Diplomatic immunity in care proceedings

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A Local Authority v AG and *Barnet London Borough Council v AG and other* [2021] EWHC 1253 (Fam)

In 2020, the tragic death of Harry Dunn, having been hit by a car driven by Anne Sacoolas, an American who may or may not have benefitted from diplomatic immunity, brought this legal concept to the attention of a large and largely outraged public. The cry that, 'surely they cannot get away with this' was a predictable initial reaction to the facts of that case. In that same year, proceedings which engaged this same concept were started before the family court and – although not as widely reported – these authors will assert, engaged issues just as interesting and relevant to readers of this journal.

In the case of *A Local Authority v AG* (*A Local Authority v AG and Others* [2020] EWFC 18 [2020] 1 FLR 1265 and *A Local Authority v AG (No 2)* [2020] EWHC 1346 (Fam), [2020] 2 FLR 747), the authors of this article represented the respondent father, a diplomatic agent. The three minor children of the family ('S', 'G' and 'A' aged 5, 9 and 14 at the time) had made allegations to their school, and subsequently to social workers, of physical abuse within their home. The local authority in which they resided made applications for protective orders under ss 31 and 38 of the Children Act 1989. The parents asserted immunity from the jurisdiction of the Family Court by virtue of the father's diplomatic status. On the evidence before the court, the local authority sought to take protective measures, at which

point the legal concepts of child protection and diplomatic immunity collided headlong.

Legal background

Mostyn J was presented with, on the face of it, a 'sacred and inviolable' [26] principle, identified by Lord Sumption in *Al-Malki and another v Reyes and another* [2017] UKSC 61 (at [5]) as:

> '. . . 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.'

In its current form, the law on diplomatic immunity is found in the Vienna Convention on Diplomatic Relations 1961 ('VCDR'). It provides a complete framework for the establishment, maintenance and termination of diplomatic relations and diplomatic immunity, and was the result of an intensely deliberative international process spanning many years.

The scope of diplomatic immunity

By s 2 and Sch 1 of the Diplomatic Privileges Act 1964 ('DPA 1964'), the full text of Arts 1, 22–24, 27–40 and 45 of the VCDR is imported into domestic law.

Article 1 of the VCDR divides persons entitled to diplomatic immunity into three tiers: (1) 'diplomatic agents'; (2) 'members of the administrative and technical staff'; and (3) 'members of the service staff'.

Article 31 provides that diplomatic agents, those referred to at (1) above, enjoy immunity from criminal, civil and administrative jurisdiction and from execution, except in three cases:

a. a real action relating to private immovable property situated in the United Kingdom (Art 31(1)(a));
b. an action relating to succession in which the diplomatic agent is involved as executor, administrator or beneficiary as a private person (Art 31(1)(b)); and
c. an action relating to any professional or commercial activity exercised by the diplomatic agent outside his official functions (Art 31(1)(c)).

Article 37(1) confers the same immunity on members of the agent's family forming part of his household. The immunity of the diplomatic agent and his household can only be waived by the government of the sending state; a diplomat and his family cannot do so (Art 32).

On the face of it, therefore, the family (including the children, in relation to whom the court was invited to make orders) in Mostyn J's case enjoyed immunity from the Family Court of England and Wales and could not waive that immunity themselves.

The procedural and reciprocal nature of diplomatic immunity

It is well-established that diplomatic immunity is not an immunity from liability but a procedural immunity from the jurisdiction of the courts of the receiving state. It is for this reason that Lord Sumption in *Al Malki* considered there to be no conflict between a rule prohibiting conduct – even if that rule was a peremptory norm of international law – and diplomatic immunity [40]:

> 'Diplomatic immunity, like state immunity, is an immunity from jurisdiction and not from liability. Its practical effect is to require the diplomatic agent to be sued in his own country, or in respect of non-official acts in the receiving state, once his posting has ended. There is therefore no conflict between a rule categorising specified conduct as wrongful, and a rule controlling the jurisdictions in which or the time at which it may properly be enforced.'

