



Neutral Citation Number: [2016] EWCA Civ 176

Case No: B6/2016/0548

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
FAMILY DIVISION
MR JUSTICE HAYDEN
FD14F00410

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2016

Before:

THE MASTER OF THE ROLLS
LADY JUSTICE KING
and
LORD JUSTICE HAMBLÉN

Between:

WALID AHMED AL-JUFFALI
- and -
CHRISTINA ESTRADA

Appellant

Respondent

**SECRETARY OF STATE FOR FOREIGN AND
COMMONWEALTH AFFAIRS**

Intervener

Martin Pointer QC, Martin Chamberlain QC and Nicholas Wilkinson (instructed by
Mischon de Reya LLP) for the **Appellant**
Charles Howard QC, Tim Owen QC, Deepak Nagpal and Tom Hickman (instructed by
Hughes Fowler Carruthers) for the **Respondent**
Tim Eicke QC, Jessica Wells and Guglielmo Verdirame (instructed by **Government Legal
Department**) for the **Intervener** (intervening by written submissions only)

Hearing date: 03/03/2016

Approved Judgment

Master of the Rolls:

1. This is an appeal against the order of Hayden J dated 8 February 2016 dismissing the application of the appellant (“H”) to strike out the claim of the respondent (“W”) for financial relief pursuant to Part III of the Matrimonial and Family Proceedings Act 1984 (“the 1984 Act”). H’s application was made on the basis that he was entitled to immunity as Permanent Representative of St Lucia to the International Maritime Organisation (“IMO”), a position to which he was appointed on 1 April 2014. The judge held that (i) He is not entitled in principle to immunity because he had not discharged any functions as a Permanent Representative and his appointment was an “artificial construct” designed to defeat the jurisdiction of the court; and (ii) in any event, he is not entitled to immunity because he was “permanently resident” in the UK and so, if he was in principle entitled to immunity, it was only in respect of official acts performed in the exercise of his functions. In this appeal, H contends that both of these conclusions were wrong on the grounds that (i) he is entitled in principle to immunity and (ii) he is not permanently resident in the UK.
2. The parties were married on 18 September 2001. They have one daughter, who was born on 30 October 2002. During their marriage, they lived a cosmopolitan life. W has been based in the UK. H has been engaged in his substantial business interests, mostly in Saudi Arabia. He is a Saudi national and has never sought or been granted any extended or permanent rights to remain in the UK. The marriage broke down in 2012. H married again in February 2012. It will be necessary to examine the facts in more detail in relation to the question of whether he is permanently resident in the UK.

IS H ENTITLED TO IMMUNITY IN PRINCIPLE?

General International Framework

3. The IMO is an international organisation established by treaty and a specialised agency of the United Nations. As an international organisation, it has legal and operational autonomy which, *inter alia*, enables it to establish its own procedures for the appointment and accreditation of Permanent Representatives of Member States. The immunities and privileges of the IMO itself, its officials, and the Permanent Representatives of its Member States are governed, as a matter of international law, by a combination of the UN Convention on the Privileges and Immunities of Specialised Agencies (“the Specialised Agencies Convention”) and the Headquarters Agreement between the UK and the IMO as amended by (i) the Exchange of Notes dated 20 January 1982 and (ii) the Exchange of Notes dated 4 January 2002 (“the Headquarters Agreement”).
4. The UK’s obligations under the Headquarters Agreement in relation to the immunities and privileges of Permanent Representatives to the IMO are given effect in domestic law by the International Maritime Organisation (Immunities and Privileges) Order 2002 (SI 2002/1826) (“the IMO Order”).
5. The Vienna Convention on Diplomatic Relations (“the VCDR”) codifies the rules for the exchange of embassies among sovereign States. It does not therefore govern the immunities and privileges of Permanent Representatives to the IMO (or of IMO officials). However, where the relevant rules of international or domestic law so

require or permit, it is common ground that reference may be made to the VCDR in the determination of the nature and extent of the immunities and privileges conferred, as a matter of law, on Permanent Representatives. In the court below, the argument of W focussed on the VCDR, in particular Articles 38 and 39. It is now common ground that the relevant international instruments are the Specialised Agencies Convention and the Headquarters Agreement.

Material International and Domestic Law Provisions

6. The UK is required, as a matter of international law, to grant privileges and immunities to Personal Representatives of Member States to the IMO in accordance with the Specialised Agencies Convention and the Headquarters Agreement.

7. Article 13 *bis* of the Headquarters Agreement provides:

“(1) Every person designated by a Member of the Organisation as its Permanent Representative or Acting Permanent Representative and the resident members of its mission of diplomatic rank shall enjoy, for the term of their business with the Organisation, the privileges and immunities set out in Article V, Section 13 of the [Specialised Agencies Convention].

(2)...

(2A) In addition to the immunities and privileges specified in paragraphs (1) and (2) of the article, the Permanent Representative and acting Permanent Representative shall enjoy, in respect of themselves and members of their families forming part of their households, for the terms of their business with the Organisation, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

(3) The provisions of Article V, Sections 14 and 16 and of Article VII, Section 25 of the [Specialised Agencies Convention] shall apply to the persons mentioned in paragraph (1) of this Article. Following completion of the procedures laid down by Section 25 in respect of any person, the privileges and immunities of that person shall cease on expiry of a reasonable time in which to leave the United Kingdom.

(4) The Government shall be notified by the Secretary-General, in accordance with a procedure established by the Council, of the appointment of a Permanent Representative or an Acting Permanent Representative and of each member of the mission. Paragraphs (1) to (3) of this Article shall not apply to any person unless and until his name and status are duly notified to the Government,

(5)...Paragraphs (2) and (2A) shall not apply to any person who is permanently resident in the United Kingdom; paragraphs (1) and (2A) shall only apply to a person so resident while exercising his official functions.”

8. Article V of the Specialised Agencies Convention provides for immunities from legal process for Personal Representatives of Member States.
9. Article 13 *bis* of the Headquarters Agreement is given effect in domestic law by the IMO Order, Article 15 of which provides:

“(1) Except in so far as in any particular case any privilege or immunity is waived by the Government of the member whom he represents, every person designated by a member of the Organisation as its Principal Permanent Representative or acting Principal Permanent Representative to the Organisation in the United Kingdom, and members of their family forming part of their household, shall enjoy for the term of his business with the Organisation:

- (a) the like immunity for suit and legal process as is accorded to the head of a diplomatic mission;
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...

Provided that sub-paragraphs (d) to (h) of this paragraph shall not apply to any person who is a permanent resident of the United Kingdom, and sub-paragraphs (a) to (c) shall apply to any such person only while he is exercising his official functions.”

