include the majority of the parties to the VCDR.

65. We shall come to the UNCRC, but there is nothing in it either which addressed the position of the children of those who enjoy diplomatic immunity. We do not find that in the least surprising; the surprise would be if some exception to immunity in that respect had been intended, but had been left unexpressed, to await later discovery.

66. Article 30 deals with the application of successive treaties relating to the same subject matter. It provides:

> "1. Subject to article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties

> relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that is not considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State Party to both treaties and a State Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

67. This does not advance the Applicant's case to which we shall come. The VCDR comes later than the ECHR, though the latter in the hands of the ECtHR is a "living document". The VCDR preceded the UNCRC, in force in 1990, but the latter is not the Treaty being interpreted; and there are states which are signatories to the VCDR but not to the UNCRC, notably the USA.

The United Nations Convention on the Rights of the Child

68. This was a major feature of the Applicant's case; the Secretary of State submitted that the UNCRC advanced the issues not one bit. It is not necessary to decide whether it too represented or now represents international customary law. The UK is a party to it and is bound by it in international law. It has not been incorporated into domestic law, and so creates no rights and obligations in UK law. In *R (SG) v Secretary of State for Work and Pensions (CPAG intervening)* [2015] UKSC 16, [2015] 1 WLR 1449, in a case likely to have been recently revisited, Lord Reed, said at [82-83]:

> "As an unincorporated international treaty, the UNCRC is not part of the law of the United Kingdom (nor, it is scarcely necessary to add, are the comments on it of the United Nations committee on the rights of the child). "The spirit, if not the precise language" of article 3.1 has been translated into our law in particular contexts…."

69. What he said about the General Comments follows from what he says about the effect of an unincorporated Treaty. Lord Reed continued at [83]:

> "The UNCRC has also been taken into account by the European Court of Human Rights in the interpretation of the Convention, in accordance with article 31 of the Vienna Convention on the Law of Treaties. As the Grand Chamber stated in *Demir v Turkey* [2008] 48 EHRR 1272, para 69:'

> The precise obligations that these substantive obligations of the convention impose on contracting states may be interpreted, first, in the light of relevant international treaties which are applicable in that particular sphere.'
>
> It is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC, that are applicable in the particular sphere."

70. In *R (C) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615, [2019] 1 WLR 5687, (judgment from the Supreme Court is awaited in the appeal from that decision), Leggatt LJ said at [112], in setting out the principles upon which he considered the UNCRC would be relevant as a tool of interpretation:

> "First, I do not accept that it is a proper or permissible approach for a court to decide – as the claimants invite us to do – whether allegedly discriminatory legislation is consistent with the UK's obligations under an international convention and then, if the court considers that it is not, to treat this as supporting a conclusion that the difference in treatment created by the legislation is not justified and is therefore incompatible with article 14 of the Convention. There is no basis in either legal principle or precedent for treating a state's compliance or lack of compliance with its obligations under other international treaties as relevant to whether it has acted compatibly with article 14 (or any other provision of the Convention). As the cases cited at paras 97-100 above make clear, when the European Court refers to international instruments in interpreting the Convention, the purpose of doing so is not to establish whether the respondent state is in breach of its international obligations. Indeed, in *Demir v Turkey* (2009) 48 EHRR 54, at para 86, the Court expressly rejected an argument that it could not rely in interpreting the Convention in a case against Turkey on international conventions that Turkey had not ratified. The purposes for which the Court has regard to other international instruments are, first, to seek to achieve an interpretation of the Convention which is consistent with rules of international law and, second, as evidence of internationally accepted common values."

71. The asserted relevance of the UNCRC here was that it was an aid to the interpretation of Articles 3 and 6 ECHR, and had been used in that way by the ECtHR, and would be used in that way were it faced with the interpretative issues raised here. For LBB, Ms Markham QC's particular theme was that a blanket provision for immunity was not compatible with the protection of the rights of the child or making the welfare of the individual child the primary consideration in decisions about their welfare.

72. The UNCRC, although the most comprehensive international instrument on this subject matter, and embodying various changes in attitude towards the rights and welfare of the child separately from its parents, was not the first post war international

instrument which touched upon or dealt with the rights of children. The 1959 UN Declaration on the Rights of the Child stated in Principle 2:

> "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

73. Article 24 of the International Covenant on Civil and Political Rights specifically referred to the rights of the child, without discrimination, to such measures of protection as his status a minor required.

74. Ms Markham relied in particular on Articles 2, 3, 4, 12, 19 and 37. They provide:

> "2(1). States Parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnical social origin property, disability, birth or other status."
>
> "3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 3(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."
>
> "4. States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention."
>
> "12.(1) States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a

> representative or inappropriate body, in a manner consistent with the procedural rules of national law."
>
> "19.(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s) legal guardian(s) or any other person who has the care of the child."
>
> "37. States Parties shall ensure that: (a) no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment…"

75. What is clear is that the concept of the interests of the child being a primary consideration in decisions affecting their welfare was not new in 1990. If the substance of the UNCRC was or was becoming customary international law by 1990, it would have been familiar to international jurists in 1960, just after the UN Declaration, and when the VCDR was made. What is also clear is that, Article 3 and its counterpart in Article 37 UNCRC notwithstanding and with the VCDR made nigh-on thirty years before, there was still no express provision dealing with the immunities of diplomats including their children. Finally, the language of Article 37 UNCRC follows the language of earlier human rights instruments. It does not enlarge upon the concepts in Article 3 ECHR; the effect of the words "States Parties shall ensure that …." is reflected in Article 1 ECHR.

76. Ms Markham quoted various of the General Comments produced over the years by the UN Committee on the Rights of the Child. We have cited what Lord Reed said in *SG* above. Lord Wilson, in *R(DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 at [69] was of this view:

> "In the light in particular of the *Mathieson* case, the Government cannot deny that the [UN] committee's analysis is authoritative guidance in relation to the dimensions of the concept [of the best interests of the child] in article 3.1. It can submit only, and correctly, that the guidance is not binding even on the international plane and that, while it may influence, it should, as mere guidance, never drive a conclusion that the article has been breached."