Lord Sumption referenced the judgments of Lords Bingham and Hoffman in *Jones v*

Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v Al-Dali [2007] 1 AC 270, which concluded that the similar jurisdictional bar operating by virtue of state immunity did not contradict a prohibition contained in a jus cogens (or 'peremptory') norm of international law – in *Jones*, against torture – but merely diverts any breach of it to a different method of settlement [40]. Thus, even stark acts of abuse have been found not to undermine or dilute the inviolability of immunity:

> '. . . 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.' (*Al Malki*[1] at [40])

To understand how Lord Sumption could reach such a conclusion in *Al-Malki*, it is also important to consider the fourth recital to the VCDR, which clearly states that:

> '. . . the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of diplomatic missions as representing states.'

As such, those interpreting the VCDR must be mindful of the reciprocal nature of diplomatic immunity:

> '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.'

Whilst in the United Kingdom we might consider our courts and procedures to be fair, our own diplomats are stationed in jurisdictions where we may not believe the same to be true. That such diplomats should also enjoy the benefit of immunity weighed heavily upon Lord Sumption in *Al Malki* [12], as it did – as will be set out further below – on Mostyn J in this case. Reciprocity is therefore a key feature of diplomatic immunity and integral to its proper functioning.

Application in family proceedings

Professor Denza, the leading academic authority on the law of diplomatic relations, in *Diplomatic Law*, 4th ed (2016) at p 235, is clear that family cases fall squarely within the scope of diplomatic immunity from civil proceedings:

> '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 . . . '

As referenced above, there are several 'tiers' of diplomatic immunity contained within the provisions of the VCDR, and all previous cases within the family jurisdiction had concerned those classified – at (2), above – as 'members of the administrative and technical staff' of a diplomatic mission.

Pursuant to Arts 37(2) and (3) VCDR, the members of the administrative and technical staff of the mission and the members of the

1 Ultimately, the claimant to the employment dispute in *Al Malki* was permitted to pursue her allegations of mistreatment against her diplomat former employers. In determining the issue of jurisdiction, the Supreme Court proceeded on the basis that these allegations amounted to human trafficking for the purposes of The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo, 2000). Jurisdiction was established because, during the course of the proceedings, the diplomat's posting came to an end and he returned to Saudi Arabia. His immunity was therefore at an end in accordance with Art 39(2) VCDR.

service staff of the mission, enjoy diplomatic immunity, but with the important qualification that the immunity does not extend to acts performed outside the course of their duties.

In *Re B (Care Proceedings: Diplomatic Immunity)* [2002] EWHC 1751 (Fam), [2003] 1 FLR 241 the local authority applied for an interim care order in respect of a child whose father was a member of the administrative and technical staff of a foreign embassy. The then President, Dame Elizabeth Butler-Sloss unsurprisingly determined that beating his child did not fall within the embassy worker's duties. The court therefore had jurisdiction to deal with the care proceedings.

Similarly, in *A Local Authority v X and others* [2019] 2 WLR 202 Knowles J concluded that the court had jurisdiction to make care orders in respect of four children whose mother was employed in an administrative role at a foreign High Commission. Shortly before the final hearing, the mother's High Commission functions ceased, and her diplomatic immunity came to an end. There was therefore no immunity from jurisdiction. In any event, it could not be said during the period when the mother did enjoy immunity, that her treatment of the children fell within the course of her duties.

There is nothing unusual or surprising about the courts' decisions as to jurisdiction in these cases. The diplomat parents were either no longer serving diplomats and/or were members of a mission's technical or administrative staff with a more limited immunity than that of diplomatic agents. These cases were, therefore, of only limited assistance when a parent party to proceedings had the broader immunity of a diplomatic agent under Art 31(1) VCDR.