10. I accept the submission of the Secretary of State that “the like immunity from suit and legal process as is accorded to the head of a diplomatic mission” in Article 15(1)(a) of the IMO Order is a reference to the provisions of the VCDR establishing the nature and material scope of immunities, such as Article 31 (on the immunity from jurisdiction of diplomatic agents).
11. By contrast, other provisions of the VCDR, particularly those governing procedural aspects of acquiring immunity as a head of a diplomatic mission, are not those which the reference to “like immunity” in Article 15(1)(a) of the IMO Order is intended to import. As a consequence, Article 8(1), Article 38(1), Article 39(1) and Article 43 of the VCDR, each cited by the judge, are among the VCDR provisions which are not transposed or imported into the plane of UK/IMO relations.
12. I should, however, refer to Articles 31 and 39 of the VCDR. Article 31 provides that a diplomatic agent “shall enjoy immunity from suit” except in certain cases which is it not necessary to describe. Article 39 provides:

“1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed. ”

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

13. The procedure for accreditation of Permanent Representatives to the IMO is governed by Annex 3 to IMO Assembly Resolution A.908(22) of 5 June 2002 (“the IMO Procedures”). These provide *inter alia*:

“1. For the accreditation of a Permanent Representative to IMO the Member Government concerned shall make known in writing to the Secretary-General the name and rank of the person designated for that purpose.”

2. (a) Where a Member Government wishes to accredit as Permanent Representative a person who is not already or will not be accredited to the Government of the United Kingdom, it shall inform the Secretary-General of the name and rank of such person before accreditation...

(b) The Secretary-General shall inform the Government of the United Kingdom of the nomination and the Government may express its views thereon to the Secretary-General.

(c) Where the Government of the United Kingdom raises an objection to a person so nominated, consultations shall take place between the Secretary-General and the Government of the United Kingdom.”

14. If a question arises in any proceedings before the English courts as to whether a person is or is not entitled to any privilege or immunity, section 8 of the International Organisations Act 1968 (“the 1968 Act”) provides that:

“...a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact.”

15. In the light of the foregoing, the following principles are applicable to persons appointed as Permanent Representatives to the IMO in the UK. First, the sending State is free to appoint anyone as a Permanent Representative, subject to the terms of the Headquarters Agreement and the IMO Procedures. Secondly, under the IMO Procedures, the Government of the UK may express its views on an appointment and, if it raises an objection, consultations shall take place between the Secretary-General of the IMO and the UK Government. These procedures do not, however, provide for any other way for the UK to raise objections to, override or reject appointments. The only other relevant power is conferred on a host government under Article VII, Section 25 of the Specialised Agencies Convention, which provides a mechanism for dealing with abuses of privileges and immunities which may result in a representative of Member States being required to leave the country “in accordance with the diplomatic procedure applicable to diplomatic envoys accredited to that country” (i.e. to be declared *persona non grata*). Thirdly, it is a matter entirely within the discretion of the UK Government whether it wishes to express views or raise an objection to the appointment of a Permanent Representative, as contemplated under the IMO Procedures. Fourthly, under Article 13 *bis* of the Headquarters Agreement (and Article 15 of the IMO Order), Permanent Representatives enjoy immunities and privileges “for the term of their business with the Organisation”. Neither Article 13 *bis* of the Headquarters Agreement nor Article 15 of the IMO Order makes as detailed provisions on the commencement of immunities and privileges as are found in Article 39(1) of the VCDR. Reference to this provision may nonetheless be appropriate by analogy, save to the extent that there is any inconsistency between the two sets of provisions. Fifthly, a Permanent Representative is entitled to the same immunity from suit and legal process as that accorded to the head of a diplomatic mission, subject to the limitation, pursuant to Article 15 of the IMO Order, that a Permanent Representative who is “permanently resident” in the UK is only entitled to such immunities and privileges in respect of his official acts.

The appointment of H

16. On 1 April 2014, H was appointed as “Ambassador and Permanent Representative” of St Lucia to the IMO in the UK with effect from 15 April 2014. The appointment was made by the Governor-General of St Lucia: see the warrant of appointment of 1 April. The appointment was officially notified by the Minister of External Affairs to the Secretary-General of the IMO and was duly notified to the Foreign and Commonwealth Office (“FCO”). His name appears in the diplomatic list published by the FCO as St Lucia’s Permanent Representative to the IMO.

17. During the hearing, the judge requested the FCO to provide a certificate under section 8 of the 1968 Act. He requested the Secretary of State to certify (i) whether, and if so when, the FCO had been notified of the appointment of H as Permanent Representative of St Lucia to the IMO; (ii) whether, and if so when, Dr Juffali was accredited by the FCO as St Lucia's Permanent Representative; and (iii) whether the FCO had been notified that the diplomatic functions of Dr Juffali had been terminated.
18. The Secretary of State provided a document which certified the following facts: "(i) the Secretary-General of the [IMO] informed the UK Government of the appointment of Dr Juffali as Permanent Representative of St Lucia to the [IMO] on 8 May 2014; (ii) the appointment of Dr Walid Ahmed Juffali as St Lucia's Permanent Representative to the [IMO] was subsequently notified to the [FCO] by the Head of Mission at the High Commission of St Lucia in London. Dr Juffali's arrival date was notified as 14 April 2014; (iii) the [FCO] has not been notified that the diplomatic functions of Dr Juffali as St Lucia's Permanent Representative to the [IMO] have been terminated."
19. The judge accepted at para 13 of his judgment that, on the face of it, the certificate "is 'conclusive' evidence of the stated fact i.e. the appointment". However, he went on to consider whether, as a matter of fact, H had "taken up his appointment" before concluding that he had not acquired diplomatic immunity by his status as Permanent Representative.
20. Having referred to a number of cases in which the compatibility of the grant of immunity from jurisdiction with Article 6 of the European Convention of Human Rights ("the ECHR") has been considered, the judge concluded at para 34:

"The cumulative impact of this case law is, in my judgement, to identify a balance that has evolved, designed to protect the 'functionality' or 'effectiveness' of a mission and to recognise the need to minimise abuse of diplomatic immunity. It is this balance which both underlies the policy considerations and establishes the proportionality of the restriction in ECHR terms. If 'functionality' is extracted from the equation, because no functions have been discharged or, to adopt Diplock LJ's terms, the diplomat is not 'en poste', there can remain only unjustified privilege or immunity linked solely to the private activities of an individual. If such is the case both the policy considerations and the proportionality of restriction cannot be justified in Convention terms and cannot be said to pursue a legitimate claim sufficient to eclipse W's right of access to a court."
21. The reference to Diplock LJ was to *Empson v Smith* [1966] 1 QB 426 at p 429C. At para 35(vi) of his judgment, the judge found that since his appointment, "H has not undertaken **any** duties of **any** kind in the pursuit of functions of office". He said that W had provided persuasive evidence that H's health was such that he was not in a position at present to fulfil any ambassadorial duties. At para 36, he said:

"H has sought and obtained a diplomatic appointment with the sole intention of defeating W's claims consequent on the

breakdown of their marriage. H has not, in any real sense, taken up his appointment, nor has he discharged any responsibilities in connection with it. It is an entirely artificial construct. I draw back from describing it as a ‘sham’, mindful of the forensic precision required to support such a conclusion.”