77. The General Comments vary between commentary, exhortation and application of the text. We do not set them out. Whatever their value in interpreting the UNCRC and in particular the concept of the "best interests of the child", they are not part of the UNCRC, nor a guide to the interpretation of the ECHR. Nor do any deal with the issue we have to resolve. That issue is not about what are the best interests of the child, or what is in their best interests under the Children Act. Nor is it suggested that the Children Act should be read so that its provisions were applicable to children in diplomatic households regardless of the protection given by the DPA to their immunity and inviolability. Nor is it suggested that it is the Children Act which is incompatible with the ECHR because its provisions cannot override diplomatic immunity and

inviolability, where it would be in the best interests of the child, judged by UK courts, for that to be overridden.

78. We were referred to the travaux preparatoires for the UNCRC, in which the position of the children of diplomats had been raised, very briefly, in discussions. It is not easy to construe the debate, but the territorial limit to the obligations was removed in favour of the limit to children "within their jurisdiction", in Article 1. It is by no means clear that all participants were using the word "jurisdiction" in the same sense. Australia seems to have agreed to a proposal thinking that it meant that immunities would be retained, Finland's object was unclear in seeking the equivalence of the ECHR "jurisdiction". But the relationship of that to their immunities is not discussed. They are within the jurisdiction and so, if immunity is waived, they can be dealt with under domestic child care laws, consistently with the DPA. What we do not extract from the UNCRC is any specific consideration given to the inclusion of the children of diplomats, and resolving the effect of diplomatic immunity. The UNCRC could not affect their immunities, let alone by a sidewind of removing "children within their territories and jurisdiction" and substituting just "children within their jurisdiction".

The approach to a declaration of incompatibility between the DPA and the ECHR

79. Sir James Eadie QC for the Secretary of State submitted, and it was not at issue, that there were four stages to this destination. For this, he drew upon Lord Woolf CJ, with whom May and Jonathan Parker LJJ agreed, in *Poplar Housing Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, at [75]. First, did the immunities and privileges in the Schedule to the DPA prevent LBB and the Court taking the steps under the Children Act which it otherwise would have done, notably making an emergency care order and an interim care order? It is not at issue but that, in the absence of a waiver of immunity by the sending State, those steps could not be taken by reason of the DPA.

80. Second, and the first stage which is at issue, on its natural meaning and effect, are the material provisions of the DPA, and hence the scheduled provisions of the VCDR, incompatible with Articles 3, or 6 ECHR? If they are not, no remedial application of even the special interpretative provision in s3, the so-called "reading down" interpretation, would arise. Third, if they are incompatible, can the conflict be resolved by such an interpretation, applied in the light of the principles governing its application? Fourth, if the conflict cannot be resolved in that way, should the court exercise its discretionary power to make a declaration of incompatibility under s4? Such a declaration does not follow as a matter of course. The language of the HRA makes that clear, and declaratory relief is inherently discretionary. The basis upon which a declaration may be refused where incompatibility has been found, is considered later.

81. The issue is not whether the DPA is in conflict with the Children Act, or UNCRC, or, if so, how that should be resolved. As we have said, it was not suggested that the Children Act could, let alone should, be read as applying regardless of such immunities. It is therefore not in issue but that in domestic law, the provisions of the Children Act are to be read as subject to the provisions of the DPA, without any express provision to that effect. Although the Children Act is the later Act, there was no suggestion of an implied repeal by it of parts of the DPA. That would have been an impossible contention. Hence the focus is on the HRA, and the DPA/VCDR.

82. The relationship between the New Zealand equivalent of the Children Act, the obligations in the UNCRC and the VCDR was considered in the New Zealand High Court in *MAGB v GQC* [2015] NZHC 1595, MacKenzie J. He concluded at [30] that Articles 3, 9 and 12 UNCRC imposed obligations on a state party in respect of children within its jurisdiction. The father's diplomatic immunity precluded the exercise of jurisdiction. The duty in domestic law and under the UNCRC to have regard to the best interests of the child did not provide a basis for the exercise of jurisdiction where diplomatic immunity precluded it.

The second stage: is there a conflict between the DPA/VCDR and Article 3 ECHR?

83. It is worth disposing initially of one short point. Article 1 ECHR states that the obligation on the States Parties is to secure the Convention rights to "everyone within their jurisdiction." It was accepted on all sides that diplomatic immunity did not mean that diplomats are not within the jurisdiction in that sense, though they are immune from it. Their immunity may be waived or cease. It is a procedural bar to the exercise of jurisdiction, or, to put it another way, it is an immunity from suit and not from legal liability. Sir James did not seek a reconciliation between the ECHR and the VCDR on the grounds that the diplomats were not within the jurisdiction in the sense in which that word is used in the ECHR. It may be that the word "jurisdiction" in the UNCRC has a narrower meaning; see *MAGB* above, but that does not make a difference here.

84. On the face of the texts of the ECHR and the VCDR, there is no conflict as between them in relation to Article 3 ECHR. The ECHR is and remains directed to the actions of the state. The parents of a child do not breach Article 3, whatever their treatment. The state has not subjected the children to any form of forbidden treatment. The scope for conflict arises with the way in which Articles 1 and 3 have been interpreted as going beyond this "negative" obligation and as encompassing a "positive" obligation necessary to secure the rights, and to make them fully effective.

85. Therefore, the scope for conflict only arises from the development of the jurisprudence of the ECHR by the ECtHR, rather than from the language of the ECHR text of itself. It is upon these developments that LBB relies, and which we now have to consider. The VCDR cannot develop in that way; to the contrary, its text as negotiated and agreed, is absolutely fundamental, without developments unless agreed by the States Parties, without Comments by a sponsoring body, or national qualifications, or judgments, however learned.