The tension with the European Convention and the UNCRC

This case was the first time a court in the United Kingdom has had to directly grapple with the difficult question of whether the immunity of a serving diplomatic agent could place the protection of children, living in this country and allegedly being abused, beyond the reach of the courts.

Indeed, it appears to be only the second case of its kind reported internationally. The immunity of a serving diplomat from child protection proceedings was considered in New York in 1988 (*In the Matter of Terrence K* (1988) 524 N.Y.S.2d 996). However, in that case the supremacy of diplomatic immunity over local child protection laws was conceded.

The difficult and unchartered question gave rise to, in Mostyn J's words [22]:

> '. . . a seemingly irreconcilable clash between two international treaties incorporated into our domestic law by statutes. These are the 1961 Vienna Convention on Diplomatic Relations, enacted by the Diplomatic Privileges Act 1964, and the 1953 European Convention on Human Rights, enacted by the Human Rights Act 1998.'

ECHR

Article 1 of the European Convention on Human Rights ('ECHR') obliges the contracting parties to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Article 3 provides that no one shall be subjected to inhuman or degrading treatment or punishment and judgments of the court in Strasbourg have repeatedly emphasised the particular importance of protecting children from such treatment. Such protection extends to imposing a positive obligation on the state to take measures to protect children in their jurisdiction who are suffering from treatment prohibited by Art 3.

However, this positive obligation is not absolute (unlike the obligation to do no harm) and requires the state to take all measures it reasonably can to prevent harm from occurring (*E v Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2008] UKHL 66, Lady Hale at [10]).

The approach of the ECtHR is as follows:

> 'These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge' (Z v United Kingdom (Application 29392/95) [2001] 2 FLR 612 at [73]).

UNCRC

The obligations under the ECHR are reinforced by the 1989 United Nations Convention on the Rights of the Child, and in particular Art 19(1) of that Convention:

> '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.'

Confronting the 'irreconcilable clash'

a. Diplomatic and practical steps

The position of the Respondent parents in *A Local Authority v AG* was that there was in fact no clash between the children's rights enshrined in the ECHR and the UNCRC and the exercise of diplomatic immunity. This was for the reasons explored by Lord Sumption in *Al-Malki*: namely, that the jurisdictional diversion of a breach to another mode or venue of settlement does not involve derogation from a substantive right.

It was further submitted that, in the circumstances, the State could meet its positive obligation to take all reasonable and appropriate measures to protect children from maltreatment by taking practical steps which did not demand the dilution of international principles of diplomatic immunity.

This was recognised by Mostyn J, who identified the following three steps which could be taken by organs of government [48]:

> 'a. A Local Authority is able to write to the Foreign & Commonwealth Office drawing the facts to the attention of the Secretary of State and inviting him to take such diplomatic steps as may be necessary.
> b. It is open to the Secretary of State for Foreign & Commonwealth Affairs, on receipt of that information, to seek to persuade the foreign government to waive diplomatic immunity in respect of the diplomat and his family so that the necessary protective measures can be taken.
> c. As a last resort, it is open to the British government to expel the diplomat and his family so that on their return to their homeland protective measures can be taken in respect of the children there.'

b. Judicial interpretation

On behalf of the local authority and the children's guardian it was argued that the VCDR, as incorporated by the DPA 1964, should be interpreted pursuant to s 3 of the Human Rights Act 1998 ('HRA 1998') compatibly with Convention rights. It was submitted that a fourth exception to diplomatic immunity should be 'read into' Art 31 of the VCDR, namely an exception to protect children or vulnerable adults at risk within the diplomat's family.

Section 3 interpretation

The ECHR takes effect in the UK by virtue of the HRA 1998. Section 3(1) of the HRA 1998 provides:

> '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.'

The limits on a court's interpretative powers are set out in *Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2002] 1 FLR 815 by Lord Nicholls at [38]–[40]. Particularly, the following was made plain at [40]:

> '. . . a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate.'

It was this section upon which the local authority and guardian relied, in order to 'read in' the exception set out above.