22. At para 40, he said that he was “not prepared to accede to H’s request to strike out W’s Part III claim on his spurious assertion of diplomatic immunity, as I find it to be.”

WAS H ENTITLED TO IMMUNITY IN PRINCIPLE?

23. Mr Chamberlain QC submits that the judge’s finding at para 36 was based on a misunderstanding of the evidence and was not open to him. More fundamentally, however, Mr Chamberlain and the Secretary of State submit that the judge was wrong in law to investigate the question of whether H had discharged the functions of a Permanent Representative, i.e. to conduct a functional review. They say that such an approach is unsupported by authority and, if correct, would have far-reaching undesirable consequences for international relations. These consequences would not be limited to claims to immunity by Permanent Representatives to the IMO. They would apply equally to claims to immunity by diplomatic agents. The judge’s approach would mean that an English court faced with a claim to diplomatic immunity would be entitled (and obliged) to receive and assess evidence in order to determine whether a properly appointed and properly accredited diplomat has in a real sense taken up his post and discharged his responsibilities and what motivated him to seek the post in the first place. If the Government of the sending State chose not to submit evidence of the responsibilities discharged (for example, because, it refused to account for the activities of its diplomatic agents to the courts of another State), it would risk a finding by an English court that its appointment was an “artificial construct” or a “sham”.
24. The Secretary of State highlights the risks that would arise if the judge’s approach were adopted by the courts of other States. The position of the UK’s diplomats and Permanent Representatives in other countries might be scrutinised, and their status unjustifiably curtailed, by the courts of receiving States asserting a power to undertake a functional review. The conduct of foreign relations and the work of international organisations could be seriously hampered if the acceptance of accreditation of diplomats and Permanent Representatives was not regarded as conclusive, but was open to scrutiny by the courts.
25. There is no support in the relevant international instruments or the case law for a functional review by a court where there is a challenge to a claim to immunity by a diplomat or Permanent Representative. The Specialised Agencies Convention, on which the immunities and privileges of Permanent Representatives to the IMO are in part based, provides (at Article V, Section 16) that:

“Privileges and immunities are accorded to the representatives of members, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the specialised agencies. Consequently, a member not only has the right but is under a duty to waive the immunity of its representatives in any case

where, in the opinion of the member, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded.”

26. It is thus envisaged that circumstances might arise in which a claim of immunity might be unjustified on the facts of a particular case. In fact, Article VII, Sections 24-25 provides for specific (and exclusive) mechanisms for dealing with abuses of privilege and immunities. Moreover, Article V, Section 16 provides that the sending State has a duty to waive the immunity in certain circumstances. However, it is not envisaged that the correct response to such a situation is for the domestic courts to look behind the status of the representative. The decision whether or not to waive the immunity is a matter which is solely within the executive discretion of the sending State or the courts of the sending State. I accept the submission of the Secretary of State that, if the sending State does not waive immunity, the courts of the receiving State are required to grant immunity.
27. The provisions of the VCDR do not provide any support for the judge’s approach either. Quite the contrary. Article 39 makes it plain that diplomatic immunity starts *before* the diplomat begins to perform any diplomatic functions when he enters the receiving State “on proceeding to take up his post” or “from the moment when his appointment is notified to the Ministry of Foreign Affairs”. Accordingly, as Mr Chamberlain submits, Article 39 identifies the starting point for diplomatic immunity and it is on any view before the diplomat has taken up his post.
28. Article 43 of the VCDR identifies two circumstances in which a diplomat’s functions “come to an end”: first, on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end; secondly, on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognise the diplomatic agent as a member of the mission. This latter procedure is the means by which a receiving State designates a diplomat as *persona non grata*. As Mr Chamberlain points out, these are not the only two circumstances in which a diplomat’s functions can come to an end. No doubt the death of a diplomat would be another (hence the need for the protection for family members provided in Article 39(3)). But they do show that the VCDR envisages a formal process by which the functions of the diplomat can be brought to an end. Once they have been brought to an end, the diplomat retains his privileges and immunities in accordance with Article 39(2) until he leaves the country or until the expiry of a reasonable period in which to do so. But all of this is fundamentally inconsistent with the judge’s approach, according to which immunity depends on a factual finding by the courts of the receiving State as to whether the diplomat is “en poste” in the sense of having begun to discharge his functions.
29. I acknowledge that Article 43 has not been incorporated into our domestic law by the Diplomatic Privileges Act 1964 (“the 1964 Act”). But I agree with what Blake J said in *Al Atiyya v Al Thani* [2016] EWHC 212 (QB) at para 39 that it is legitimate to construe the terms of the VCDR that have been incorporated into domestic law by reference to all of its provisions, including those that have not been so incorporated. The VCDR has an autonomous international meaning. It is irrelevant to its proper interpretation whether any of its provisions have been incorporated into any particular domestic legal system.

30. Article 13 of the VCDR is also important. It provides that a head of mission is “considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the [receiving State]”.
31. Mr Hickman submits that Article 39(1) of the VCDR draws a distinction between a person who is “entitled” to diplomatic privileges and immunities and a person who “enjoys” them. A person appointed as a diplomatic agent to a permanent mission does not enjoy immunity until he has entered the receiving country to take up his post. If after appointment he enters the country for other reasons and/or does not proceed to take up his post, no immunity will arise. It follows, he submits, that there are cases in which appointment as a diplomatic agent is not sufficient for a person to enjoy immunities under Article 39(1). This will be the case even where the diplomatic agent has been notified to the UK Government, accredited and placed on the diplomatic list. The same is true of Article 39(2), which does not refer to the “appointment” of a diplomatic agent coming to an end, but the “functions” of a person “enjoying privileges and immunities” coming to an end. There are circumstances in which the functions of a diplomatic agent can come to an end other than by his appointment coming to an end. Death and incapacity are obvious examples.
32. There is superficial force in these points. But in my view, the contrary arguments based on the language of the VCDR, which I have summarised at paras 27 to 30 above are unanswerable.
33. I come back to the practical implications of the judge’s approach. In *Al Atiyya*, Blake J rejected submissions which were very similar to those advanced by W in the present case. I agree with what he said:

“74. In the previous cases where a FCO certificate or letter has been issued, the court has treated the question of whether a person is a diplomatic agent as settled by the question of whether the receiving state has accepted the accreditation of the sending state or not. Whilst acceptance is not an act that itself affords the immunity, it is regarded by the courts as good evidence of the fact of membership of diplomatic staff. The fact that the courts have not previously asked more searching questions and sought evidence of the precise activity that has been performed suggests that such an inquiry was considered unnecessary.