86. This concept of the positive obligation inherent in Article 3 appears to have been first made express in ECtHR jurisprudence in 1998. One aspect, the first to appear, was the obligation to conduct an effective and official investigation into arguable claims of ill-treatment breaching Article 3 by the police or agents of the state. This gloss was applied in order to make the obligation in Article 3 effective in practice and to prevent state agents breaching Article 3 with impunity: *Assenov v Bulgaria* (1998) 28 EHRR 652. That does not apply here, as there is no question of the involvement of agents of the UK, and such conduct would breach diplomatic immunity of itself. An effective investigation is likely to require the sending state to waive, for example, the inviolability of its premises.

87. However, the law has not stood still on this point, and the question has been considered of whether and when the inadequacy of a police investigation into the offences committed by a non-state agent, a private person, which reached the level of severity required in Article 3 cases, can of itself give rise to a breach of Article 3 by the state. In *D v Commissioner of Police of the Metropolis* [2018] UKSC 11, [2019] AC 196, to which Ms Markham referred us at the close of the hearing on another point, the Supreme Court accepted that the ECtHR's jurisprudence had developed, largely unnoticed since a case in 2003, (*MC v Bulgaria* (2003) 40 EHRR 20), such that they concluded that Article 3 could be breached where there were "really serious" or "egregious" or "obvious and significant" or "conspicuous or substantial" failings in an investigation by the police of offences committed by a private individual, which themselves crossed the threshold of severity in Article 3. This case concerned the very considerable failures of the police investigation into the rapes committed by a taxi driver, John Worboys. There was a dispute about whether the failings of that nature were "operational" or "investigative." It does not matter under which head it is put for these purposes, though it seems to fit more naturally as a failure in the investigative duty which is a necessary part of making the Convention rights under Articles 2 and 3 effective. There was also an issue about the extent of any "systemic" failings, such as in training or other aspects of the investigative system. Such a distinction is not material here. The duties in establishing a "system" for investigation which enables it to be effective, is also subject to limits on what is reasonable having regard to what is practicable, resources, and other obligations. These categories are more a useful shorthand terminology for various facets which stem from the one obligation to secure the rights under Articles 2 and 3, than distinct categories differing in principle in legal content and consequence. What is clear, however, is that the investigative duty is not the same as the *Osman* duty to which we now turn.

88. The second aspect of the inherent obligations was the state's duty to protect someone within its jurisdiction from treatment by a person for whose acts the state is not responsible, but which would reach the level to breach Article 3 if it were carried out by a state agent. A similar approach has been applied to Article 2. This itself has developed two facets. The first is that the state should have a legal framework for the prohibition of conduct passing the Article 3 threshold, and that the legal system of the state should be available to protect the individual: *A v United Kingdom* [1998] 2 FLR 959. This is a short judgment, and simply asserted that the acquittal, on the "reasonable chastisement" defence, of a father accused of assaulting his child by caning him, in a manner which crossed the minimum level of severity required by Article 3, showed that the law did not provide adequate protection against treatment breaching Article 3. This may not be the first case in which that point was developed. That obligation here is in part fulfilled by the Children Act, but the child in a diplomatic family with the alleged and future perpetrator, is only fully protected under the UK's legal system, criminal and family, when immunity has been waived. Otherwise there are real, and significant, restrictions on what can be done, even after a child has suffered grievously at the hands of the parents.

89. The second facet of the second positive strand to Article 3 is what is called the operational duty. This was first elaborated in *Osman v United Kingdom* [1999] 1FLR

193, (2000) 29 EHRR 245, though there had been earlier straws in the wind. The ECtHR at [115] found:

> "…common ground that the State's obligation [to take appropriate steps to safeguard the lives of those within its jurisdiction] in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.
>
> 116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which would legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention. [A violation of that positive obligation would only be established if] the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. [The positive obligation was] to take all those preventive operational measures that could reasonably be expected of them to avoid a real and immediate risk to life which they have or ought have knowledge."

90. Every step of that "carefully drafted test is of importance", as Lord Bingham pointed out in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] AC 225, at [29].

91. The powerful judgment of Lord Hughes in *D,* markedly differing in its reasoning, illuminates the unsatisfactory nature of the ECtHR's development of and clarity in its jurisprudence, whatever the merits of the judgment as to the basis in Article 3 for the decision. Lord Mance DPSC recognised the force of those criticisms. They are significant here in two respects. First, they underline the difficulty of construing the ECHR in reliance on its jurisprudence with the clarity necessary to decide whether another international convention is incompatible with it. This Court is construing a considerable and variable body of ECtHR jurisprudence to ascertain the ECHR's purport and scope. Second, they demonstrate the problem, which the Strasbourg Court would recognise even if it rejected all other criticism, that what the Convention means today is not necessarily what it meant yesterday or will mean tomorrow. That is the price and point of a living Convention. But it is difficult to see that those ECtHR decisions have already developed the scope of the ECHR in such a way that the Council of Europe countries are themselves now required to breach an international convention such as the VCDR, and even less so where the particular issue is neither raised nor addressed in the jurisprudence which is said to have that effect. Likewise, it is difficult to see the ECtHR developing its jurisprudence in that way in the future.

92. A further relevant example of the ECHR as a living Convention is in the *Soering* and *Chahal* line of cases; *Soering v UK* (1989) 11 EHRR 193, and *Chahal v UK* (1997) 23 EHRR 413. This is relevant to the position of diplomats and their children were the Children Act to be applied to them. A state can breach its obligations under Article 3 when removing someone from the UK to another country where there is a real risk that they would be subject to a treatment of a sufficient severity to breach Article 3, with neither an adequate system of law, protection or enforcement to protect them. Absent any diplomatic immunity, a state would not normally allow a child in these circumstances to return home with its parents, unless an examination of the situation in the sending state showed that there was no real risk of their Article 3 rights being breached on return. Unless the ECtHR jurisprudence is qualified by the international obligations to which the Council of Europe member states were already subject, the *Soering/Chahal* jurisprudence risked requiring Council of Europe member states to breach either the VCDR or ECHR, without that issue even being considered. This illustrates the need for great care and restraint in applying general ECtHR principles to circumstances which were not considered and to which other international conventions apply.