Treaty interpretation

However, as a treaty, the VCDR and the implementing 1964 Act must be interpreted in accordance with the international law principles of treaty interpretation. Article 31 of the Vienna Convention on the Law of Treaties (1969) provides:

> '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.'

Lord Sumption in *Al-Malki* again provided useful guidance on the principles of treaty interpretation insofar as they apply to the VCDR and diplomatic immunity. The following points are extracted [12] (emphasis added):

> '(1) 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…*
>
> (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.*'

There was, however, divergence in judicial opinion about how extensively Art 31(3)(c) of the Vienna Convention on the Law of Treaties permits the meaning of a treaty to develop and change over time by reference to relevant rules of international law.

a. According to Lord Sumption, with whom Lord Neuberger agreed, the intention that the principal treaty should accommodate future change must be found within the treaty itself. In other

words, the relevant provision in the original treaty must be 'ambulatory' (*Al-Malki*, obiter at [42]–[43]). He made clear that Art 31(3)(c) is a principle of interpretation and 'not a principle of revision' [42].

b. Lord Wilson, with whom Lady Hale and Lord Clarke agreed, adopted a more revisionary approach. He considered that a treaty provision is able to develop over time in accordance with the emergence of new international law and that such development need not be expressly provided for in the original treaty (*Al-Malki*, obiter at [67]).

Accordingly, the argument advanced on behalf of the local authority and the guardian was that the VCDR and the 1964 Act should be interpreted through what Mostyn J called at [31] 'the lens of the mores of the time'. When the VCDR was being drafted and then considered by Parliament in the 1960s, little regard was paid to the welfare and protection of children at risk. The exceptions in Art 31(1) of the VCDR are thus exclusively to do with money and property. Now that rules of international law emphasise the importance of child protection, it was argued that the VCDR could and should be reinterpreted to account for such progress.

The proposed reading down of the VCDR and the DPA 1964 in accordance with the development of international child protection laws and s 3 HRA 1998, required more than interpretation of any specific provision already contained within them. It instead required the judicial introduction of an entirely new exception.

Mostyn J's judgment of 1 March 2020 ([2020] EWFC 18): a compatible interpretation?

Mostyn J concluded that, by virtue of diplomatic immunity, the care proceedings could not proceed. He expressed sympathy for the local authority and guardian's arguments but found himself unable to accede to their proposed revision of Art 31 VCDR for the following reasons, which draw heavily upon the principles of treaty interpretation and reciprocity as set out above [38]:

> 'In my judgment the innovation proposed in this case passes well beyond the boundary of interpretation for the following reasons, all of which are reflected in the judgment of Lord Sumption (in *Al-Malki*).
>
> 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.
> 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.
> iii) The foundation of the Convention is the idea of reciprocity. As Lord Sumption says at [12(3)], a significant purpose of conferring 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]:
> "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." '

In so concluding, Mostyn J respectfully disagreed (at [39]) with the obiter expressed in the cases of *Re B* and *A Local Authority v X* referred to above. It had been suggested in those cases (*Re B* at [38]–[40] and *A Local Authority v X* at [60]) that an ECHR compatible interpretation of the VCDR necessitated the invocation of the jurisdiction of the Family Court in cases such as *A Local Authority v AG*. However, having analysed the principles in more detail (an exercise which was not necessary in *Re B* and *A Local Authority v X*) Mostyn J did not consider this to be the case.

As such, it is established that no family court in England and Wales has jurisdiction to hear claims under the Children Act 1989 in respect of the children of serving diplomatic agents. Mostyn J's judgment of 28 May 2020 ([2020] EWHC 1346): an 'academic' declaration of incompatibility?

Although the local authority had not formally applied for a declaration of incompatibility under s 4 HRA 1998, in the final paragraph of the court's first judgment, Mostyn J suggested [49]:

> '. . . that inasmuch as articles 31 and 37 of the Convention prevent protective measures being taken in respect of the children of diplomats who are at risk then they are irreconcilable, and therefore incompatible, with the duties imposed on the state under articles 1 and 3 of the European Convention on Human Rights. They are probably incompatible with the rights under articles 6 and 8 also.'