75. There would be real difficulties and uncertainties if the court were to undertake the inquiry that the claimant contends it should. The sending state is not obliged to provide evidence and the nature of any exchanges in which the person concerned may have engaged might well be something that both states would prefer not to disclose. A functional inquiry may well result in information not known to the FCO being examined and opens the door to the real possibility that conflicting factual findings are made between the court and the FCO, with the result that the one voice principle is undermined.

76. If the FCO has good reason to believe that the status of diplomat and membership of the staff of a mission is being abused by the sending state to promote the personal convenience of the *propositus*, there may be representations made that immunity is waived by the sending state or that the person ceases to be a member of a mission. In the last resort, a person may be declared *persona non grata*, but even in those circumstances I anticipate that in the light of VCDR Art 9 (2) and 39 (2) some time to leave the country would be afforded before any immunity ceased.

77. Leaving the control mechanism for termination of an appointment in the hands of the FCO, if it considers appropriate, avoids the risk of inconsistency and leaves the exercise of the prerogative untrammelled by a rival judicial enquiry. The prerogative power of conducting foreign relations is exercised by the executive through the FCO and not by the courts; that power includes the exercise of waiver where considered expedient. If private commercial activity by a member of the diplomatic staff of a mission has been taking place in breach of Article 42, that may be the subject of waiver by the receiving state. Equally a receiving state may be content to accept a member of diplomatic staff even if that person is not engaged in such a function full time.

78. The sending state's freedom of appointment under Article 7 goes beyond the identity of the appointee and extends to the rank to which the person is appointed, as well as the instructions as to the activity to be appointed to and the degree of time spent on it. If both the receiving and sending state are aware that a diplomat is spending significant periods of time on other matters, that may be a reason to terminate the appointment but it does not follow that immunity does not apply while the person remains an accredited diplomat.”

34. This is consistent with the common law approach to establishing entitlement to diplomatic immunity which was authoritatively explained by the House of Lords in *Engelke v Musmann* [1928] AC 433. As the Attorney General said at p 437:

“if the court can go behind [a statement made on behalf of the UK Government that a person has or has not been recognised as a member of the diplomatic staff of a foreign ambassador] and themselves seek to investigate the facts, compelling the person on behalf of whom immunity is claimed to submit to legal process, it would be impossible for His Majesty to fulfil the obligations imposed on him by international law and the comity of nations, since the steps taken to investigate the claims would in themselves involve a breach of diplomatic immunity which in the event the Court might decide to have been established.”

This was accepted by the House: see per Lord Buckmaster at p 446-7, Viscount Dunedin at p 448 and Lord Phillimore at p 455.

35. Mr Hickman submits that the common law is irrelevant because the position is now governed by statute. But it would be surprising if Parliament had intended to effect the fundamental change in the law relating to diplomatic immunity for which Mr Hickman contends. We have seen nothing to indicate that Parliament intended to effect such a change, which would potentially hamper the conduct of foreign relations and the work of international organisations. No reason has been advanced to suggest why Parliament would or might have wished to do this.
36. Mr Hickman relies on a trilogy of cases in support of his submission that, in investigating the factual basis of H's claim to immunity, the judge adopted an approach that was correct in law. These are *R v Governor of Pentonville Prison ex p Teja* [1971] 2 QB 274, *R v Secretary of State for the Home Department ex p Bagga* [1991] QB 485 and *Apex Global Management Ltd v Fi Call & Others* [2013] EWHC 587 (Ch).
37. In *Teja* an Indian national claimed immunity as a member of a diplomatic mission of Costa Rica. There was a certificate before the court from the FCO stating that the applicant "has not been accredited to the Court of St James as a diplomatic agent". It was held by the Divisional Court that he was not entitled to immunity. A foreign State's unilateral action in appointing a diplomatic agent did not confer diplomatic immunity. Until the receiving State had accepted and received the intended representative as a *persona grata*, he was not immune from proceedings in the English courts. In addition, Parker CJ observed at p 283F:
- "I would add for my part that even if I felt that both of those prior points were wrong, it is almost impossible to say that a man who is employed by a government to go to foreign countries to conclude purely commercial agreements, and not to negotiate in any way or have contact with the other government, can be said to engaged on a diplomatic mission at all."
38. These observations were *obiter dicta*. They are not binding on this court. The *ratio* of the decision does not assist W, because it is clear that H has not only been appointed by the St Lucia Government, but has also been accepted and received by the FCO.
39. *Bagga* was an immigration case which was concerned with the question of whether persons entering the UK as members of missions could be granted leave to remain under the Immigration Act 1971. This did not turn on the question whether the applicants enjoyed immunities under the 1964 Act. As Parker LJ said at p 496F: "so far as immigration is concerned, the Home Office are not in any way involved in what may be the diplomatic niceties as to when a head of mission or other diplomat begins to enjoy the benefits conferred by the [1964 Act]". In any event, Parker LJ went on to disapprove the reasoning in *Teja* that both appointment by the sending State and acceptance by the receiving State were required for immunity to apply. In the light of Articles 1 and 39 of VCDR, he said at p 497F that "[i]t could not, I think, be contended that if an embassy chooses to employ a secretary who is already in this country, anything more is required than notification before that person is entitled to enjoy immunities". In my view, *Bagga* is inconsistent with the proposition that, in

deciding whether immunity applies, the court can enquire into the nature of an individual's activities.