93. Continuing with the analysis of the first step identified on the route to a declaration of incompatibility, the actions taken under the Children Act Part IV have two broad features in the normal run of cases: investigative and protective. They meet those obligations which the ECtHR has considered in relation to Articles 2 and 3. They can usefully be considered in relation to diplomatic immunity as a measure of the conflict between the DPA and Article 3.

94. It is clear that the legal framework represented by the Children Act represents a system which complies with the requirements of Article 3. Those who enjoy diplomatic immunity in the UK are nonetheless not free from an obligation to comply with those laws; Article 41 VCDR. We accept that it is not as practical or effective in its

application to them as it is for other children, because of the operation of the VCDR. However, it is not without some practical measures which are of some value.

95. Sir James made it plain that the Secretary of State did not suggest that any of the steps which LBB had taken in this case infringed diplomatic immunity or inviolability. Yet these steps have achieved, directly and indirectly, protection for the 4 children still in the UK. This position was achieved, albeit not as swiftly as would normally be required, perhaps in the nature of the task, by seeking agreements, a waiver of immunity, and then by declaring the diplomat and family persona non grata.

96. It is not to be supposed that waiver would never be granted, or that the return of the family to the sending state, would not lead to protective measures being taken in respect of the children there, in the light of what had emerged in the UK and with the steps taken by a local authority. These and the further steps which are available, including by declaring a diplomat to be persona non grata, consistently with the obligations in the VCDR, give some practical effect to the Article 3 obligation in respect of these children.

97. We do not accept the Applicant's submission that these limitations mean that a blanket excision is to be made in practice from the ECHR in respect of the children of diplomats, with their best interests always and totally to be ignored. The facts in this case show the relevance of the authority having regard, as the primary consideration, to their best interests. The actions of the FCDO, within the framework of the VCDR, likewise show that LBB took the steps it could to enable investigation and the protection of the children. It did not say that as the children were part of a diplomatic household, nothing could therefore be done. The DPA limits the powers of the police and local authority, but the duty under the ECHR requires the FCDO to act *under the* VCDR, with the best interests of the children in mind.

98. In the light of that analysis, it is our judgment that there is no conflict between the ECHR and DPA/VCDR. The ECtHR jurisprudence requirement for a legal system to be in place to protect children through legislation, investigation and then the taking of other measures, cannot be read as also requiring the UK and the other Council of Europe Member States, all parties to the VCDR, to adopt a system which would require them to breach the VCDR towards each other and to other states. The ECHR does not require that in its text, and there is no jurisprudence which requires the Contracting Parties to breach the VCDR in order to avoid a breach of the ECHR. That is not surprising given that the VCDR codified the customary international law on diplomatic agents, and would have been well known in 1953. Nor is it surprising that the evolving jurisprudence of the ECtHR has not suggested any such consequence follows from its various decisions. That is because the ECtHR could not contemplate requiring a breach of an international Convention in order that its obligations be met, let alone a Convention of global reach, well beyond the regional concerns of the ECHR. The issue simply has not been addressed. If it were to be addressed, it is not thinkable that it would simply be addressed by an ECtHR decision, rather than through a separately negotiated protocol.

99. Describing the obligations in Article 3 as "absolute" can be misleading if it is used in all contexts. It refers to the justification for inflicting torture or inhuman or degrading treatment. In *E v Chief Constable of the RUC* [2008] UKHL66, [2009]1 AC 536, at [10], Lady Hale had made the point that while the "negative" duty, the state's duty not to ill-treat people in a way which breached Article 3, was "absolute", the state's duty to protect people from the harm which others may do to them "is a duty to do what is reasonable in all the circumstances." Both, she thought, could be described as absolute but their content was different.

100. The ECtHR's own jurisprudence on the duties of investigation and protection within Article 3 expresses them in qualified terms. The duty to investigate offences committed by a private individual which reach the Article 3 threshold undoubtedly exists, and is breached if the failings in the investigation are sufficiently severe. We see no incompatibility with that approach if the reason an investigation, by the local authority or police, cannot proceed further is that the diplomat stands on his immunity, and his immunity is not waived. This is not the same qualification and not directly the same issue as in *DSD*. But it is clear that the duty is subject to practical constraints. The diplomatic immunity of those subject to investigation is plainly one such constraint and a very real and serious one.

101. The duty to take protective measures is subject to similar qualifications; see *Osman* above. It is subject to due process and other guarantees which place legitimate restraints on the scope of an authority's actions. The protective measures are those which are reasonably to be expected, in all the circumstances. These obviously include the fact that the victim is a child. However, the duty did not impose an impossible or disproportionate burden on the authorities in terms of priorities. This concept of what is reasonable in all the circumstances includes operation of the whole of the VCDR. The position of children within it is part of enabling the diplomatic agent to perform their functions as required by the VCDR. There could be no readily defined principle for children alone under Article 3, which would not also extend to all aspects of the way in which Articles 2, 3 and 4 might operate in relation to diplomats.

102. In *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, concerning the nature of the operational duty owed to a voluntary psychiatric patient who was a suicide risk, Lord Dyson said at [43]:

> "The standard demanded for the performance of the operational duty is one of reasonableness. This brings in "consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available": per Lord Carswell in *In re Officer L* [2007] 1 WLR 2155, para 21.