As such, the local authority and the guardian indicated an intention to issue such a formal application. The care proceedings were therefore transferred to the High Court and the Secretary of State for Foreign and Commonwealth Affairs was joined as a party to proceedings.

Following the first judgment of 16 March 2020, the factual situation underpinning the care proceedings continued to evolve:

a. The government of the sending state was invited to waive the family's immunity. It refused to do so, but recalled the father with immediate effect (though departure was delayed by the Covid-19 pandemic);
b. The Secretary of State informed the government of the sending state that, in accordance with Art 9(1) of the VCDR, the father and his dependent family members were personae non gratae and were required to leave the UK at the first opportunity;
c. Before the family had the opportunity to leave the country 'A', aged 14, left the family home and sought asylum;
d. On 18 April 2020, the parents returned to the sending state together with their two youngest children ('S' and 'G,' aged 5 and 9). 'A' remained in the UK.

The diplomatic immunity which had prevented the care proceedings from proceeding was therefore at an end. Care proceedings were withdrawn in respect of 'S' and 'G' and an interim care order was made in respect of 'A'. However, the local authority, supported by the guardian, continued to pursue an application for a declaration that the DPA 1964 is incompatible with (at least) Art 3 of the ECHR.

Given that the issue of incompatibility had become academic – the diplomatic immunity no longer subsisting – a 'permission hearing'

was conducted on 18 May 2020 to determine whether the local authority's application should be allowed to proceed. The Secretary of State and the parents opposed the continuation of the application for a declaration of incompatibility. It was accepted that the court had a limited discretion to hear academic claims, but that this should be exercised cautiously (*R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450, at 456–457). The principle set out in the cases of *Sun Life Assurance Co. of Canada v Jervis* [1944] AC 111, at 113–114; and *Ainsbury v Millington* [1987] 1 All ER 929, at 381, that the court does not pronounce on abstract questions of law, remained good.

Mostyn J admitted the need for caution but concluded, in a judgment given on 28 May 2020, that the application should proceed. He determined that the subject matter was of the upmost importance, the protection of children at risk being one of the 'first and foremost' obligations of the state, and there being 23,000 people (including many children) in the United Kingdom to whom the concept of diplomatic immunity might apply [17]. Mostyn J also noted that there now existed conflicting authorities on the point before him (although *Re A* only addressing the point directly).

Additionally, although Mostyn J found that the potential consequences of this claim were not relevant to whether it should be heard, they were quite rightly identified as far reaching on behalf of the Secretary of State ([14]):

> '. . . [the]conclusion that provisions of the VCDR are incompatible with the ECHR could have far reaching implications, particularly in the context of the UK's diplomatic relations. The VCDR operates on the basis of reciprocity and is the foundation of the legal framework for the conduct of international relations. The practical impact of a divergence in the interpretation of the VCDR in this jurisdiction cannot be overstated. The likelihood is that any such interpretation by the UK will simply place the UK out on a limb in relation to the other 190 states.'

The declaration of incompatibility judgment of 13 May 2021 ([2021] EWHC 1253 (Fam))

In respect of this far-reaching matter, the local authority then made its application pursuant to s 4(2) HRA 1998, seeking the following declaration:

> '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
> (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.'

That application was heard by Sir Andrew McFarlane, President of the Family Division, and Sir Duncan Ouseley in March 2021. Following a careful and detailed exposition of the relevant legal principles, the High Court concluded that 'there is no conflict between the ECHR and the DPA/VCDR', and the local authority's application was dismissed [98]:

> '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.'

