Neutral Citation Number: [2022] EWHC 668 (QB)

Case No: QB-2020-004165

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2022

Before :

THE HONOURABLE MR JUSTICE NICKLIN

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Between :

Corinna Zu Sayn-Wittgenstein-Sayn	**Claimant**
- and -	
His Majesty Juan Carlos Alfonso Víctor María de Borbón y Borbón	**Defendant**

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Jonathan Caplan QC, James Lewis QC, Adam Chichester-Clark and **Andrew Legg**
(instructed by **Kobre & Kim (UK) LLP**) for the **Claimant**
Sir Daniel Bethlehem QC and **Professor Philippa Webb**
(instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 6-7 December 2021

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This judgment was handed down by the judge remotely by circulation to the parties' representatives and BAILII by email and publication on www.judiciary.uk. The date of hand-down is deemed to be as shown above.

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Approved Judgment

The Honourable Mr Justice Nicklin :

1. The issue to be resolved by the Court is whether, by operation of the State Immunity Act 1978, the Defendant is immune from the jurisdiction of the Court in respect of all or part of a claim for harassment brought against him by the Claimant.

A: The parties

2. The Claimant is a Danish national who has been a resident of Monaco since 2008. She lives in London and Shropshire.

3. The Defendant was the King of Spain and head of state from 22 November 1975 until his abdication on 18 June 2014, at which point his son, King Felipe VI became King of Spain and head of state. The Defendant retired from public life on 2 June 2019. From August 2020, the Defendant has been living in Abu Dhabi in the United Arab Emirates.

4. It is common ground that the Claimant and the Defendant were in a relationship from 2004. The Claimant alleges that, in January 2009, the Defendant asked the Claimant to marry him. Their relationship is said to have ended later in 2009.

B: The claim

5. On 16 October 2020, the Claimant issued a Claim Form seeking damages and an injunction against the Defendant on the grounds that he had pursued a course of conduct against the Claimant that, she alleged, amounted to harassment in breach of s.1 Protection from Harassment Act 1997.

6. In her Particulars of Claim, dated 29 December 2020, the Claimant identifies the alleged acts which she contends amounts to the course of conduct amounting to harassment for which, she alleges, the Defendant is responsible. The Claimant alleges that the harassment started in April 2012 and has continued until the Claim was issued.

7. As it will become important when I come to assess the claim for immunity, I need to set out, in detail, the pleaded claim in respect of the alleged acts of harassment in the period prior to the Defendant's abdication. As this includes allegations about third parties (who have had no opportunity to respond), fairness requires that I make clear that, at this stage, these are only allegations. I have redacted some names where the status of the individual means that the name is not relevant for the issues I have to decide. It is common ground between the parties that, for the purposes of this hearing only and the argument on immunity, the Court will assume the matters pleaded in the Particulars of Claim to be true. At this stage, the Court does not have – and there has been no investigation of – any evidence relating to these alleged incidents.

8. The detail of the alleged harassment in the period from April 2012 to 18 June 2014 is set out in the following paragraphs of the Particulars of Claim:

> "13. As detailed below, the Claimant was later informed by General Felix Sanz Roldán, the head of the Spanish National Intelligence Agency known as the 'Centro Nacional de Inteligencia' ('CNI'), that he had been responsible for deliberately leaking the identity of the Claimant to the media. He did not offer any reasonable explanation as to why he had done so. Thereafter General Sanz Roldán, the Defendant's agents and/or agents or contractors of

the CNI acting on the Defendant's instructions placed the Claimant, and others close to her, under physical surveillance which included vehicle and personal surveillance, trespassing onto her property at which she was residing and hacking into her/their telephones and computers.

…

16. During April to June 2012 General Sanz Roldán, acting under the direction or with the consent of the Defendant, co-ordinated a covert operation to enter and search the Claimant's office and apartment in Monaco. General Sanz Roldán utilised armed operatives from the Monégasque security company, [X], as a cover for the operation in order to enable a CNI team dispatched from Spain to gain access to her property without her consent. Operatives from [X company] informed the Claimant that 'the Spanish sweeping team' were arriving on 4 June from Madrid and would need five days 'to sweep' her office and apartment. Business and personal documents belonging to the Claimant had been examined and/or copied and some removed during the operation, without her consent.

17. The Claimant was told by the Defendant, and by General Sanz Roldán, that [X company] had been engaged to protect her from the paparazzi and from journalists who might steal documents. However, the true objectives of the Defendant were: to find and remove any documents in her possession related to his business and financial dealings; to ascertain any information about the Claimant which might be used to pressurise her to comply with his wishes; to prevent her from providing information in respect of anything which might incriminate him; and to install surveillance equipment.

18. General Sanz Roldán contacted the Claimant on a number of occasions by email and telephone using the alias 'Paul Bon'. 'Paul Bon' made it clear that he was acting under directions from the Defendant. The Defendant confirmed that this was the position in the course of telephone conversations between the Claimant and the Defendant during the period between April and June 2012.

19. In early May 2012 the Defendant told her that General Sanz Roldán would be arriving in London in order to meet with her in person, in terms that made it clear that he required her to meet with the General. The Claimant and General Sanz Roldán met in the Claimant's hotel room at the Connaught Hotel on 5 May 2012 at the Defendant's insistence. During the meeting he threatened the Claimant and her family by stating that he could 'not guarantee her physical safety or that of her children' unless she complied with what he described as 'recommendations' but which were, in fact, orders. This threat reasonably made the Claimant fear for her life and that of her children. The words themselves were clear and sinister but they were made all the more so by the fact that they were made by the head of the CNI on the Defendant's behalf in the United Kingdom, and whilst the Monaco operation was ongoing.

20. The Claimant travelled the same day to her apartment in Villars, Switzerland to visit her son. On arrival, the Claimant found that papers had been disturbed within her apartment and a copy of a book on the death of Princess Diana had been left on a coffee table (which, for the avoidance of doubt, did

not belong to the Claimant and had not been there before). The book was entitled 'Princess Diana: The Hidden Evidence, How MI6 and the CIA were involved in the death of Princess Diana'. That evening she received a telephone call from an unknown person who said, in Spanish, that 'there are many tunnels between Monaco and Nice' – it is averred that the telephone call and placement of the book are obviously connected.

21. On 17 May 2012, 'Paul Bon' (i.e. General Sanz Roldán) sent the Claimant an email stating that the 'services' that had been provided to her at her Monaco home and office were no longer necessary and that he would let [X company] know that going forward the Claimant or any person she designated would be exclusively dealing with her security. Mr 'Bon' added one 'last recommendation'. He said that it was 'advisable' for the Claimant to keep a security guard at her premises 'until the moment you send the black boxes with the documents to the place of your chose [sic].' Mr 'Bon' expressly stated that the Defendant had been informed of 'this intention'. The Claimant reasonably construed this as a threat to her person.

22. In one telephone call General Sanz Roldán threatened the Claimant that there would be consequences if she did anything against the Defendant's interests. The Claimant telephoned the Defendant in Madrid about this threat and on 18 May 2012 'Paul Bon' responded by email stating that there had been a misunderstanding.

23. On 11 June 2012, the Claimant received a further email from 'Paul Bon' referring to a number of matters which made allegations which were inculpatory of the Claimant and her business or financial affairs. The allegations were false and were partly based on documents which had been stolen and/or information obtained from her office/apartment in Monaco in April/May. The email said: 'Any leak of this information would have a devastating effect at this moment for the Institution and Your image'. The email was reasonably construed by the Claimant as a threat that these allegations would be leaked to the media if the Claimant failed to co-operate with the Defendant and General Sanz Roldán".