103. Lady Hale formulated her essential proposition thus at [104]:

> "The state does have a positive obligation to protect children and vulnerable adults from the real and immediate risk of serious abuse or threats to their lives which the authorities are to be aware in which it is within their power to prevent. When they are in breach of this obligation will depend upon the nature and degree of risk and what, in the light of the many relevant considerations, the authorities might reasonably have been expected to do to prevent it. This is not only a question of not expecting too much of hard-pressed authorities with many other demands upon their resources. It is also a question of proportionality and respecting the rights of others, including the rights of those who require to be protected."

104. For much the same reasoning that we have given in relation to the investigative duty in Article 3, the protective duty in it is not breached by the DPA/VCDR either. It is not reasonable, possible or proportionate to require the State to act in breach of the VCDR, because of the importance which it has in reciprocal and global international relations, and with countries which are more or less friendly or hostile, as circumstances change, or which have very different domestic cultural values, and in which diplomats' families with children perforce live.

105. Accordingly, we do not consider that the natural meaning of Article 3 ECHR, as developed in the Strasbourg Court's jurisprudence, provides a basis for saying that the DPA, or more realistically, the VCDR, is incompatible with it. Indeed, there is no ECtHR authority which has suggested that that is so, over the decades since the VCDR entered into force, codifying existing customary international law. We have been shown no Council of Europe member state domestic court decision which has found that to be the case either.

106. We were told that one of the five Belgian Courts of Appeal, but not its Cour de Cassation, had developed a reading of the VCDR which sought to reconcile the UNCRC with the VCDR, on a basis not presented to us as a relevant or possible interpretation of either Convention, but that is all. This is not an issue peculiar to the UK or to the terms of the Children Act. *MAGB v GQC*, above, dealt with the issue by finding that the UNCRC had to be read as subject to the VCDR, a particular application of the general propositions in *Reyes*, above, at [7].

The role of the UNCRC in interpreting the ECHR and the VCLT

107. We see that conclusion as reinforced by the ECtHR approach to the relationship between the proper interpretation of the ECHR and other international conventions. It is plain that it uses the UNCRC as a tool of interpretation of the ECHR. But it would also use the VCDR for the same purpose. It would apply Article 31 VCLT so as to bring in the VCDR as a relevant rule of international law applicable in the relations between the parties. This use of other international conventions is not confined to human rights conventions. In so doing, we regard it as inconceivable that it would hold that the limitations which compliance with the VCDR places on the powers of a state, under its domestic law, to investigate the well-being of the children of diplomats, and to protect them from serious ill-treatment accordingly, had to be breached in pursuit of the jurisprudence it has developed about Article 3. Such a holding would not be necessary under its jurisprudence. It would instead confirm that its jurisprudence

required no such breach of international law, adopted almost universally. It would recognise the limits of a regional human rights convention in achieving all that might be desirable.

108. We do not accept either the submission made on behalf of the Applicant, that we should resolve the issue on the basis that any conflict between the UNCRC and the VCDR should be resolved, (or would be resolved by Strasbourg) on the basis that, as the UNCRC was the later Treaty, the VCDR should be interpreted as now subject to the UNCRC, and that the well-being of the children of diplomats should be investigated and protected as if they had no immunity.

109. Plainly, it does not arise on the natural interpretation of the ECtHR jurisprudence on which the incompatibility claim has to be founded. However, it is an impossible contention, for more than one reason, anyway. The relevant asserted incompatibility is between the ECHR and the VCDR. The Applicant's argument requires the ECHR to be interpreted with the UNCRC so as to support a conflict between the ECHR and the VCDR. But far more obvious is an interpretation of the ECHR, and in particular of its developing jurisprudence, which recognises the limits on using the UNCRC to support that conflict.

110. The Applicant relied on the lex posteriori principle to interpretate Article 30 (3) VCLT, in cases of conflict. However, the lex posteriori is not the starting point in international law for the interpretation of treaties; it deals with the resolution of incompatibility. The starting point, however, is to achieve a reconciliation between the international obligations. The prior task is to see if the two provisions are reconcilable or compatible. One aspect of that is the relationship between the specific and the general. The specific will usually continue to apply in the situations which it covers, leaving the general to apply elsewhere. This is discussed in the Study Group on the Fragmentation of International Law 2006, whose conclusions were adopted by the International Law Commission in 2006, p178-180, just before the section on the lex posteriori, on which the Applicant relied. This principle is that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. It is applicable in the context of provisions within two or more treaties. Whether it is the general rather than the specific which should be predominant should be decided contextually. The rationale of the principle that the special has priority over the general is justified by the former being more concrete, taking better account of the particular features of the context in which it is applied than any applicable general law. Its application may also often create a more equitable result; it may often better reflect the intent of the legal subjects. Its effect is not to extinguish the relevant general law; this may still give direction for the interpretation and application of the special law, and it will become applicable in situations not provided for by the special law. The same result may also arise where there is a special regime in which a treaty contains the rights and obligations relating to a specific subject matter.

111. The VCDR, codifying customary international law, after extensive negotiations and consideration, leading to its specific text governing international diplomatic relations, is a special regime dealing with all aspects of diplomatic immunity, including the rights and immunities of diplomats' children. The text of the material parts of the VCDR was adopted into UK domestic law without embellishment. It is a complete code, certainly in the areas it covers. It cannot be interpreted as permitting general exceptions to its language either by region, or topic including the protection of family members. Any

such approach would simply be to countenance its breach on a large scale. It cannot be interpreted as permitting exceptions on a case by case basis without undermining its clarity and effectiveness including its reciprocal force, however much in an individual case, that might be regarded as achieving an important individual purpose. It is also the only one of the three Conventions considered here in which specific provision is made for how the children of diplomats are to be treated, or rather under whose authority they are to be protected. The general regimes of the ECHR and UNCRC do not purport to cover the topic. The general must yield to the specific.