The court recognised that the state's *positive* protective and investigative obligations under Art 3 ECHR are not 'absolute' (unlike the *negative* obligation not to inflict torture or inhuman or degrading treatment, for example) .While the duty to investigate offences committed by a private individual which reach the Art 3 threshold exists, that duty is subject to 'practical constraints', diplomatic immunity being 'one such constraint and a very real and serious one' [99]–[100].

Similarly, the duty to take protective measures is subject to 'due process and other guarantees which place legitimate restraints on the scope of an authority's actions'. Measures are those which are 'reasonably to be expected, in all the circumstances' those circumstances including the operation of the VCDR in its entirety [101]. Echoing points made by Mostyn J earlier in the proceedings, the court concluded that it was:

> '. . . *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.'

The court found its conclusion to be reinforced by the principles used to interpret and reconcile international conventions, including the ECHR and VCDR, specifically the interrelationship between the specific and the general [107, 110]. The general obligations of the ECHR and UNCRC were held to yield to 'specific text governing international diplomatic relationship' and 'a special regime dealing with all aspects of diplomatic immunity, including the rights and immunities of diplomats' children' [111].

Further, the court did not accept that the children of diplomats were not without protection, even if that protection differed from the protection of other children within the jurisdiction of the receiving state in the event immunity were not waived. They are instead 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 [113].

In respect of Art 6 ECHR, the court also found that there was no basis for holding that the ECHR was inconsistent with the DPA/VCDR [126]–[133]. Applying *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 and *Estrada v Al-Juffali (Secretary of State for Foreign and Commonwealth Affairs Intervening)* [2016] EWCA Civ 176, [2017] 1 FLR 702, it was held that diplomatic immunity was required by international law and the restriction on the right of access to a court was again proportionate. Proceedings, if any were to take place would take place in the territory of the sending state, absent any waiver or cessation of immunity.

The two remedies available under the HRA 1998 are, as above, contained within ss 3 and 4. The proposed reading down had been addressed by Mostyn J in the March 2020 judgment at [38], but the High Court again expressed a short view that there was no scope for such an interpretation.

Concluding that there was no incompatibility, the court issued no declaration. However, it further indicated that even if incompatibility had been established, no such remedy would have been awarded because [138]–[139]:

a. Parliament could not remedy the position, except by breaching international law;

b. there was force in the evidence presented to the court on the effect which the declaration itself could have on the way in which the UK diplomats abroad could be seen, to their peril;

c. there is nothing to prevent the International Law Commission seeking some internationally agreed protocol to the VCDR to deal with child protection, whether there is incompatibility or not with the ECHR; and

d. there is no obvious solution to hand. This is not a matter of drafting but of principle, that principle as enshrined under the VCDR being that jurisdiction over the protection of children of diplomats is for the sending state to exercise.

Conclusion

Sir Andrew McFarlane P and Sir Duncan Ouseley's judgment appears to be an emphatic denial of any further role for the courts of England and Wales in this matter, considering the issue to be one for international, geopolitical consensus and not for further litigation. However, whether that view will be once more subject to challenge (there now being four judgments, although some obiter, handed down by judges of the High Court which conflict on the points engaged) remains to be seen.

At a time of transition and possible transformation of the UK's international relationships and affiliations, therefore, this aspect of our law seems clear: the Family Court has no jurisdiction to make orders under the Children Act 1989 in respect of the children of diplomatic agents. This results in no incompatibility with the provisions of the ECHR, as incorporated into domestic law in the HRA 1998 (noting however that the future of the HRA 1998 is itself uncertain under the current UK administration).

For family lawyers and child protection professionals, used to operating under predictable state-sanctioned procedures, from the initial intervention of local authorities through to care proceedings or use of the inherent jurisdiction, the apparent impotence of the existing domestic system to enable directly protective measures to be taken may seem uncomfortable. The nature of the solution as identified both legally and practically in this case will require from safeguarding practitioners a faith in diplomatic/political channels and the willingness and ability of sending states to take protective action. In this limited category of cases, effective intervention will take a radically different form but will have to form part of the armoury of those seeking to protect all children in the UK.