9. I can summarise the acts of harassment alleged against the Defendant following his abdication as follows:

i) The Claimant alleges that, at the direction of the Defendant or with his consent, she was placed under covert surveillance by CNI agents. This included an alleged attempt to place a tracking device on the Claimant's car and what the Claimant believes are attempts to intercept or monitor her communications.

ii) This surveillance is alleged to have included further targeting of the Claimant's property in the UK.

iii) In 2014, the Claimant alleges that the Defendant pressurised the Claimant to restart their relationship and, in May 2014, it is alleged that the Defendant again proposed marriage to the Claimant, which she rejected. In June 2014, following his abdication, it is said the Defendant began to travel more frequently to London. It is alleged that the Defendant was angered by the Claimant's refusal to restart their relationship and stated that there would be consequences if she

did not. The Claimant alleges that the Defendant pressurised the Claimant to return previous gifts that he had given to her and then started spreading false allegations that the Claimant had stolen monies from him.

iv) From October 2014, it is alleged that the Defendant engaged in a course of conduct designed to undermine the Claimant's personal and commercial relationships and/or to state falsely that she had stolen from him.

v) From early 2015, the Claimant alleges that the Defendant spread defamatory allegations about her and also supplied, or caused to be supplied, false information to the media, intending that it should be published and damage the Claimant's reputation.

10. The Claimant alleges that, as a result of this harassment, she has "*suffered great mental pain, alarm, anxiety, distress, loss of well-being, humiliation and moral stigma*". Specifically, in terms of her health, the Claimant alleges that the harassment has "*undermined her sense of wellbeing… [and] she has suffered great distress, anxiety [and] sleep deprivation.*" Although the Claimant claims damages which include the "*cost and expense of medical treatment for her anxiety and distress*", there is no pleading that the impact on her health amounts to personal injury or any form of recognised psychiatric injury.

11. A separate complaint has been made by the Defendant that several of the alleged acts, said to constitute the course of conduct of harassment, are said to have taken place outside the jurisdiction of England & Wales, occurring, variously, in Monaco, Switzerland, Abu Dhabi, Los Angeles, Tahiti, Austria, Riyadh and the Bahamas. Further, the Particulars of Claim contain allegations against Spanish Government officials, including agents of CNI. There is first instance authority, that, for the English Court to have jurisdiction over a claim for harassment, the harassing effect must be felt on the claimant whilst s/he is within jurisdiction: ***Rahman -v- ARY Network Limited*** **[2017] 4 WLR 22** [115]-[120]. This may be an issue that will need to be resolved if the claim survives the Defendant's challenge on the grounds of immunity.

12. Although the Defendant has not (yet) filed a Defence in these proceedings, it is right to record, in this judgment, that the Defendant denies what he calls "*unsubstantiated allegations*" made against him by the Claimant and any alleged wrongdoing by the Spanish State in the strongest terms. In evidence filed with the Court, on behalf of the Defendant, it is stated that he would defend the Claimant's claim on the merits. If the case goes further, the Defendant will have an opportunity to defend the claims made against him and, ultimately, the Court will hear evidence and make a decision after a trial.

C: The challenge to the Court's jurisdiction

13. As noted, no Defence has been served. Instead, on 18 June 2021, the Defendant issued an Application Notice seeking an order declaring that the Court had no jurisdiction to try the claim because the Defendant was immune under ss.1(1), 14 and 20 State Immunity Act 1978 ("SIA"). The Defendant has also challenged the claim on three further grounds:

i) that the Claim Form and Particulars of Claim have not been properly (or lawfully) served on the Defendant;

ii) that England & Wales is not the appropriate forum for the claim; and

iii) that the claim does not fall within the jurisdictional scope of the Protection from Harassment Act 1997.

The parties have agreed that these further grounds of challenge should be resolved, if necessary, after the Court has determined the issue of state immunity.

14. The claim to state immunity was summarised on the Defendant's behalf as follows. The Defendant is entitled to immunity from the jurisdiction of the English courts in his capacity as a senior member of the Spanish Royal Family and Royal House of Spain, including in respect of the claims brought in these proceedings. It is contended on the Defendant's behalf that this does not place him above the law. The Defendant is subject to the jurisdiction of the Supreme Court of Spain, but that Court alone.

15. The Defendant's claim to state immunity is advanced on two bases:

i) s.14 SIA confers immunity on the Defendant in respect of acts in his public capacity while he was head of state; and

ii) s.20 SIA confers immunity on the Defendant arising from his position as "sovereign" and a member of the current King of Spain's family and part of his household.

D: The evidence, including expert reports

16. The parties have exchanged witness statements. The Defendant's solicitor, Jeremy Kosky, has filed two witness statements relevant to the current application, dated 18 June 2021 and 19 November 2021. The Claimant has filed a witness statement, dated 8 October 2021, from her attorney, Robin Rathwell.

17. Mr Kosky states that the Defendant has lived in the Palacio de La Zarzuela since May 1962, and that it remains his residence and where he retains an apartment. Since August 2020, the Defendant has been living in Abu Dhabi, but many of his personal effects, clothes and belongings remain in his apartment at the Palacio de La Zarzuela. Queen Sofia, the Defendant's wife, lives in the Palacio de La Zarzuela. In Abu Dhabi, the Defendant has a personal security detail which is paid for by the Spanish Ministry of the Interior. Mr Kosky states that, notwithstanding the Defendant's move to the United Arab Emirates, "*he remains part of the Spanish Royal Family and intends in due course to return to Spain*". Although Mr Kosky does not state, in his witness evidence, that the Defendant remains part of the household of the current King of Spain, he makes the point that the Claimant's lawyers have purported to serve the Claim Form on the Defendant at the Palacio de La Zarzuela and have sought to correspond with the Defendant by writing to the Head of the Royal household. Mr Kosky states that there is no need for the Defendant to be physically resident in the same property as King Felipe VI to be regarded as being a member of the Royal household, and he draws analogies with other Royal Families in Europe.

18. Mr Kosky gave details of the occasions on which, following his abdication, the Defendant has continued to discharge public duties representing King Felipe VI. The Defendant attended the ceremony, in 2015, in Uruguay to mark the transfer of power to the new President of Uruguay; he visited Chile, on 11 March 2018, to observe the transfer of power to the new President Sebastian Pinera; and the Defendant and Queen Sofia attended the funeral of Grand Duke Jean of Luxembourg in May 2019.

19. In respect of the Defendant's relocation to Abu Dhabi, in his witness statement, Mr Rathmell states that, on 10 September 2020, the Spanish Minister of Foreign Affairs, European Union and Cooperation, Arancha González Laya, stated that the Defendant had settled in the United Arab Emirates as a private citizen without the support of the Spanish Ministry of Foreign Affairs. Mr Rathmell stated that the Defendant is not part of King Felipe VI's household and that he has lived in a separate household from the Crown Prince, latterly King Felipe VI, since 2002. On 15 March 2020, the Royal Family released an official statement that King Felipe VI was "*disinheriting himself*" from his father, discharging him from official representation and withdrawing the resources previously assigned to the Defendant in the budget of the Royal Family. Insofar as the Defendant continued to maintain an apartment at the Palacio de La Zarzuela, it is physically separate, and independent, from King Felipe VI. Since he ascended the throne in 2014, King Felipe VI has continued to reside at the Pabellón del Principe, situated about 1 kilometre from the Palacio de La Zarzuela.

20. Although, in his witness evidence, Mr Kosky dealt with the status of the Defendant, and referred to several parts of Spanish law, subsequently, each side has filed an expert report as to the constitutional and legal status of the Defendant under Spanish law.

    i) The Claimant has filed an expert witness statement from Dr José Antonio Choclán Montalvo dated 8 October 2021. Dr Montalvo is a practising Spanish lawyer and a doctor in criminal law. He was a Judge of the Spanish National High Court (Audiencia Nacional) from 1997 until 2000. Dr Montalvo has published widely in legal journals and books, mainly in the field of criminal law.

    ii) The Defendant has filed an expert witness statement from Professor Bernardo del Rosal Blasco dated 19 November 2021. Professor Blasco is also a practising Spanish lawyer and a Professor of Criminal Law at the University of Alicante. He was an alternate senior Judge at the Provincial Courts of Madrid from 1987 to 1991 and Alicante from 1991 to 1993.

21. Pursuant to directions given by the Court, the experts filed a joint report, dated 24 November 2021, setting out the matters on which they were agreed and the significant points of disagreement between them.