40. Mr Hickman also relies on *Apex Global* as a useful source of guidance as to the role of the court when immunity is asserted by a foreign State. But as Mr Chamberlain points out, that was not a case about diplomatic immunity at all. It concerned State immunity. The question at issue was whether individuals were “members of [the Saudi Head of State’s] family forming part of his household” within the meaning of section 20(1)(b) of the State Immunity Act 1978. The Court of Appeal held that, in the absence of a certificate from the Secretary of State under section 4 of the 1964 Act in relation to the princes, there was no basis in law for treating a letter from the Saudi Arabian ambassador stating that the princes formed part of the Saudi Arabian King’s household as conclusive of the immunity issue. They said that the question whether, and when, a diplomat is entitled to immunity is very different. It is a question on which the view of the Secretary of State is conclusive by virtue of section 8 of the 1968 Act.
41. Section 8 of the 1968 Act provides that, if a question arises in any proceedings before the English courts as to whether a person is entitled to any privilege or immunity, a certificate issued under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact. I have set out at para 18 above the facts the truth of which is conclusively proved by the certificate in the present case. If the immunity of a Permanent Representative or diplomatic agent depends on establishing whether he has in fact performed the relevant diplomatic functions, then the certificate issued in this case is of little value. It does not purport to say anything about the functions performed by H. That is not surprising. The policy reasons justifying the conclusiveness of FCO certificates has been discussed most frequently in the context of issues relating to State immunity. For example, in *The Arantzazu Mendi* [1939] AC 256, Lord Atkin said:

“Our state cannot speak with two voices on such a matter [that is state sovereignty and matters flowing from it], the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognise as a fellow sovereign in the family of states; and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone.”
42. I accept the submission of the Secretary of State that the same considerations of law and policy apply in the present context. In this case, the Secretary of State certified that (i) he had been notified of H’s appointment and of H’s “arrival date” and (ii) he had not been notified that H’s diplomatic functions had been terminated. The certificate was conclusive evidence of the truth of (i) and (ii). It was also powerful evidence of the truth of the facts themselves, i.e. the appointment, (particularly where, as here, the warrant of appointment was primary evidence of the appointment), H’s “arrival date” and the fact that his diplomatic functions had not been terminated. The judge’s factual determinations were inconsistent with this powerful evidence.

43. It seems that the judge considered that a functional review was mandated by Article 6 of the ECHR. However, in my view, there is no suggestion in the jurisprudence of either the ECtHR or the domestic courts that it is necessary or permissible, in determining whether a diplomat or Permanent Representative is *in principle* entitled to claim immunity, for a court to consider whether that person has “taken up” his post or is fulfilling the requisite functions of the post.
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 reflects generally recognised rules of public international law. This test was developed by the ECtHR 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 *Al Malki v Reyes* [2015] EWCA Civ 32, [2015] ICR 931 where I said at para 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 ECtHR decision in *Fogarty*]. 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.”

45. In *Stichting Mothers of Srebrenica v Netherlands* (2013) 57 EHRR SE10 at para 139 the ECtHR said much the same thing:

“(e) the Convention, including art.6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, among other authorities and *mutatis mutandis*, *Loizidou v Turkey* (1997) 23 E.H.R.R. 513 at [43]; *Al-Adsani* at [55]; and *Nada v Switzerland* (2013) 56 E.H.R.R. 18 AT [169]). 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 grant of immunity to a state (the Court would add: or to an international organisation) (see *Loizidou* at [43]; *Fogarty* at [35]; *Cudak* at [56]; and *Sabeh el Leil* at [48]);

(f) measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity (the Court would add: or the immunity of international

organisations) cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in art.6(1). Just as the right of access to a court is an inherent part of the fair trial guaranteed in that article, so some restrictions on access must likewise be regarded as inherent. Examples are those limitations generally accepted by the community of nations as part of the doctrine of immunity from domestic jurisdiction, whether it concerns the immunity of a foreign sovereign State or that of an international organisation (see *Fogarty* at [36]; and *Cudak* at [57]);”

46. The grant of immunity to Permanent Representatives of the IMO, which like diplomatic immunity, is largely governed by international treaties, reflects generally recognised rules of international law. In particular, the UK is required to accord to Permanent Representatives of the IMO the immunities and privileges referred to in Article 13 *bis* of the Headquarters Agreement. These privileges and immunities are, in turn, themselves delimited by reference to (i) the Specialised Agencies Convention and (ii) those accorded to diplomatic agents under international law.
47. Mr Hickman submits that the terms of the Headquarters Agreement go well beyond the requirements of the Specialised Agencies Convention. The Headquarters Agreement was amended in November 2001 by the insertion of Article 13 *bis* (2A) which it is convenient to repeat:

“In addition to the immunities and privileges specified in paragraphs (1) and (2) of this Article, the Permanent Representative and acting Permanent Representative shall enjoy, in respect of themselves and members of their families forming part of their households, for the term of their businesses with the Organisation, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.”
48. This amendment was given effect in the IMO Order and is the source of the immunity claimed by H in this case. Mr Hickman submits that, prior to the amendment, there had been no such general immunity for Permanent Representatives to the IMO. Article 13(1) of the Headquarters Agreement had simply given effect to the immunities and privileges set out in Article V, Section 13 of the Specialised Agencies Convention. Mr Hickman submits that Article V, Sections 13 to 16 set out more limited immunities relating to the official activities of representatives to international organisations which would not avail H in this case. He says that Article 15 of the IMO Order on which H relies represents a fairly recent extension of privileges and immunities and does not reflect international law; nor does it represent a reasonable interpretation of what international law requires.
49. I reject Mr Hickman’s submission on this point for the reasons given by Mr Chamberlain. The Explanatory Notes to the IMO Order explain that the immunity conferred on principal Permanent Representatives reflects an Exchange of Notes between the UK Government and the IMO. When the IMO Order was placed before Parliament, the Minister said that it:

“...brings the United Kingdom into step with accepted practice for UN specialised agencies based elsewhere in the world and will allow senior representatives and officials at the IMO to enjoy the same status as they would enjoy if attached to UN specialised agencies in, for example, Paris, Geneva, Vienna or Rome” (HL Deb 10 July 2002, vol 637, col 766).

50. Immunity for the principal Permanent Representatives derives from the amended Headquarters Agreement. Article 13 *bis* (2A) provides for Permanent Representatives to receive full diplomatic immunity in the same terms as Article 15 of the IMO Order.
51. Although the Headquarters Agreement is a bilateral agreement between the UK and the IMO, there are strong indications that full diplomatic immunity for principal Permanent Representatives to the IMO is required by customary international law.
52. First, Article 30 of the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character 1975 (“the 1975 Convention”) provides full diplomatic immunity for Permanent Representatives of Specialised Agencies. The 1975 Convention applies to all UN specialised agencies (Articles 1.1(2) and 2(1)). A head of mission is defined by Article 1.1(17) as a “permanent representative or permanent observer”. A permanent representative is defined as “the person charged by the sending State with the duty of acting as the head of the permanent mission” (Article 1.1(18)). That would include principal Permanent Representatives of the IMO. It is true that the 1975 Convention has not come into force. That is because it has only received 34 of the necessary 35 ratifications by Member States (not including the UK). Nevertheless, it is reflective and evidence of customary international law.
53. Secondly, there is good evidence of State practice of conferring full immunity on the principal Permanent Representatives of international organisations, including UN specialised agencies. For example, see the Headquarters Agreements between (i) the United Nations and the US which provides full immunity to “principal permanent representatives”; (ii) NATO and its Member States, which provides full immunity to “every person designated by a Member State as its principal permanent representative”; (iii) the WTO and the Swiss Confederation, which provides full immunity to members of “permanent missions”; (iv) the UN Food and Agriculture Organisation and Italy, which provides full immunity to “principal resident representatives”; (v) the UN Industrial Development Organisation and Austria, which provides full immunity to “members of permanent missions”; (vi) the International Atomic Energy Agency and Austria, which provides full immunity to “permanent missions” and “permanent representatives”; and (vii) the UN Economic Commission for Africa and Ethiopia, which provides full immunity to “resident representatives of government”.
54. The UN Special Rapporteur on Relations between States and International Organisations has expressed the view that, although there are differences between the immunities enjoyed by different agencies, there is a consensus that such agencies must be given such immunities as they require to enable them to perform their functions effectively; and that is why the immunities to be accorded to each agency are often set out in headquarters agreements: see Leonardo Diaz-Gonzalez, “Fourth

report on relations between States and international organisations” (April 1989) UN Document No. A/CN.4/424.