112. The provisions of the VCDR and the UNCRC are also reconcilable by reference to the specific provision for the children of diplomats and their immunities in the VCDR. There is no provision for the special position of such children or their diplomat parents in the UNCRC. It is incontestable that some provision needs to be made for them. It is made in the VCDR and not controverted by any provision of the UNCRC. The specific provisions in the VCDR would sensibly apply instead of the general provisions of the UNCRC or ECHR where they fall within the scope of the VCDR. The UNCRC is not so much incompatible as inapplicable, where the VCDR bites.

113. The children are not without protection, even if it is not the same as others within the jurisdiction of the receiving state. The children, in the interests of reciprocal diplomatic immunity, understood and applied on a global basis, are to be protected in the receiving state only if the sending state waives immunity, and otherwise are to receive the protection of the sending state, following either recall or a declaration of persona non grata, where the case is seen as sufficiently severe.

114. If however there were a conflict on the first approach, the question under Article 30(1) is whether the successive treaties relate to "the same subject matter." The academic material, Corten and Klein's 2006 commentary in "The Vienna Convention on the Law of Treaties", does not deal with this specific conflict or anything remotely akin to it. They commend testing whether two treaties relate to the same subject matter by asking whether the two different rules lead to a different answer to the same question, and not by looking at the overall subject matter of the treaties. This, it was said, adopts a suggestion of the International Law Commission. We observe that if the later treaty overrides the earlier on that basis, then on the Applicant's analysis, the same argument would apply to the effect of the VCDR on the ECHR, however the latter may be regarded in UK domestic law.

115. In any event, the two Conventions, UNCRC and VCDR, clearly do not relate to "the same subject matter". The subject matter of each is very different, as we have already discussed. The effect of treating them as dealing with the same and applying the rule that the later prevails, is plainly not what any party to either could have thought. The parties to the VCDR would never have agreed to such a provision. The VCDR, codifying customary international law, after extensive negotiations and consideration, leading to its specific text governing international diplomatic relations, cannot have been superseded in any part by a Convention dealing with the rights of children. Still more difficult is it to conclude that that has been achieved in so sensitive an area, where the very purpose is to send diplomats and their families abroad safely, and entrust them to the compliance with the VCDR by the receiving state, without so much as a word in the text of the later to the problem of diplomats' children. It is not possible to conclude that the UNCRC should be interpreted as disturbing the VCDR, heedless of the real harm that would risk doing, and doing to the children of diplomats abroad, as the

UNCRC would be doing were the Applicant right. None of the Comments, for what they are worth, suggested that either.

116. The ECtHR would not interpret any provision of the ECHR so as to create an obligation on the member states of the Council of Europe to disapply the VCDR to children and their diplomat parents, where the investigatory and protective obligations in Article 3 would otherwise apply. It would interpret the ECHR, not in a vacuum but taking account of the general principles of international law, mindful of its special character as a human rights treaty, but interpreted as far as possible in harmony with other principles of international law. It would take account of the special position of the VCDR, its codification of the special regime for diplomats and their families, its express provision in relation to children. We have no doubt that it would not require the Council of Europe member states to breach a specific international law code in support of the general provisions of its jurisprudence.

117. We do not agree with the obiter comments in the two earlier Family Division cases, see [21] above, on the relationship between the DPA and the UNCRC or ECHR, and agree with what Mostyn J said about them. We should return to the two domestic decisions to which Mostyn J referred, [21] above. *In re B*, the comments of the then President are short obiter dicta, without the benefit of submissions on behalf of the FCO. The immunities were those under Article 37(2) VCDR, those of non-national or permanently resident administrative and technical staff, for acts done in the course of their duties. She contemplated "little difficulty" in interpreting the DPA as subject to the ECHR. Failing that, she would interpret the DPA under the power in s3 to make it compatible. None of the problems to which that would give rise were identified or addressed. She did not contemplate a declaration of incompatibility. We agree, as have all the parties and Mostyn J, that this is not a case for remedy, if remedy is required, by interpretation under s3.

118. Gwynneth Knowles J in *A Local Authority v X*, agreed obiter with those obiter comments. She too was dealing with Article 37(2) immunities. She did have representations on behalf of the Secretary of State. There is an obvious difference in the extent of the immunities considered there and here, but the use of s3 HRA is not one which can be dealt with so simply. That should await a case in which the issue arises, principally, it appears from the later judgment, concerns in relation to enforcement. They do not advance the Applicant's case.

119. Accordingly, we do not need to consider whether the DPA can be read down under s3 HRA. But we should express our view shortly.

The third stage: reading down the DPA/VCDR

120. Were the Applicant right in submitting that the DPA and Article 3 ECHR cannot sit together on the natural meaning of the DPA, and would otherwise be in conflict, we are satisfied that there is no scope for a reading down interpretation. This was not a contention seriously pursued by the Applicant.

121. The nature of the task in s3 HRA has been considered in a number of cases. They make the point that giving a statutory provision a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and judicial legislation. This is especially so where the departure

has important practical repercussions which the court is not equipped to evaluate, as Lord Nicholls put it *In re (S) (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 29. The meaning must be compatible with the underlying thrust of the legislation. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557,

> "33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

122. It would plainly not be in line with those principles to give to the DPA, and in reality to the scheduled Articles of the VCDR, a different meaning from the one they naturally bear, so as to provide for the immunities of the diplomat and his family to be overridden when the investigatory or protection obligations under Article 3 arose. Even this would not permit the full exercise of the powers of the Children Act, because "significant harm" and Article 3 are not co-extensive. There is no room for a further exception to immunity to be implied alongside those which are express in the VCDR. They obviously read as the three and only three exceptions. Such an outcome would be wholly inconsistent with the fundamental purpose of the DPA, and of the VCDR, which codifies the rules for immunities of diplomats, one of the most important tenets of civilised and peaceable relations between nation states, as Mostyn J aptly put it.