22. The experts are agreed about the following matters:

(1) The legal status of the Defendant prior to 19 June 2021

    i) Prior to 19 June 2014, the Defendant was King of Spain and the Head of State in Spain.

    ii) All acts performed by the Defendant during the time he was head of state, whatever their nature (public or private), are covered by inviolability. Therefore,

the Defendant was exempt from liability whilst being King of Spain and head of state, according to Article 56(3) of the Spanish Constitution ("the Constitution").

iii) In relation to the acts of the Defendant that occurred during his mandate as the King of Spain, this inviolability is absolute, as it covers any act of the King. The Defendant cannot be subject to reproach for actions in the exercise of his Royal duties, or, even, outside such exercise or performance.

(2) The legal status of the Defendant after 19 June 2014

iv) On 2 June 2014, the Defendant informed the President of the Government of Spain of his intention to abdicate, and that abdication was effective on 19 June 2014 by operation of Organic Law 3/2014 of 18 June 2014.

v) Organic Law 3/2014 automatically resulted in the succession of the Defendant's son, the Prince of Asturias, whom, from that moment on, became King Felipe VI and Head of the State of Spain, exercising in an exclusive way all the powers and prerogatives that the Constitution gives to the King of Spain.

vi) From the Defendant's abdication on 19 June 2014:

a) King Felipe VI has been the King of Spain and head of state of Spain and the constitutional powers and privileges are exclusive to the King of Spain, King Felipe VI;

b) the Defendant no longer had any of these powers;

c) the Defendant lost the prerogative of inviolability, afforded by Article 56(3) of the Constitution, in relation to his conduct following his abdication; and

d) a new Article 55 bis was introduced to Organic Law 6/1985 that, from that moment on, the only courts which may have jurisdiction over the Defendant are the Civil and Criminal Chambers of the Supreme Court in Spain, and only in relation to his conduct following his abdication.

vii) The Constitution does not regulate the legal status of an abdicated King.

viii) On the day of the Defendant's abdication, Royal Decree 470/2014 was published, which established that:

a) the Defendant would continue to use the title of King for life on an honorary basis, being addressed as "*His Majesty*" and receiving military honours analogous to those provided to the Heir to the Throne and provided the same in respect of Queen Sofia de Grecia, mother of King Felipe VI; and

b) the Defendant and his wife would occupy the position directly following that of the descendants of Don Felipe VI in the order of precedence of public offices and entities in official acts.

ix) The Defendant is a member of the Spanish Royal Family, according to the provisions of Royal Decree 2917/1981; being an ascendant in the first degree of King Felipe VI. The members of the Royal Family of Spain changed after King Felipe VI was proclaimed the King. King Felipe VI's sisters (infanta Doña Elena and infanta Doña Cristina), who were included in the Defendant's Royal Family, were no longer included in King Felipe VI's Royal Family. Once King Felipe VI became King, the members of the Royal Family of Spain became: King Felipe VI; Queen Doña Leticia; the King's daughters, Princess of Asturias Doña Leonor and infanta Doña Sofia; and the King's parents, the Defendant and Doña Sofia.

x) Since his abdication, the Defendant is entitled to hold a diplomatic passport as a member of the Spanish Royal Family, in accordance with the provisions of Royal Decree 1123/2008.

(3) Other matters

xi) Under the Constitution, the King of Spain receives an overall amount from the State Budget for the maintenance of the Royal Family and household. Each year, an allocation is approved in the General State Budget Law (Ley de Presupuestos Generales del Estado), which is available to be distributed by the King.

xii) In the period following his abdication until March 2020, the Defendant received a budget allocation from the monies King Felipe VI received under the State Budget. The Defendant ceased to receive this allocation in March 2020 and, since then, this allocation has been reallocated to the Household Contingency Fund to meet non-discretionary needs.

xiii) The Royal household in Spain is a constitutionally relevant body the mission of which is to serve as support for the King in all the activities derived from the exercise of his functions as head of state according to Article 1 of the Royal Decree 434/1988.

xiv) The Defendant represented the Spanish State at various public events in the period from 19 June 2014 until 2 June 2019. The Defendant's retirement from public duties became effective on 2 June 2019. Royal Decree 372/2019, of 7 June 2019, abolished the Secretariat of the Defendant.

23. The experts identified some areas of disagreement between them. As it is impossible for me to resolve disputes between the experts – not least because they were not called to give evidence or be cross-examined – and that the areas of disagreement have limited bearing on the issues I must decide, I will simply summarise. The experts disagreed about aspects of the Defendant's position and current status, as former King, and whether, following abdication, he would have been treated as "*an ordinary citizen*" in Spain prior to Organic Law 4/2014. They also disagreed about whether the title "*King Emeritus*" was merely an honorific title, or one reflecting a status with continuing legal and constitutional significance.

E: State/Sovereign Immunity: the Law

24. The relevant parts of the State Immunity Act 1978 provide as follows:

"**s.1 General immunity from jurisdiction**

(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

…

s.5 Personal injuries and damage to property

A State is not immune as respects proceedings in respect of—

(a) death or personal injury; or

(b) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom.

…

s.14 States entitled to immunities and privileges

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.

…

(5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.

…

s.20 Heads of State

(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—

(a) a sovereign or other head of State;

(b) members of his family forming part of his household; and

(c) his private servants,

as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.

(2) The immunities and privileges conferred by virtue of subsection (1)(a) and (b) above shall not be subject to the restrictions by reference to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964

…

(5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity.

s.21 Evidence by certificate

A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question—

(a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State..."

25. Before the SIA was enacted, the ambit and extent of state immunity was governed by the common law (and customary international law). The SIA replaced and codified the law and, insofar as it applies, is now the principal source of English law on state immunity: ***Apex Global Management Ltd -v- Fi Call*** **[2014] 1 WLR 492** [7]; ***R -v- Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No.3)*** **[2000] 1 AC 147** ("***Pinochet (No.3)***"). Lord Goff summarised (p.210B):

> "The effect is that a head of state will, under the statute as at international law, enjoy state immunity *ratione personae* so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity *ratione materiae* 'in respect of acts performed [by him] in the exercise of his functions [as head of state],' the critical question being 'whether the conduct was engaged in under colour of or in ostensible exercise of the head of state's public authority'... In this context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not."

26. As a cursory examination of the law reports will demonstrate, the law relating to state immunity is rather wedded to Latin terminology. Use of Latin in court judgments is now frowned upon by some. As I do not feel that it is my place to edit the judgments of people like Lord Goff, I shall instead attempt a translation, which I hope will aid comprehension of this judgment. Perhaps a workable explanation for the terms *ratione personae* and *ratione materiae* is "*by virtue of who s/he is*" for the former, and "*by reason of what s/he does*" for the latter. Applied to concepts of immunity, the former is a personal or status immunity, and the latter is a subject-matter or functional immunity.

27. Personal immunity for a head of state is provided under s.20 SIA (which applies the relevant provisions of the Diplomatic Privileges Act 1964) whereas functional immunity is provided by ss.1 and 14(1)(a). The Diplomatic Privileges Act 1964 incorporated parts of the Vienna Convention on Diplomatic Relations 1961 into English Law: s.2 and Schedule 1 of the Diplomatic Privileges Act 1964.

28. From ***Pinochet No.3*** at pp.201H-202G *per* Lord Browne-Wilkinson; p.265F-G *per* Lord Saville; pp.268F-269E *per* Lord Millett; p.285D-H *per* Lord Phillips; and ***Harb -v- Aziz*** **[2016] Ch 308** [33] *per* Aikens LJ I would draw the following principles:

    i) The personal or status immunity (*ratione personae*) affords complete immunity from the civil and criminal jurisdiction of the national courts of foreign states in respect of both public and private acts. It is confined to heads of state and heads of diplomatic missions and applies only for as long as the individual holds the relevant office. As Diplock LJ noted in ***Empson -v- Smith*** **[1966] 1 QB 426**, **438A**, it is "*elementary law*" that state immunity is "*not immunity from legal liability, but immunity from suit*".

    ii) Once a head of state, for example, leaves office, his/her personal immunity ceases, leaving only a subject matter immunity (*ratione materiae*), granted under s.14(1)(a) SIA, in respect of official acts performed whilst s/he was head of state.

    iii) Functional immunity, in respect of acts done by the relevant person in his or her "*public capacity*", is granted to preserve the integrity of the activities of the foreign state. It is a narrower form of immunity, but it is more widely available as it is afforded to anyone whose conduct in the exercise of authority of the state is called into question.

    iv) These immunities belong, not to the individual, but to the state in question. They exist to protect the sovereignty of that state from interference by another state.