55. It is therefore clear that there is a well-established practice of host States granting full diplomatic immunity to (at least) the principal Permanent Representatives of international organisations, including UN specialised agencies. That State practice is reflected in the 1975 Convention, which, although not universally accepted, commands a considerable degree of international support. The immunity conferred by Article 15 of the IMO Order was expressly conferred to bring the UK into line with State practice in relation to other UN specialised agencies. These facts indicate that the immunity conferred by Article 15 reflects international law, or at least that the view that it reflects international law is “reasonable and falls within currently accepted international standards” (*Al-Malki* para 70).
56. For all these reasons, I reject the submission that Article 15 is incompatible with Article 6 of the ECHR. I do not, therefore, need to deal with Mr Chamberlain’s submission that the judge’s finding at para 36 of his judgment was not open to him on the facts.

Conclusion on whether H is entitled in principle to immunity

57. For the reasons that I have set out, I would hold that the judge erred in his approach to the immunity issue and was wrong to hold that H was not *in principle* entitled to immunity from W’s claim for financial relief pursuant to Part III of the 1984 Act. It remains to be considered whether, as the judge held, H was “permanently resident” in the UK. If he was, then it is clear that he would not be entitled to immunity since W’s claim does not arise in respect of official acts performed by H in the exercise of his functions.

THE PERMANENT RESIDENCE ISSUE

The meaning of “permanently resident”

58. Subject to the exceptions set out in Article 31(1)(a) to (c) of VCDR, a diplomatic agent is immune from the jurisdiction of the receiving State. Article 38 provides:
- “1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.”
59. The permanent residence issue was addressed in the court below by reference to Article 38(1) of the VCDR. In fact, it should have been addressed by reference to Article 13 *bis* of the Headquarters Agreement and Article 15 of the IMO Order. But there is no material difference between the relevant parts of these provisions and Article 38(1) of the VCDR.
60. It seems that there is no authority on the meaning of “permanently resident” from any senior court in the UK.

61. Soon after becoming a party to the VCDR in 1964, the UK Government decided that the most satisfactory interpretation of the term “permanently resident” depended on asking the question whether, but for his employment with the mission, the person concerned would choose to remain in the receiving State (the so-called “but for test”). After a few years, the FCO formulated some general rules and in January 1969 a Circular Note (“the Circular”) was sent to all diplomatic missions in London by the Secretary of State. It included the following guidance:

“When determining whether or not a particular member of your staff should be regarded as a permanent resident of the United Kingdom the test should normally be whether or not he would be in the United Kingdom but for the requirements of the sending State. In applying this test, I suggest that you should be guided by the following considerations:

(i) The intention of the individual: a person should be regarded as permanently resident in the United Kingdom unless he is going to return to his own country as soon as his appointment in the United Kingdom ends. It is suggested that points which may be relevant to this question include the links of the individual with the State which he claims as his home, e.g. payment of taxes, participation in social security schemes, ownership of immovable property, payment of return passage by the sending State.

(ii) The prospect of the individual being posted elsewhere as a career member of the service: he should be regarded as permanently resident in the United Kingdom if his appointment in the United Kingdom is likely to continue or has continued for more than five years, unless the Head of Mission states that the longer stay in the United Kingdom is a requirement of the sending State and not a result of personal considerations.

(iii) Local recruitment of the individual: a person who is locally engaged is presumed to be permanently resident in the United Kingdom unless the Head of Mission concerned shows that he is going to return to his own country or to proceed to a third country immediately on the termination of his appointment in the United Kingdom; and

(iv) Marital status of the individual: a woman member of the Mission who is married to a permanent resident of the United Kingdom is presumed to be herself permanently resident in the United Kingdom from the time of her marriage unless the Head of Mission shows that in addition to her satisfying the other criteria, there remains a real prospect in view of the special circumstances of her case that she will be posted as a normal career member of the service.”

62. *Satow's Diplomatic Practice* (6th ed) states of the Circular:

“This guidance has been followed by the UK in administering privileges since 1969 and, although consultations as envisaged have sometimes taken place, it has not generally been challenged by missions in London.....The key test in the Circular was whether the individual was resident in the receiving State for a purpose unconnected with the holding of the status of membership of the mission....

A number of other countries have since 1969 drawn up practice guidelines on the meaning of ‘permanently resident in the receiving State’ which are broadly similar to those applied by the United Kingdom.” (paras 10.17 and 10.18)

63. The judge said at para 64 that, in this international context, the intention of the *propositus* was highly relevant, but not determinative. It would be necessary to survey the wider picture of H’s life, both to evaluate his degree of integration into any particular place as well as to infer his intentions from the facts.
64. Mr Pointer QC on behalf of H submits that the phrase “permanently resident” must be given its ordinary meaning. He places some reliance on what Lord Evershed MR said in *Re Gape* [1952] Ch 743 at p 749: “the conditions of taking up permanent residence in England was another way of saying making England your permanent home; that is to say, residing in England with the intention of continuing to reside there until you die”. That was said in relation to the construction of the phrase “permanent residence” in a will. Mr Pointer submits that the exception in Article 38 of the VCDR applies to “nationals” as well as those who are “permanently resident”. The latter should be construed *eiusdem generis* with the former. Like nationals, permanent residents are persons whose status vis-à-vis the receiving State makes it appropriate for the receiving State to continue to exercise jurisdiction over them notwithstanding their diplomatic status. There is nothing to suggest that the phrase “permanently resident” includes those (like H) who neither have, nor intend to obtain, any right permanently to reside in the receiving State.
65. With reference to the Circular, Mr Pointer submits that the FCO cannot determine the true meaning of “permanently resident”. In any event, it does not address the situation of a person such as H who has always had the use of property in the UK and spent some time here, but who has never had the right, or intention, to make the UK his permanent home. Nor does it deal with the situation of an individual who has the means to maintain properties in several jurisdictions including the UK, and who chooses the UK as the place to educate his children.
66. In my view, the Circular provides valuable guidance as to the meaning of “permanent residence”. It has the imprimatur of general international acceptance: see para 62 above. I see no basis for accepting the test put forward by Mr Pointer of whether the person has or intends to apply for the right to remain in the receiving State. That is too narrow an approach. Nor do I consider that, in order to establish permanent residence, it must be shown that the person intends to live in the country until he dies (the *Re Gape* test). Indeed, I did not understand Mr Pointer in the end to be contending for such an absolutist approach.