123. Moreover, it would be contrary to the context and purpose of the VCDR for it to be interpreted by reference to a regional treaty such as the ECHR. Regional interpretations, and even less national interpretations, are wholly inconsistent with the purpose of the codification of customary international law, and the creation of a single text which must be given its natural and ordinary meaning, as Lord Sumption explained in *Reyes*. Such an interpretation would be a statement that other state parties to the ECHR should be doing or would be entitled to do likewise. The problem could not be stopped simply at the borders of the UK, or with its diplomats abroad. Even if it could be, the problems of reciprocity and risks of reprisal would be only too obvious. The Court could not interpret the DPA/VCDR under s3 HRA so as to put the UK in breach of the VCDR, as it would necessarily have to do.

124. In short, the answer to the interaction between the ECHR and the VCDR lies not in a close examination of the ECtHR's Article 3 jurisprudence, whatever the UNCRC brings. It lies in a broader approach, which still leads to the same conclusion. There is no scope for interpretation of the VCDR in a way which gives children the protection which is at the heart of this case on its wording. The crucial nature of the agreed

wording of the Convention affords no scope for differing interpretations, and has no in-built procedure for resolving such differences of interpretation as there might be, in a way acceptable to all signatories.

125. The ECHR has to be construed, and would be construed by the ECtHR, as part of the body of international law by which Council of Europe members have to abide. The customary international law which was in force before the ECHR was adopted, and codified in the VCDR, was and is part of that body of law. The ECHR would be interpreted so as to accord with it, rather than to be in conflict. The ECtHR could not require the Council of Europe member states to breach their obligations under the VCDR towards each other, and still less towards other states who were not parties to the ECHR but were parties to the VCDR. The jurisprudence of the ECtHR would not permit the removal of immunity to stop at the territorial borders of the member states. The protection of children would require not just intervention in the UK but would require it to continue to the extent of preventing their removal if they would face a real risk of treatment by non-state agents abroad which breached Article 3, against which the state would provide inadequate protection. Nor is it possible to see by what logic the legislative and operational protection which LBB relies on here could be confined to the children of diplomats, and not extended to their family who were members of the household. If pragmatic limits were to be emplaced, why would children be the limits of that pragmatic exercise of interpretation? The reconciliation of the obligations is quite straightforward, although the outcome cannot achieve the child protection which LBB seeks.

The second and third stages: Article 6

126. LBB and AG contended that their rights of access to the Court were impeded by the diplomatic immunity of the parents and children. The child could not waive her immunity, while part of her parents' household. The Court was obliged to undertake the same assessment as was undertaken in respect of state immunity under the State Immunity Act in *Benkharbouche v Embassy of Sudan* [2017] UKSC 62, [2019] AC 777. There it was suggested that the Court had decided for itself whether international law required the immunity to be granted. If it did not, then its grant was in breach of Article 6. This decision was handed down on the same day as its decision in *Reyes*, and with the same constitution in each.

127. This case, properly understood, does not assist the Applicants. Certain provisions of the State Immunity Act 1978 were said to be incompatible with Article 6 ECHR because they unjustifiably barred access to a court. Lord Sumption, [14], treated as uncontroversial the point that :

> "…although there is no express qualification to a litigant's right under article 6 (except in relation to the public character of the hearing), the right to a court is not absolute under the Convention any more than it is at common law. It is an aspect of the rule of law, which may justify restrictions if they pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right: see *Ashingdeane v United Kingdom* (1985) 7 EHRR 528, 57."

128. Although the case concerned state immunity, much of what Lord Sumption said is applicable to diplomatic immunity. He examined the ECtHR jurisprudence on state immunity. In *Al-Adsani v United Kingdom* (2002) 34 EHRR 11, the applicant had been barred by state immunity from bringing an action against the Government of Kuwait for damages for his torture in Kuwait. This was seen as a procedural bar by the ECtHR which held that it was justifiable. First, it pursued the legitimate aim of complying with international law to promote comity and good relations between states through respect for another state's sovereignty. Second the bar was proportionate to the aim. The VCLT permitted account to be taken of relevant rules of international law applicable in the relations between the parties. The ECtHR stated at [55]:

> "The Convention, including Article 6, cannot be interpreted in a vacuum. The court must be mindful of the convention's special character as a human rights treaty also take the relevant rules of international law into account. The convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part including those relating to the ground state community.
>
> 56. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."

129. In the absence of a recognised rule of customary international law, the ECtHR allowed the Member States a margin of appreciation in conferring immunity; so Article 6 was satisfied if the rule applied by an ECHR state lay within the range of possible rules consistent with "current international standards": *Benkharbouche*, [25]. But that meant that a court would have to decide whether that margin of appreciation had been exceeded in its application of state immunity to any particular set of facts, and as international law developed, there could be further restrictions, as appeared to be the case with a more restrictive application of state immunity in employment disputes. What then followed is to be contrasted with what would have followed if the diplomatic rights and privileges had not been codified, and there was doubt about how far the DPA reflected the true limits of customary international law on diplomatic immunity. It was a consideration and identification of what customary international law was on state immunity.

130. Far from *Benkharbouche* being support for the Applicant's proposition that this Court should treat itself as not obliged by international law to grant the parents and children here immunity, it shows what the effect of both the codification of that law in the VCDR, and the manner of its incorporation into domestic law, signifies. It requires no further identification of international law or investigation into the relationship of the DPA to international law. Here the Court is not asking itself whether the view that the diplomat or his children have immunity is a tenable one; it is applying the indisputable

view that they do. The immunity is required by international law; the restriction is proportionate.