29. If state immunity is established, it is for a claimant to establish, to the civil standard, an exemption to that immunity (e.g under s.5 SIA). The Court assumes the facts pleaded in the claimant's statement of case to be proved, without regard to any disputed matters. If there are disputed matters of fact upon which the claim for immunity would depend, then the Court can direct the trial of those matters as a preliminary issue: ***Al-Adsani -v- Government of Kuwait*** **(1996) 107 ILR 536, 550-551** *per* Ward LJ.

F: Submissions

(1) Defendant's submissions

30. Sir Daniel Bethlehem QC on behalf of the Defendant argues that the Defendant is immune from the Claim under two provisions of the SIA.

    i) The Defendant is immune as a sovereign and a member of the current King's family forming part of his household under s.20 SIA. This immunity applies to the public *and* private acts of a person.

    ii) Alternatively, the Defendant is immune under s.14 SIA, in respect of acts done in his or her "*public capacity*" (so-called "*public acts*" or "*official acts*").

(a) s.20 immunity as "sovereign" or as part of King Felipe VI's "household"

31. Based upon the Defendant's constitutional position following abdication, Sir Daniel contends that, as "*King Emeritus*", he occupies an "*unprecedented and new position*" in Spain. It is submitted that the Defendant retains immunity under s.20 SIA, following his abdication, on two bases:

    i) he is still a "*sovereign*" within the terms of s.20(1)(a) SIA and/or

    ii) he remains a member of King Felipe VI's "*household*" within the terms of s.20(1)(b).

32. As regards the former, Sir Daniel argues that there is a public policy imperative to protect a sovereign's dignity and the dignity of the monarchy: ***Re The Will of His late Royal Highness The Prince Philip, Duke of Edinburgh*** **[2021] EWHC 77 (Fam)** [47], [55]-[56] *per* Sir Andrew McFarlane P. The ordinary meaning of "*sovereign*" is the symbol of the monarchy and the personal embodiment of the state. This, it is submitted, is not limited to one person. State practice leaves open the possibility that more than one person may be a "*sovereign*": see "*The Position of Heads of State and Senior Officials in International Law*", Joanne Foakes (Oxford International Law Library, 2014, pp.29-30). Sir Daniel submits that, on the evidence, the Defendant has "*a unique role akin to a 'sovereign' in Spain*". He is entitled to use the title "*King*" and to be addressed as "*His Majesty*". Until his retirement from public life in June 2019, the Defendant was performing sovereign roles as a member of the Spanish Royal family, including representing King Felipe VI at several events (see [18] above).

33. In support of his argument that the Court should find that the Defendant is still a family member forming part of the "*household*" of the current King of Spain and therefore entitled to immunity under s.20(1)(b) SIA, Sir Daniel relied upon the following:

i) s.20(1)(b) is to be interpreted according to the principles of the Vienna Convention on the Law of Treaties ("VCLT") because s.20 gives effect to an international treaty, the Vienna Convention on Diplomatic Relations 1961 ("VCDR"): ***Reyes -v- Al-Malki*** **[2019] AC 735** [10]-[11] *per* Lord Sumption.

ii) The ordinary meaning of "*family member*" is "*a person who belongs to a (particular) family; a (close) relative*". In the context of family law, a "*household*" has been held to refer to people "*held together by a particular kind of tie, even if temporarily separated*": ***Santos -v- Santos*** **[1972] Fam 247, 262** *per* Sachs LJ; ***Re Dix deceased*** **[2004] 1 WLR 1399** [23] *per* Ward LJ.

iii) Under Article 32 VCLT, for the purposes of interpretation, recourse may be had to the preparatory work of the treaty. In the case of the reference in Article 37 VCDR to "*members of the family of a diplomatic agent forming part of his household*", the *travaux préparatoires* confirm that the emphasis is upon the close ties that derive from the phrase's ordinary meaning.

iv) The question of who comprises the members of the family forming part of the household was considered by the United Nations Law Commission ("ILC") in 1957-1958 and by the delegates to the United Nations Conference on Diplomatic Intercourse and Immunities held in Vienna in 1961, which culminated in the adoption of the VCDR. The ILC rejected a proposal to restrict immunities to the spouses of diplomats and their children under the age of 18 and to define family members by reference to whether they were "*living under the same roof*", and ultimately did not adopt a definition. The *travaux préparatoires* noted that "*household*" should be interpreted as a concept not a place.

v) The foreign state's laws determine the legal status of the family member within that state. The constitutional arrangements in Spain are a matter of fact and whether the Defendant "*form[s] part of [the] household*" of King Felipe VI is also a factual question to be resolved considering all the circumstances of the case. The Defendant is a member of the narrowly defined Spanish Royal Family (see [22(ix)] above). As is the case with other Royal Families in Europe, not all members of the relevant Royal Family are physically resident within the same building. Until 2020, the Spanish Royal Family were all resident within the Palacio de La Zarzuela. Although the Defendant is financially independent from King Felipe VI, the Spanish State still pays for the Defendant's security detail.

34. Sir Daniel seeks to distinguish the authority of ***Apex Global Management Ltd -v- Fi Call Ltd & Others*** **[2014] 1 WLR 492** on the grounds that the large number of members of the Saudi Royal Family meant that it was impossible to consider that they were all members of the King's family forming part of his household. Here, the Royal Family of Spain is a narrowly defined group of six people. Sir Daniel also contends that the Court can and should distinguish ***Apex*** on the further ground that the Court of Appeal did not formulate a test for the interpretation of the phrase, "*members of his family forming part of his household*", so it is open to me to decide, myself, whether the Defendant is a member of King Felipe VI's family forming part of his household on the evidence in this case.

(b) s.14 immunity for official acts

35. Some of the acts of harassment alleged by the Claimant relate to a period when the Defendant was King of Spain. Sir Daniel contends that several of these acts can be considered to have been done in his public capacity. In particular, he points to the allegations that the Defendant used the Head of CNI or its agents or contractors and other operatives to conduct physical and digital surveillance of the Claimant and alleged trespass on her property. He drew attention to a subtle, but he contended important, change of emphasis between the Claimant's Particulars of Claim and Mr Lewis QC's skeleton argument. In the skeleton argument, General Sanz Roldán is described not as the Head of the CNI, but as a "*close personal friend*" of the Defendant and the CNI agents are described as "*contractors*". These changes, Sir Daniel submits, demonstrate a recognition of the strength of the immunity claim in respect of these alleged acts of harassment.

36. Relying upon ***Jones -v- Ministry of the Interior of the Kingdom of Saudi Arabia and another*** **[2007] 1 AC 270**, Sir Daniel argues these acts, even if abusive or unlawful, would have been undertaken in the Defendant's official capacity. A person acts in his or her public/official capacity "*[w]here such a person acts in an apparently official capacity, or under colour of authority*" and it is irrelevant whether the person "*may have had ulterior or improper motives or may be abusing public power*" ([12] *per* Lord Bingham). Lord Hoffmann agreed that "*the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law*" ([74]) and "*… if the act is done under colour of official authority, the purpose of personal gratification […] should be irrelevant*" ([92]). In ***Jones***, the House of Lords concluded that the allegations of torture against Saudi military, police and prison officials and the Minister of Interior overseeing those departments involved conduct "*in discharge or purported discharge of [the official's] duties*" and "*no distinction is to be made between the claim against the Kingdom and the claim against the personal defendants*" ([11], [13]). The claims were therefore barred by state immunity.