67. In *Jimenez v IRC* [2004] STC 371, Mr John Walters QC, sitting as a Special Commissioner of Income Tax said, with reference to the Circular, that he was “not surprised” that “permanently resident” means “resident for a purpose unconnected with the holding of the status of membership of a mission.” It seems to me that this may be another way of expressing the “but for” test stated in the opening paragraph of the Circular. In my view, it is a necessary condition of being “permanently resident” in a host country that the individual would be resident in that country even if he had not been a Permanent Representative or diplomatic agent. But it is not a sufficient condition, because what is required is *permanent* residence. Thus, it is difficult to see how an individual who (i) would be resident in a host country even if he were not appointed a Permanent Representative or diplomatic agent and yet (ii) intends to leave the host country as soon as his appointment comes to an end can be said to be permanently resident in the host country. That is why other factors, such as those identified in the Circular, should be borne in mind when applying the “but for” test. It is clear from the Circular that what is required is a degree of permanence, not a settled intention to reside in the host country until death.

The facts relating to permanent residence

68. By way of evidence, the judge had before him two statements filed by W. By contrast, notwithstanding that it was his application to strike out W’s Part III claim, H failed to file a statement. He filed a number of statements made by his solicitor, Sandra Davis, but largely relied on a statement filed by Turki Alammari, his office manager. Mr Alammari is responsible for H’s personal and business schedule and maintains *inter alia* details of his international movements.
69. In the light of H’s challenge to the findings of fact made by the judge, it is necessary to examine the statements and supporting documentation in order to consider the submission that the judge drew inferences of fact which were not open to him and should not therefore have informed the outcome of the case. Much of the evidence is found in the largely unchallenged statements filed by W.
70. H was born in the Lebanon in 1955. He is a Saudi national and domiciled in Saudi Arabia. He is a member of a large Saudi family of immeasurable wealth. The family has, throughout his life, had a close connection with the UK. In particular, a substantial property, Bishopsgate House, near Windsor Great Park was bought many years ago by H’s father as a family estate for use in summer holidays. The family also had a flat in London. For a time H attended Oxford University before going on to university in the US.
71. For many years H has had a visa which enables him to spend 180 days in the UK each year without compromising his non-resident tax status. In common with men of his wealth and background, he crosses and re-crosses the world, largely by private jet, staying in properties in various countries owned by, or on his behalf, through elaborate financial structures. The figures produced by Mr Alammari show the division of H’s time over recent years to have been largely spent between Saudi Arabia, Switzerland and the UK; the majority of his time over the period being spent in Switzerland closely followed by Saudi Arabia.
72. H has been married three times. His first marriage in 1980, was to Basma Sulaiman, a Saudi national. There were three children by that marriage, M, D & H; each of whom

(in common with all H's children) were born at the Portland Hospital in London. It is common ground that at least the eldest of those children has a British passport.

73. Critical to his ultimate finding that H was permanently resident in the UK, the judge found in relation to this marriage (as with each of his marriages) that 'the family home was based in the UK' and that the children were educated in England and speak English.
74. Mr Pointer submits that this finding of fact was not open to the judge as it goes further than the evidence of Mr Alammari who said:

“M, D and H have at times studied in the UK and Dr Juffali did travel to the United Kingdom to visit them during their studies.”

Mr Alammari did not however address, obliquely or at all, the issue of where the children lived during their childhood, the period with which the judge was concerned.

75. The judge had W's written evidence that, when she first met H, he was living in a property at Wilton Crescent in London, SW1. Her statement does not specifically say that also living at that address was H's first wife, to whom he was still married. That this was the case is supported by the report of *Sulaiman v Juffali* [2002] 1 FLR 479, a decision of Munby J on H's challenge to the court's jurisdiction in relation to the divorce from his first wife. The report quotes from the divorce petition filed by Ms Sulaiman on 22 June 2001; in the petition she stated that she had last lived with H as man and wife at an address in London, and that she was habitually resident in the UK.
76. The hearing before Munby J had held over the issue of Ms Sulaiman's habitual residence which was being challenged by H. But W gives evidence in her statement in these proceedings that ultimately H and his first wife were divorced by way of English divorce petition in 2001. That outcome can only have been on the basis that Ms Sulaiman had been habitually resident in the UK for a period of 12 months at the time the petition was filed.
77. Mr Pointer urges caution saying that putting together the pieces of the jigsaw in such a manner can lead to a misinterpretation of the facts and that the judge had been wrong to conclude that the evidence, looked at as a whole, could lead him to a finding that H's first family had been based in the UK.
78. In my judgment it was open to the judge to reach the conclusion that the family home of H's first family was the UK (para 65), particularly given the absence of any evidence from H or of any real assistance from Mr Alammari.
79. W was H's second wife. She was born in 1962 in California and is a US citizen. She came to the UK on 25 June 1988 and has lived here ever since, obtaining indefinite leave to remain in this country in the mid-1990s. H and W started seeing each other in 2001 and were married in Dubai on 18 September 2001. Their daughter, S, was born on 30 October 2002. W's evidence is that in the early years of the marriage, the family home was at 50 Hyde Park Gate, a property owned or leased by H. Since 2005 H has had the use of Bishopsgate House as a result of his beneficial interest in the family trust which indirectly owns it. W (and she is not contradicted by Mr

Alammari) says that this property became the family home for the duration of the marriage with S attending then, as now, a preparatory school in Surrey. The mother and S continue to live at the property. During the course of the marriage, H completed a PhD in neurology at University College, a property was acquired in Devon for holidays and the family had a flat in London.

80. In February 2012, H contracted his third (on this occasion, polygamous) marriage to Loujain Adada in Beirut.
81. Shortly after his third marriage, H's only son M died. In the aftermath of M's death there was a period of reconciliation between H and W, which came to end in June 2013. Following this final breakdown of the marriage, W issued (but did not serve) a divorce petition on 13 August 2013. In the same month H rented an apartment at 1 Hyde Park Gate for a period of 12 months.
82. In April 2014, H acquired the use of (again through a company/trust structure) a property in Walton Street, London which was bought for £41million. This property, W says, is H's matrimonial home. His third wife and the child of that marriage T (born 1 November 2014) live there and S has her own substantial suite of rooms for when she is visiting her father.
83. On 14 April 2014, in the same month as the property at Walton Street was bought, H was appointed as the Permanent Representative of St Lucia (a country with which he had had, until that time, no connection) to the IMO.
84. In respect of the current living arrangements of H with his third wife, Mr Alammari says in his statement that the "current family unit" divide their time between Jeddah and the house bought in April 2014 in Walton Street, which he refers to as H's "diplomatic residence".
85. On 17 September 2014, H and W were divorced by Talaq in Jeddah, a divorce which is recognised in England.