131. Article 6 has been considered in the context of a matrimonial dispute and diplomatic immunity in *Estrada v Al-Juffali* [2016] EWCA Civ 176, [2017] Fam 35. The husband was a diplomat under the International Maritime Organisation (Immunities and Privileges) Order 2002, enjoying the same immunity from suit as under the VCDR except where he was permanently resident in the UK, in which case his immunity only covered his official acts. The first issue was whether the Court, in considering whether his rights to immunity were a proportionate restriction on his wife's right of access to the courts under Article 6, could consider and determine whether he had "taken up" his post. Lord Dyson MR, with whom King and Hamblen LJJ agreed, said at [44]:

> "On the contrary, the clear and consistent position taken by the courts is that for a claim to immunity to be regarded as a proportionate restriction on the right of access to a court enshrined in article 6 of the ECHR, it is necessary to do no more than determine whether the grant of immunity reflect generally recognised rules of public international law. This test was developed by the ECHR in the context of state immunity. But its application in the context of diplomatic immunity has been expressly endorsed by the decision of this court in [*Reyes* [2015] EWCA Civ 32, [2016] 1 WLR 1785] …where I said [70]:
>
> 'In short, the court held that compliance with a state's international law obligations is conclusive on the issue of proportionality. In my view, although there are important differences between state immunity and diplomatic immunity, these differences are immaterial to the point of principle that the court enunciated at para 36] of the ECHR decision in *Fogarty v United Kingdom* [2001] 34 EHRR 12]. The central point is that restrictions on the right of access to court which reflect generally recognised rules of public international law cannot in principle be regarded as disproportionate. The court added that this is so even if international practice as to the meaning or scope of an international obligation is inconsistent, provided that the interpretation applied by the state in question is reasonable and falls within currently accepted international standards.' "

132. The Court of Appeal decision on this aspect was not overturned by the Supreme Court; it found it unnecessary to deal with it. We see nothing in what Lord Dyson said above which was at all inconsistent with the approach of the Supreme Court to the application of diplomatic immunity.

133. That decision is applicable here and what Lord Dyson said in *Reyes* means that there is no basis in Article 6 for holding that the DPA/VCDR is inconsistent with the ECHR. Court proceedings, if any are to take place, must take place in the territory of the sending state, absent its waiver or cessation of immunity. The same points that we have made in relation to Article 3 and s3 HRA apply here to a reading down interpretation for the purposes of Article 6.

Inviolability

134. Articles 29 and 30 VCDR provide for the inviolability of the diplomat's person and his property and residence. By Article 37, the family of the diplomat enjoy the same privilege. LBB is concerned that this would prevent the sort of investigation which is required, even to the extent of not permitting the children to be spoken to. It had led to the social workers being refused entry to the diplomat's home to carry out a welfare check in the home environment. The local authority is concerned to establish as much clarity as it can by way of investigations and genuine emergencies.

135. We recognise the considerable difficulties which uncertainty poses for local authorities. In the first place, the local authority is seeking a ruling as to what the VCDR/DPA prohibits under those Articles, rather than a declaration of incompatibility under the HRA, without a specific set of facts to be ruled on. That is understandable but Courts do not give advisory rulings. We have already said that nothing that the local authority did infringed the rights and privileges of the diplomat or his family. We are not prepared to go further without a case which specifically raises the point and requires its resolution. If it is not necessary to do so, it would be unwise to do so.

136. Sir James Eadie made a number of points in his Skeleton Argument about the limits which inviolability and immunity placed on what could be done in relation to diplomats: they could not be detained or arrested or compelled to attend a police station, but that did not mean that they could not be invited to do so and agree to do so to verify their identity or status. A "*Gillick* competent" child could consent to participate in enquiries under s47 Children Act, provided that that was voluntary and without any measure of restraint, impediment or indignity.

137. There does appear to be some recognition of circumstances in which a brief arrest could take place, in exceptional circumstances to restrain a diplomatic agent caught in the act of committing an offence in order to prevent its further commission. Measures of self-defence may also be taken. This applies only to inviolability of person and property, and not to immunity from criminal proceedings. The exceptional circumstances appear to require an extreme and continuing character, where there is an immediate threat to human life. The breach of inviolability may take place only where that is the only option available to save human life, and there has to be a special relationship between the diplomat and the person in danger, or where the breach is the only way for the State to safeguard an essential interest of the State itself against a grave and imminent peril. But a local authority would be very unwise to see this, and we do not see it, as a tool of any practical use in the sort of circumstances likely to be encountered in child protection.

The fourth stage: should a declaration of incompatibility be made?

138. This does not arise on the conclusions we have reached. Had we reached different conclusions, however, we would not have granted a declaration in the exercise of our discretion. We reach that decision having given careful attention to what the Supreme Court said in *R (Steinfeld) v Secretary of State for Education* [2018] UKSC 32, [2020] 1 AC 654 at [54-61], in the judgment of Lord Kerr. It recognised that this remedy was discretionary, and its grant did not compel Parliament to do anything. The fact that the solution might be controversial is plainly not a reason for refusing a declaration.

139. First, nonetheless, it has to be anticipated that Parliament could do something compatibly with the UK's other international law obligations to meet the breach of another. Here it cannot do so. Parliament could not remedy the position on its own, except by breaching international law. The speedy provision in s10 HRA for remedying an Act incompatible with the ECHR is plainly not applicable. This is a case therefore in which the remedy would be of no immediate value and potentially never would be of any value. Second, we recognise the force of the evidence given by Ms MacMillan as to the effect which such a pronouncement could have of itself on the way in which UK diplomats abroad could be seen, to their peril. Third, there is nothing to prevent the International Law Commission taking up the issues to seek some internationally agreed protocol to the VCDR to deal with child protection, whether there is incompatibility or not with the ECHR. We see no need to throw a "pebble into the pool" for that to happen. Fourth, it is equally clear that there is no obvious solution to hand. This is not a matter of drafting, but of principle. The jurisdiction over the protection of children of diplomats is much more obviously for the sending state to exercise, to which the measures available under the VCDR already enable the family to be returned.

140. We were not persuaded, however adventurous the Supreme Court felt that UK Courts could be in advancing beyond the position of the Strasbourg Court, for which encouraging dicta in *D v Commissioner of Police of the Metropolis* was cited in support, that this was a case for such an advance. Rather, real caution is merited.

Overall conclusion

141. This application must fail, and is dismissed.