37. Similarly, in ***Pinochet (No.3)***, the House of Lords considered that official conduct is one "*engaged in under colour of or in ostensible exercise of the head of state's public authority*": p.210C-D *per* Lord Goff; and p.241 *per* Lord Hutton. That can include conduct which is unlawful, criminal or otherwise an abuse of public power. Lord Browne-Wilkinson noted that "*actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae*" (at p.203G). Lord Millett similarly observed that the "*immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state*" (p.270G). The acts which formed the basis of extradition charges against Senator Pinochet, the former head of state of Chile, including torture, murder, and conspiracy, would have been acts done in his public/official capacity: p.205G-H *per* Lord Browne-Wilkinson; p.224F *per* Lord Goff; p.251C-D *per* Lord Hutton; p.266F-G *per* Lord Saville; and p.270D-F *per* Lord Millett.

38. Sir Daniel also relies upon Calver J's application of ***Jones*** in ***Surkis -v- Poroshenko*** **[2021] EWHC 2512 (Comm)** [20], [81]-[82] and the Judge's conclusion that advancing one's personal agenda or abusing power for private reasons is irrelevant to

the characterisation of the conduct as having been done "*under colour of authority*" ([74], [81]). Even if a state official abuses his/her power in pursuit of a private grudge, providing s/he acts in an official capacity, then state immunity will nevertheless apply: ***Fawaz Al Attiya -v- Hamad Bin-Jassim Bin-Jaber Al Thani*** **[2016] EWHC 212 (QB)** [15].

(c) Immunity of state officials in respect of giving evidence

39. Sir Daniel made a final submission that, pursuant to Article 31(2) VCDR and the international law principle that it embodies, state officials cannot presumptively be called to give evidence in the English Court. This submission was not developed very far. In his skeleton argument, Sir Daniel put it in this way:

> "As this hearing is not about any named State official, we do not address this issue further save for noting and emphasising that were the court to conclude… that [the Defendant] was not entitled to immunity, it should still be in contemplation that [he] would, if pressed into doing so, be subject to a significant immunity impediment in advancing a defence on the merits. This is because the court would be unable to compel evidence from State officials…"

(2) Claimant's submissions

40. James Lewis QC, on behalf of the Claimant, contends that the issues before the Court are, first, whether the Defendant enjoys personal immunity under s.20(1)(a) or s.20(1)(b) SIA. If he does, the Court has no jurisdiction over the Claimant's claim. If he does not, the question arises whether, in respect of any or all of the pre-abdication acts of harassment alleged against him, the Defendant enjoys functional immunity under s.14(1)(a). If he does, then in respect of such acts of alleged harassment that are protected by immunity, those would have to be removed from the Claimant's Particulars of Claim.

41. In respect of the immunity said to arise under s.20 SIA, Mr Lewis QC submits:

i) the Defendant is, palpably, not "*a sovereign or other head of State*". He relinquished that status when he abdicated. The only person entitled to immunity pursuant to s.20(1)(a) SIA in relation to the Kingdom of Spain is King Felipe VI; and

ii) the legal test for immunity for a family member forming part of King Felipe VI's "*household*" in s.20(1)(b) SIA has been clearly established by the Court of Appeal in ***Apex***. It applies to dependent family members. The Defendant is plainly not, and does not claim to be, a dependent of his son, King Felipe VI.

42. In respect of the reliance upon immunity under s.14 SIA, this can only potentially cover the allegations in the claim which predate the Defendant's abdication. These involve acts of harassment (including alleged harassment by publication) following the break-up of an intimate personal relationship between the parties. s.14(1)(a) SIA is inapplicable because:

i) they are clearly private acts which do not attract functional immunity and are therefore not protected by s.14(1)(a) SIA;

ii) there is no functional immunity for the commission of unlawful acts by a State (or state actors) outside its own territorial borders; and

iii) there is no state immunity for personal injury claims caused by an act or omission in the United Kingdom by virtue of the exception in s.5 SIA.

(a) s.20 immunity as "sovereign" or as part of King Felipe VI's "household"

43. The Claimant's primary submission is that, as a matter of statutory construction, the "*sovereign*" referred to in s.20(1)(a) must be a head of state. That is plain from (a) the title to s.20 "*Heads of State*"; and (b) the word "*other*". Mr Lewis QC submits that the matter is binary. Either the Defendant is a "*sovereign or other head of State*", and so entitled to immunity under s.20(1)(a), or not. There can be no separate category, as the Defendant contends, of a sovereign who is not head of state.

44. Further, former heads of State do not qualify for personal immunity under s.20(1)(a): ***Harb -v- Prince Fahd Bin Abdul Aziz*** **[2016] Ch 308** [39], [48] *per* Aikens LJ. The fact that the Defendant has been accorded a special constitutional status in Spain does not make him a sovereign within the terms of s.20(1)(a). Since he abdicated in 2014, the Defendant is not the head of state of Spain (and thus not a "sovereign"). Spain only has one sovereign, and that is now King Felipe VI.

45. As to the proper interpretation of s.20(1)(b), and whether the Defendant is a member of King Felipe VI's family forming part of his household, Mr Lewis QC submits that the decision of the Court of Appeal in ***Apex*** means that the Defendant's arguments must be rejected.

46. At first instance, Vos J had found that the immunity extended to "*another person undertaking the sovereign or head of state's duties*" ([32]). The appellants sought to persuade the Court of Appeal that the test for membership of the household of a head of state should extend further to "*adult members of the family of the sovereign who share with and assist in the exercise of royal constitutional and representational functions*" ([29]). The Court of Appeal held that, historically [23]:

> "… the central criterion for the extension of personal immunity to members of the diplomat's household (apart perhaps from spouses) is dependence, rather than performance by any such persons of diplomatic duties or functions on the diplomat's behalf"

And when Parliament came to codify the head of state immunity in s.20 SIA, it chose to define its extension to close members of the head of state's family using the same formula [24]:

> "… There is no hint of a suggestion that the functional basis for either the immunity itself, or its limited extension to persons other than the head of state, was intended to be any different than it had been understood to be in connection with diplomats and their families. There is in particular no indication that the use of the same phrase was, for the first time, intended to accommodate the notion that close members of a head of state's family deserved head of state immunity for the better performance of their own royal, governmental or constitutional duties."

47. That led Briggs LJ to conclude:

[35] In my judgment there is no interpretational basis for giving the phrase "members of his family forming part of his household" a wider meaning in relation to heads of state than in relation to diplomats. My reasons follow. First, I have already noted how the phrase had a relatively settled meaning in 1978 and that, when referring to it twice in section 20(1) of the 1978 Act, Parliament may reasonably be supposed to have understood that meaning or, at least, the understanding of it customarily applied by the United Kingdom Government.

[36] Secondly, the essence of the mechanism by which the 1978 Act grafts a form of personal immunity on the immunity *ratione materiae* already conferred on heads of state by Part I of the 1978 Act is, precisely and without any specific relevant modification, by reference to diplomatic immunity. Had section 20 of the 1978 Act, as originally intended, been confined so as to confer personal immunity on heads of state only when visiting the UK, then no extension of the nature and ambit (within the head of state's family) would have been appropriate. When by amendment the restriction of the period of immunity to visits to the United Kingdom was removed, and replaced with what the House of Lords in the ***Pinochet*** case **[2000] 1 AC 147** regarded as an immunity for as long as the head of state remained in office, there was no consideration by Parliament whether this necessitated a broader approach to the meaning of household, as applied to heads of state. The purpose of the amendment was (as is clear from its presentation in Parliament) simply to avoid a misapprehension that personal head of state immunity was limited to the short periods of royal visits.

[37] Thirdly, it is, as the judge recognised, clear that the United Kingdom Government did not think that section 20 of the 1978 Act used the household concept more widely in relation to heads of state than to diplomats, as is evident from the Immigration Directorate Instructions. Nothing in the Secretary of State's letter to the judge seems to me to come near undermining the effect of those Instructions as indicative of the United Kingdom Government's view.