The judge's findings and assessment

86. At para 51 of his judgment, the judge identified the following features as relevant:

(i) H is an international businessman with a peripatetic existence throughout the world;

(ii) H has the use of properties in various countries, including e.g. UK, Saudi Arabia;

(iii) H frequently spends protracted periods in the UK;

(iv) H has close family members in Saudi Arabia including his mother and grandmother whom he visits regularly;

(v) The only property which is vested in H's own name (the remainder being subject to various trusts) is in Saudi Arabia. It is, according to the evidence, a substantial property located on a 13,000 m² plot;

(vi) H is a Saudi national, domiciled in Saudi Arabia;

(vii) H's UK visa permits him to remain in the UK for no more than 180 days per year but there is no restriction on the number of visits to the UK or any requirement that a specified time must elapse between visits;

(viii) H has now been married three times. There are children from each of the marriages. The family home in each marriage has been in the UK and all the children have (so far) been brought up in the UK;

(ix) W is 53, she has lived permanently in the UK since 1989, including throughout the marriage to H i.e. since 2001. There is no dispute that she is 'habitually resident' in this jurisdiction. She has been granted indefinite leave to remain;

(x) S, the couple's child, now aged 13 years has lived her entire life in this jurisdiction.

(xi) Bishopsgate, a one hundred million pound property in Windsor Great Park has been the family home throughout the marriage.”

87. He continued:

“65. In my survey of the background of H's life (at para 51, above) I have endeavoured to identify key facts which point to permanent residence being established either in Saudi Arabia or in the UK. The fact that H does not enjoy leave to remain in the UK and that he is only permitted to visit for 180 days per year seems to drag the conclusion towards Saudi Arabia. Mr Pointer's team have spent considerable time and effort drawing up a table setting out the number of nights H has spent in the UK on a yearly basis since 2009. That data has been further refined to include the average duration of trips to the UK and also the unbroken sequence of days spent here. This is helpful so far as it goes but, in my view, a qualitative rather than quantitative assessment is likely to illuminate intention more accurately. Of all the matters identified at para 50 one is, to my mind, magnetic in its attraction. H has been married three times. On each occasion the marriage produced children. For each reconstituted family unit the family home was based in the UK. W herself is habitually resident in the UK. The children of the first two marriages have all been educated here and, inevitably, all speak English. The youngest child, now from the third marriage, is pre-school age. There are three homes in the UK.

66. Where a man chooses to live with his wife and children, and I emphasise the element of choice, says a great deal, to my

mind, about where he intends his home to be. When the circumstances of his life cause him to repeat that same decision throughout three marriages, it seems to me to signal an intention which is 'unlimited in period', to adopt Langton J's phrase and therefore to qualify as permanent. I very much agree with Mr Pointer that both the case law and the Circular require me to give significant weight to H's intentions but I have, on the facts of this case, come to a different conclusion from that contended by Mr Pointer. The evidence points very strongly, in my view, to establishing that these were the arrangements before H's appointment and, on the basis that past behaviour is often a reliable predictor of future intention, the status quo was likely to continue. On this basis H also fails the 'but for' test in *Jiminez v IRC* (see para 48 above). By way of completeness I should add that I have not found it necessary to deploy either Article 6 of the ECHR or section 3 of the HRA to construe the meaning of permanent residence.

Conclusion on the permanent residence issue

88. In my view, the judge did not misdirect himself in law as to the correct approach to this issue. Broadly speaking, he directed himself correctly and in accordance with the Circular. In the end, the main thrust of Mr Pointer's challenge was to the judge's evaluation of the facts. In order to succeed in this challenge, he must persuade us that the judge's conclusions on the facts were not open to him. As Mr Owen QC points out, this is a high hurdle for H to surmount. He has to show that the judge exceeded "the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible": per Ward LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577 at para 197. This test applies to all findings of fact. Importantly for present purposes, at para 16, Clarke LJ said the following in respect of evaluative assessments:

"Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

89. I have already rejected Mr Pointer's submission that the intention to make the UK one's permanent home cannot be inferred in circumstances where the evidence demonstrates neither a right permanently to reside in the UK nor any intention to obtain such a right. He says that the judge was wrong to find that H intended to reside in the UK for an unlimited period. He relies in particular on the fact that (i) H is a Saudi national, domiciled in Saudi Arabia; (ii) Saudi Arabia is the only State in which H has an indefinite right to remain; (iii) H is not and never has been resident in the UK for tax purposes; he has no assets in the UK that give rise to taxable income; (iv) H's UK visa permits him to remain in the UK for no more than 180 days per year; and

(v) prior to his appointment, he spent much less than half the year in the UK (in 2011, 38 nights and in 2013, 110 nights).

90. As Mr Pointer says, the judge identified one matter as being “magnetic in its attraction”. This is that H had been married three times. On each occasion the marriage had produced children. For each reconstituted family unit, the family home was based in the UK. The children of the first two marriages had all been educated here and speak English. At para 66, he said: “where a man chooses to live with his wife and children... says a great deal... about where he intends his home to be”. Mr Pointer submits that this conclusion (i) is wholly unreasoned, (ii) appears to be based on a misunderstanding of the evidence and (iii) places far greater weight than could properly be placed on the fact that a part of the education of each of H’s children took place in the UK.
91. Having considered the evidence that was available to the judge, there was in my view, ample material from which to conclude that H has chosen, over a period of in excess of 35 years and three marriages, to maintain his family base in the UK. That conclusion could properly provide an important part of the factual background against which the judge would consider whether H was or was not a permanent resident in the UK. More generally, H has not surmounted the high hurdle that he faces when challenging a factual assessment of this kind.

OVERALL CONCLUSION

92. For the reasons that I have given, I consider that the judge was wrong to hold that H is not entitled in principle to immunity from W’s claim. But the judge was entitled to conclude on the facts that H is not entitled to immunity because he is permanently resident in the UK and the claim does not relate to any official acts performed by H in the exercise of his functions. I would dismiss the appeal. It is, therefore, unnecessary to consider the issues raised by the Respondent’s Notice.

Lady Justice King:

93. I agree.

Lord Justice Hamblen:

94. I also agree.