[38] Fourthly, and of high importance in my judgment, the rationale for the identification of some extended meaning of household when applied to heads of state appears … to be based on a perception that it would be desirable to extend head of state immunity to those closely assisting the head of state in doing his job, for the protection of the dignity and independence of the assistants themselves, rather than of the head of state. But, as is clear from Lawrence Collins LJ's analysis in ***Aziz -v- Aziz (Sultan of Brunei intervening)*** **[2008] 2 All ER 501**, the extension of immunity beyond ambassadors to close members of their family was never designed for any such purpose, nor is it any part of the functional purpose of head of state personal immunity that it should be.

[39] Fifthly, once some form of extension of the meaning of household beyond spouses, civil partners, dependent children and relatives is contemplated, it is impossible to discern as a matter of interpretation of section 20 of the 1978 Act where the boundary should be set. The interpreter is cast adrift on an uncharted sea in which, like the judge, he is forced to make up the rules as he goes along.

48. Mr Lewis QC argues that Briggs LJ, in [38], specifically rejected the argument advanced by Sir Daniel as the justification for an expansive view of sovereign immunity (see [31] above). More generally, even if this wider interpretation were adopted, the Defendant would still not qualify. Whatever may have been the position immediately following his abdication, the Defendant no longer shares or assists in the exercise of any Royal, constitutional and representational functions. Since March 2020, the Defendant has retired from public life. The argument that, nevertheless, the Defendant remains a part of King Felipe VI's "*household*", requires an interpretation of the word divorced from its context.

(b) s.14 immunity for official acts

49. Mr Lewis QC submits that the test for determining functional immunity under s.14(1)(a) SIA is found in Lord Wilberforce's speech in ***Playa Larga (Owners of Cargo lately laden on board) -v- I Congresso del Partido*** **[1983] 1 AC 244**:

> "When ... a claim is brought against a state ... and state immunity is claimed, it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act *jure gestionis* or is it an act *jure imperii*: is it ... a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of a private law character such as a private citizen might have entered into?" (at p.262E-G)
>
> ...
>
> "The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity" (at p.267B-C).

50. In ***Kuwait Airways -v- Iraqi Airways*** **[1995] 1 WLR 1147, 1160A**, Lord Goff, commenting on this statement of principle, held that "*the ultimate test of what constitutes an act jure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform*".

51. In ***Holland -v- Lampen-Wolfe*** **[2000] 1 WLR 1573, 1577B**, Lord Hope emphasised that: "*It is the nature of the act that determines whether it is to be characterised as jure imperii or jure gestionis. The process of characterisation requires that the act must be considered in its context.*"

52. Mr Lewis QC also referred me to Calver J's analysis and examples given in ***Surkis -v- Poroshenko***. After reviewing the authorities set out above, the Judge continued:

> [53] The court is therefore concerned to identify the character of the act considered in its context.

[54] Ordinarily one can readily identify an act which is private in character as opposed to public in character. Examples of acts performed by state officials in their private capacity can be seen in the case-law:

(a) ***Harb -v- Aziz*** [2], [4]: an oral contract by the King of Saudi Arabia to "*provide for [his wife] financially and in a manner fitting for his wife*" was made in his private capacity.

(b) ***Thor Shipping A/S -v- the Ship Al Duhail*** **[2008] FCA 1842** [2], [61]: it was common ground before the Australian Federal Court that the alleged breach of a charterparty by Amiri Yachts, acting on behalf of the Amir of Qatar, related to acts in the Amir's private capacity including his ownership of a private vessel.

(c) ***Mobutu and Republic of Zaire -v- Societe Logrine*** **117 ILR 481 (1994)**: the Court of Appeal in Paris rejected a claim of head of state immunity in a case in which President Mobutu of Zaire did not pay for tents for the celebration of his sixtieth birthday because the contract was concluded in his private capacity.

(d) ***Ex-King Farouk of Egypt -v- Christian Dior***, Judgment of the French Court of Appeal of Paris dated 11 April 1957, **24 ILR 228** and ***Société Jean Dessés -v- Prince Farouk and Mrs Sadek***, Judgment of the Tribunal de Grande Instance of the Seine dated 12 June 1963, **65 ILR 37**: the former Egyptian King's purchase of luxury clothes for his wife was held to be an act in his private capacity.

(e) ***Francisco Mallén -v- United States***, Docket No. 2935, Opinion dated 27 April 1927, **21 American Journal of International Law 777 (1927)** [4], [7], cited by Lord Hoffmann in ***Jones -v- Ministry of Interior of Saudi Arabia*** [75]: a US deputy constable in Texas held a private grudge against the Mexican consul and assaulted him on two occasions. On the first occasion, he physically assaulted him in the street on a Sunday night, while on a private outing. This was an act in his private capacity: "*a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official*". On the second occasion, the constable, while on duty, boarded a car in which the consul was travelling, showed his badge, physically assaulted him and took him to prison. Although this seemed to be "*a private act of revenge*", it was held that "*the act as a whole can only be considered as the act of an official*". In other words, seen in context, the act was a public act.

[55] The ***Francisco Mallén*** case also illustrates the fact that the Court is not concerned with the purpose of or motivation for the act unless the motivation throws some light on the character of the act. As Lord Sumption in ***Benkharbouche -v- Embassy of the Republic of Sudan*** **[2019] AC 777**, stated at [8]:

> "… the classification of the relevant act was taken to depend on its juridical character and not on the state's purpose in doing it, save in cases where that purpose threw light on its juridical character."

[56] Lord Hoffmann made the same point in ***Jones*** at [92]

> "If the act is done under colour of official authority, the purpose of personal gratification … should be irrelevant."

And Lord Bingham likewise considered in ***Jones*** at [12] that a person acts in his or her public/official capacity "*[w]here such a person acts in an apparently official capacity, or under colour of authority*". It is irrelevant whether the person "*may have had ulterior or improper motives or may be abusing public power*".

[57] Blake J in ***Fawaz Al Attiya v Hamad Bin-Jassim Bin-Jaber Al Thani*** … [26] referred to Lord Hoffmann's observation in ***Jones*** in finding that the contention that the relevant dispute "*arose as a purely personal matter*" was irrelevant to whether state immunity was a bar to jurisdiction. In that case, the claimant was a dual British-Qatari national who brought a tortious claim against the defendant, who at the relevant time (but not at the time of the proceedings) was the Minister of Foreign Affairs and/or the Prime Minister of Qatar. According to the claimant, the defendant expressed interest in buying a plot of the claimant's land in Qatar but the claimant refused as the price was not acceptable. It was alleged that, subsequently, the defendant procured the making of several adverse decisions against the claimant by Qatari authorities, eventually resulting in a compulsory appropriation of the land by the Ministry of Municipality, purportedly for public use. At a later date, the claimant was arrested by Qatari authorities and allegedly tortured. The claimant contended that the confiscation of the land and his mistreatment by Qatari officials were done "*at the instigation of the defendant*". The court held, citing ***Jones***, that an official acting in an official capacity is entitled to state immunity "*even if the state official was abusing his power for reasons of his own and in pursuit of a private grudge*".

53. Applying this test, Mr Lewis QC submits that the acts of harassment alleged against the Defendant in the period prior to his abdication are "*quintessentially private in nature*". The context in which they are alleged to have occurred was following the breakdown in a romantic relationship. Hiring private investigators to enter the Claimant's homes in Monaco and Switzerland, threats made by an intermediary, telephone calls and emails and supplying false information to the media about the Claimant were private, not public acts. Any wealthy private person could have taken these steps. Mr Lewis QC accepted in submissions that had the Spanish state carried out acts of surveillance (including trespass onto her properties) then these might attract functional immunity, but it is not the Claimant's case that this is what happened. The Defendant has not submitted any evidence to suggest that these were state-sponsored actions or that General Sanz Roldán was acting in a state capacity. If that was in any doubt, Mr Lewis indicated that the Claimant would be content to make it clear in her Particulars of Claim that General Sanz Roldán was acting in a private capacity in respect of the acts alleged against him in the Particulars of Claim.

54. In the alternative, if any of the acts of alleged harassment had the appearance of being exercised in accordance with the Defendant's public functions, for example, the deployment of General Sanz Roldán and CNI operatives, then such acts are not immune when they occur outside the territory of Spain and involve criminal activity: ***Khurts Bat -v- Germany*** **[2013] QB 349** [70]-[101]. Based on that authority, Mr Lewis

QC contends that there can be no functional immunity in respect of unlawful activities outside of Spain and that this provides a further basis for rejecting reliance on s.14(1)(a). All the pre-abdication acts, relied upon in the Particulars of Claim, are alleged to have taken place outside Spain.

55. Finally, Mr Lewis QC contends that the Claimant can rely on s.5 SIA to defeat any immunity. He submits that, on the authority of ***Jones -v- Ruth*** **[2012] 1 WLR 1495**, claims for anxiety and associated losses are personal injury claims. A claim for compensation for psychiatric illness caused by unlawful discrimination is a claim for personal injury within the meaning of s.5 SIA: ***Nigeria -v- Ogbonna*** **[2012] 1 WLR 139** [14]-[28].

G: Decision

(1) Personal immunity under s.1 and s.20 SIA

(a) Sovereign under s.20(1)(a)?

56. I reject the Defendant's contention that, notwithstanding his abdication, his constitutional position in Spain means that he nevertheless remains a "*sovereign*" and entitled to the personal immunity afforded under s.20(1)(a).

57. Following his abdication, the Defendant has enjoyed certain status and privileges provided by Royal Decree 470/2014 and he remains part of the Spanish Royal Family. Prior to his retirement from public duties, the Defendant has also represented the King and the Spanish State at several events ([22(xiv)] above). Whilst it is, therefore, clear that the Defendant retains a special, and unprecedented, status of "*King Emeritus*" under the law and Constitution of Spain, it is equally clear that there is only one King of Spain and head of state of Spain and, since 19 June 2014, that has been his son, King Felipe VI.

58. I reject that, having regard to his special status, the Defendant should be regarded as falling within the definition of "*sovereign*" in s.20(1)(a). The subsection cannot be interpreted to sustain that construction. I accept Mr Lewis QC's submissions. Section 20, as the title to the section demonstrates, confers immunity on the head of state (and associated personnel). It does not, by s.20(1)(a) confer, and extend, that personal immunity to a former head of state, however much s/he may retain a special and respected position within the relevant state. As a matter of statutory construction, if the words "*sovereign*" and "*head of state*" in s.20(1)(a) were read disjunctively, then the word "*other*" would be redundant. The plain reading of the subsection indicates that, for those countries where this applies, the sovereign will be the head of state. Whatever his special constitutional position following abdication, the Defendant is neither the sovereign nor the head of state of Spain. Since abdication, he is not entitled to personal immunity under s.20(1)(a) SIA.

59. More generally, and in support of my construction of s.20(1)(a) as not including the Defendant, the personal immunity of a head of state is "*only narrowly available*" and confined to serving heads of state. It is justified because of his/her special status as the holder of the relevant state's highest office: "*It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether*

in respect of his public acts or private affairs": ***Pinochet (No.3)*** *per* Lord Millett at pp.268G-269C.

60. A striking feature of Sir Daniel's submissions is that, if his interpretation were correct, and the Defendant remains a "*sovereign*" within the terms of s.20(1)(a), then the immunity he enjoys is personal and life-long, subsisting even today, in respect of all civil and criminal proceedings. This would be so even though, on the agreed facts: the Defendant abdicated, and ceased to be the head of state of Spain, on 19 June 2014; retired from public duties on 2 June 2019; ceased receiving financial support from King Felipe VI in March 2020; and, since August 2020, has been living in the United Arab Emirates. At its most stark, Sir Daniel's argument, if accepted, would mean that if, tomorrow, the Defendant were to walk into a jewellers' shop in Hatton Garden and steal a diamond ring, he could face no civil or criminal proceedings in this jurisdiction (unless the Spanish state waived his immunity). Nothing in the principles of international law or respect for the dignity and sovereignty of the Spanish state compels such a conclusion. I reject the Defendant's construction of s.20(1)(a) SIA. He is not entitled to personal immunity on this ground.

(b) Member of King Felipe VI's family forming part of his household under s.20(1)(b)?

61. Whilst not determinative, it is notable that the evidence filed on behalf of the Defendant does not state that the Defendant is a member of the household of King Felipe VI. No evidence has been filed for or on behalf of the Spanish state, or King Felipe VI, stating that the Defendant is part of the King's household. There has been no claim, by the Spanish state, to state immunity in respect of the claim brought against the Defendant or any aspect of it. No certificate from the Secretary of State has been provided under s.21 SIA.

62. Whether the Defendant does fall within the definition of "*household*" is a matter of the proper construction of s.20(1)(b). The substance of Sir Daniel's arguments focused, again, on the special – even unique – position that the Defendant enjoys under the Constitution following his abdication. There is no doubt that he remains a member of the Spanish Royal Family, as an ascendant in the first degree of the current King. The real issue is whether the Defendant is, now, a member of the King's household so as to bring him within s.20(1)(b). I am satisfied that he is not and does not.

63. In my judgment, Mr Lewis QC is correct when he submits that the answer to this issue is to be determined by application of the Court of Appeal's decision in ***Apex***. I accept Sir Daniel's submission that, fundamentally, the assessment of "*household*" is a factual one, but it is an assessment that has to be conducted in accordance with the principles identified in ***Apex***. The plain fact is that the Defendant is not a dependent of King Felipe VI, the key factor identified by the Court of Appeal to qualify as a member of the "*household*". More widely, the Defendant does not live with the current King; he does not even live in Spain. The Court of Appeal rejected the functional definition of "*household*" to embrace those closely assisting the head of state to discharge his responsibilities, but even had that been the test, the Defendant would not have qualified. Whatever the extent of the assistance the Defendant provided prior to his retirement from public life, since then he has discharged no such function.

64. Even had I not been bound by ***Apex***, and had a free hand to interpret s.20(1)(b), I would still have comfortably rejected the Defendant's arguments. The claim that the

Defendant is a member of the current King's household is based on little more than a combination of his constitutional status and his position as the King's father. Being simply a member of the King's family clearly cannot be sufficient as otherwise the reference to "*household*" in s.20(1)(b) would be redundant. The position occupied by the Defendant under the Constitution is entirely honorary, respecting his position as the former King and father of the current King. Whilst the Constitution therefore acknowledges and respects the Defendant's position, and confers certain honours and privileges to reflect this, it provides no continuing role for the Defendant to perform. As matters stand presently, and since his retirement from public life, the Defendant has discharged no public functions in support of the Royal Family or Spanish state, and he has lived in the United Arab Emirates since August 2020. I asked Sir Daniel during his submissions whether the Defendant would nevertheless remain part of King Felipe VI's "*household*" under s.20(1)(b) if he moved to Siberia and had no further communication with his family or anyone in Spain. Sir Daniel said that he was reluctant to put the position in such stark terms, but that was the effect of his submissions. In my judgment, that demonstrates that, in the Defendant's argument, the term "*household*" means nothing more than "*family member*". That submission must be rejected on a simple reading of s.20(1)(b). Once ***Apex*** is applied, the Defendant's argument is untenable on the facts as to the current position and role of the Defendant.

(2) Functional immunity under s.14 SIA

65. I have found this issue more difficult. It is possible to state clearly the following propositions:

    i) the Claimant's claim is that the Defendant has been responsible for a course of conduct amounting to harassment of her in the period from April 2012;

    ii) the claim for functional immunity under s.14 can only be made in respect of acts of alleged harassment that pre-date the Defendant's abdication on 18 June 2014; and

    iii) to give rise to a civil cause of action, a course of conduct amounting to harassment must consist of conduct on at least two occasions: s.7(1)(a) Protection from Harassment Act 1997.

66. The challenge made by the Defendant, at this stage, is solely on the basis of immunity. The Court is not adjudicating on whether the pleaded claim for harassment is otherwise defective (and liable to be struck out) or in respect of which the Claimant has no real prospect of success. Given my rejection of the claim to personal immunity, even if the claim for functional immunity were upheld (in whole or in part), the effect would be that only the relevant pre-18 June 2014 acts (in respect of which an immunity was upheld) would be struck out of the Particulars of Claim. As this would leave more than two acts of alleged harassment, said to constitute the course of conduct, the Claimant's claim would then proceed, potentially to be further challenged on grounds other than immunity.

67. The boundary between a private act and a sovereign/public act is not always easy to draw. On the authority of ***I Congresso*** the Court is required to focus on "*the relevant act which forms the basis of the claim*". The claim is for harassment. The acts in respect of which functional immunity is claimed by the Defendant form only part of the alleged

course of conduct relied upon by the Claimant. My task is to consider the "*the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s)... should, in that context be considered as fairly within an area of activity… of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity*": ***I Congresso*** (see [49] above); and that I should "*identify the character of the act considered in its context*": ***Surkis -v- Poroshenko*** [53].

68. Applying that test, the outcome would be clear. The claim for functional immunity would fail. The claim for harassment, made up of several constituent elements alleged against the Defendant, is not (even arguably) within the sphere of governmental or sovereign activity. The alleged course of conduct amounting to harassment is not "*of its own character a governmental act*": ***Kuwait Airways*** (see [50] above). On the contrary, harassment is an act that any private citizen can perform.

69. Can functional immunity nevertheless be claimed in respect of individual acts relied upon as part of the course of conduct amounting to harassment? From the submissions of the parties, it appears that they are agreed that a claim for immunity can be maintained in respect of individual acts relied upon by the Claimant to support her claim for harassment. However, one of the difficulties of approaching that issue is that, in her Particulars of Claim, the claim is pleaded on several bases as to who it was that actually carried out the acts said to amount to harassment.

70. In paragraph 13 of the Particulars of Claim (see [8] above), it is alleged that: "*General Sanz Roldán, the Defendant's agents and/or agents or contractors of the CNI acting on the Defendant's instructions placed the Claimant… under physical surveillance which included vehicle and personal surveillance, trespassing onto her property… and hacking into her/their telephones and computers*". It is of some significance, for the claim to state immunity, whether the acts of surveillance and physical intrusion onto the Claimant's property were done by agents of CNI or other "*contractors*". No state immunity could be claimed in respect of the latter. Some acts of surveillance can only be carried out by state operatives, others can be carried out by well-resourced and skilled civilians.

71. In respect of the alleged targeting of the Claimant's home (see Paragraph 16 of the Particulars of Claim), the operation is said to have been directed by General Sanz Roldán ("*under the direction or with the consent of the Defendant*") utilising "*armed operatives from a Monégasque security company*". The precise circumstances of this alleged trespass into the Claimant's property are, at the moment, unclear. For a claim to state immunity, there is a big difference between a mission to gain access to the Claimant's property which was authorised, directed, and executed by CNI operatives, and a mission that was carried out by "*contractors*", with which the Spanish state had no involvement. Both could have been "*directed*" by the Defendant, but only in respect of the former could there be any conceivable claim to functional immunity.

72. I do not have enough information – or evidence – about the alleged operation which targeted the Claimant's Monaco home to resolve the question of functional immunity in respect of this alleged incident. I am not satisfied, on the pleaded case, that it raises an obvious claim to state immunity. Whether such a claim could be maintained, and on

what basis, would require further investigation of the factual circumstances and who, precisely, carried out the operation and in what capacity. If, for example, credible evidence emerges that the operation to gain entry to the Claimant's home was a state-sanctioned mission conducted by CNI operatives (or under their supervision), then the point can be revisited later in the proceedings. As matters stand, I am very far from convinced that there could be any claim to functional immunity on the grounds advanced by the Defendant. If the Spanish state wishes to step forward and to maintain that the trespass onto her property in Monaco (or other acts of covert surveillance) are protected by state immunity, then it will have an opportunity to do so. In reaching this conclusion, I have taken into account that the claim will be continuing in any event. The point in dispute here relates to one incident relied upon by the Claimant as an alleged act of harassment. Even if upheld, the immunity claim cannot dispose of the Claimant's claim.

73. Mr Lewis QC's further point that the trespass into the Claimant's Monaco home was an act that took place outside Spain (see [54] above) is not one that I need to resolve, but had it been material, this objection appears to be well-founded.

74. In my judgment, the remaining pre-abdication acts of alleged harassment (Paragraphs 19-23 of the Particulars of Claim) cannot attract any functional immunity. Apart from the suspicious circumstances in which the Claimant discovered the book about Princess Diana left in her apartment in Switzerland, and the telephone call she received later that evening (neither of which is directly attributed to state actors), the only connection to the Spanish state in relation to the remaining acts is that they are alleged to have been carried out by General Sanz Roldán. But the making of allegedly harassing threats, by email or by telephone, by a high-ranking state official does not, without more, make them state acts. ***Mallén -v- United States*** (cited by Calver J in ***Surkis -v- Poroshenko***) usefully demonstrates the difference. The assault of the Mexican consul by a US deputy constable in the street on a Sunday night, while on a private outing was held to be "*a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official*". A later incident, when the constable was on duty, in which he boarded a vehicle in which the consul was travelling and assaulted him was, by contrast, properly to be regarded as a "*public act*". The recent case of ***Fernando -v- Sathananthan*** **[2021] EWHC 652 (Admin)** [37]-[40] also helpfully analyses the difference "*between acts performed qua diplomat and acts performed in a personal capacity*".

75. For the sake of clarity in the future conduct of the Claimant's claim, I consider that the Claimant should, as Mr Lewis QC offered, make it clear in her Particulars of Claim that the acts alleged against General Sanz Roldán are said to be acts of his in his personal capacity, not as head of the CNI or other official capacity.

(3) s.5 SIA

76. Although, based on my decision, the point does not arise, I should deal, finally, with the submission that, had an immunity subsisted, the Claimant's claim could nevertheless continue on the basis of s.5 SIA. I would have rejected that argument. The Claimant's claim is for pure harassment. The loss she claims does not include a claim for any recognised psychiatric injury (see [10] above). As such, I do not accept that the Claimant's claim is, or includes, a claim for personal injury. A claim for distress and anxiety arising from an alleged course of conduct amounting to harassment is not,

without more, a personal injury claim. Neither of the authorities relied upon by Mr Lewis QC assists the Claimant. The claimant in ***Jones -v- Ruth*** was pursuing a claim for psychiatric injury (i.e. a claim for personal injury). ***Nigeria -v- Ogbonna*** is authority only for the proposition that "*personal injury*", as used in s.5 SIA, should be given its normal meaning in domestic law; i.e. to include a claim for a recognised psychiatric injury (see [27] *per* Underhill J). The short point is that, in her Particulars of Claim, the Claimant makes no claim that she has been caused a recognised psychiatric injury by the alleged harassment. Her claim is therefore not a claim for personal injury within the terms of s.5 SIA; it is a claim for distress caused by the alleged harassment.

(4) Immunity of state officials

77. I did not understand Sir Daniel's submissions on this point to be advanced in support of his main arguments. They were, if I understood them correctly, adverting to potential practical difficulties that the Defendant may encounter were the claim to continue. If those difficulties do materialise, then, in the first instance, the Court will try to resolve them. If, ultimately, the Defendant is prevented from gaining access to and presenting significant evidence in his defence, then the Court may have to consider whether he would be able to receive a fair trial. If the Court reached the conclusion that a fair trial was not possible, then the Court may stay the proceedings. But these are issues that are some way off, and I need not say any more about them at this stage.

H: Conclusion

78. For the reasons set out above, my decision is that none of the grounds on which state immunity was claimed have been made out. The claim will therefore continue. In the interests of clarity, the Claimant will be required to amend her Particulars of Claim to make clear that acts alleged against General Sanz Roldán are said to have been carried out by him in his personal capacity.