Neutral Citation Number: [2022] EWCA Civ 1505

Appeal No: CA-2021-000619
Case No: ZW20C00036

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION (DIVISIONAL COURT)
Sir Andrew McFarlane. President of the Family Division and Sir Duncan Ouseley

Royal Courts of Justice, Strand
London WC2A 2LL

Date: 18/11/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE MOYLAN
and
LORD JUSTICE BAKER

BETWEEN:

THE LONDON BOROUGH OF BARNET

Claimant/Respondent

and

AG (A Child)

Respondent/Appellant

THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVLOPMENT AFFAIRS

Respondent

Caoilfhionn Gallagher KC, Tatyana Eatwell, and Chris Barnes (instructed by **Bhatt Murphy**) for the **Appellant Child** (AG)

Hannah Markham KC, **Kate Tompkins** and **Peter Webster** (instructed by **HB Public Law**) for the **Claimant/Respondent** (Barnet)

Sir James Eadie KC, **Professor Vaughan Lowe KC**, **Joanne Clement KC**, **Jason Pobjoy** and **Belinda McRae** (instructed by **Government Legal Department**) for the **Secretary of State** (SSFCDA)

Hearing dates: 1-2 November 2022

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on Friday 18 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This case concerns the question of whether certain provisions of the Diplomatic Privileges Act 1964 (DPA) and the Vienna Convention on Diplomatic Relations 1961 (VCDR) are incompatible with article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment" (article 3). Article 1 of the ECHR (article 1) provides that the parties "shall secure to everyone within their jurisdiction the rights and freedoms defined" including article 3.

2. The appellant AG (who is now 17, but was 14 in 2020 when the relevant events occurred) and her 5 siblings were subjected to severe ill-treatment, and both physical and psychological abuse by both their parents. The events took place whilst their father was an accredited diplomat and the family was living in the London Borough of Barnet. Barnet attempted to take steps to protect the children, but was impeded by the provisions of the DPA and the VCDR, which provided the father, as a diplomatic agent, with immunity from the criminal, civil and administrative jurisdiction of the receiving state (article 31). The civil jurisdiction immunity for these purposes includes family jurisdiction immunity (see Professor Denza in *Diplomatic Law* 4th edition (2016) at page 235).

3. I will explain in due course how Barnet's application for a declaration of incompatibility came before the Divisional Court. In essence, however, Mostyn J gave directions on 28 May 2020 for the hearing of that application.

4. At [83]-[106] of its comprehensive judgment, the Divisional Court declined to make the declaration of incompatibility. Its reasoning is encapsulated in [98] as follows:

> In the light of that analysis, it is our judgment that there is no conflict between the ECHR and DPA/VCDR. The ECtHR jurisprudence requirement for a legal system to be in place to protect children through legislation, investigation and then the taking of other measures, cannot be read as also requiring the UK and the other Council of Europe Member States, all parties to the VCDR, to adopt a system which would require them to breach the VCDR towards each other and to other states. The ECHR does not require that in its text, and there is no jurisprudence which requires the Contracting Parties to breach the VCDR in order to avoid a breach of the ECHR. … That is because the ECtHR could not contemplate requiring a breach of an international Convention in order that its obligations be met, let alone a Convention of global reach, well beyond the regional concerns of the ECHR. …

5. AG, supported by Barnet, challenges this reasoning. They contend that article 3 includes a systems duty on the state to take effective measures to prevent private acts of torture, inhuman or degrading treatment or punishment. In *Z v. United Kingdom* (2002) 34 EHRR 3, the ECtHR said at [73] that article 3 enshrined "one of the most fundamental values of democratic society", and that "[t]hese measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge". Effective deterrence was required (see *A v. United Kingdom* (1998) 27 EHRR 611 at [22]). AG complains also about the suggestion that the ECHR expressed only regional concerns. This did not form a central plank of AG's oral argument.

6. AG submitted that the systems obligation was absolute, but not unfettered. It was an obligation to establish a framework of laws, precautions, procedures and means of enforcement which would protect children from such conduct to the greatest extent reasonably practicable (c.f. Lord Bingham at [2] in *R (Middleton) v. West Somerset Coroner* [2004] 2 AC 182). Ultimately this formulation seems to have been largely common ground (see also article 2 of the unincorporated UN Convention against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment (UNCAT) providing for states to take effective measures to prevent torture).

7. AG accepted also that the ECtHR was required under article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), in interpreting the ECHR, to take account of "any relevant rules of international law applicable in the relations between the parties". The ECHR should, therefore, so far as possible, be interpreted in harmony with other treaties (see *Al-Adsani v. United Kingdom* (2002) 34 EHRR 11 (*Al-Adsani*) at [55], *Demir v. Turkey* (2009) 48 EHRR 54 at [67] and *Al-Dulimi v. Switzerland* (2016) (5809/08) (*Al-Dulimi*) at [134]).

8. In essence, AG argued that, in this case, it was simply not possible to interpret article 3 in harmony with the DPA and the VCDR. The ECtHR would seek to produce alignment between treaties, but would not engage in a harmonising process of interpretation (i) if that would impair the very essence of the convention right (*Al-Adsani* at [52]-[53]), or (ii) if it would prevent the ECtHR from performing its duty in full (*X v. Latvia* (2014) 59 EHRR 3 (*X v. Latvia*) at [94]). Moreover, when looking to interpret other rules of international law, the ECtHR would ask whether they were consonant with the ECHR (*Al-Dulimi* at [139] and *Matthews v. United Kingdom* (1999) 28 EHRR 361 (*Matthews*)). Accordingly, the ECtHR would give precedence to article 3 of the ECHR which was *jus cogens* (as the ICJ explained in *Belgium v. Senegal* 20 July 2012 at [99]: "the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens)"). This was a "clean slate" case where there was no previous ECtHR authority (just like *Rabone v. Pennine Care NHS Trust* [2012] 2 AC 72 (*Rabone*), [19] and [119]). The ECtHR would give primacy to article 3, read together with the principles of non-refoulement in article 3(1) of UNCAT and the primacy of the best interests of children provided for by article 3(1) of the UN Convention on the Rights of the Child ('UNCRC'). AG did, however, acknowledge that the UNCRC was not incorporated into English law and could not, therefore, be given direct effect.

9. Ultimately, therefore, AG submitted that the UK's inability to provide effective protection for AG and the siblings when to do so, using the powers available under the Children Act 1989, would have been reasonably practicable, meant, as Mostyn J had suggested in his judgment of 16 March 2020 at [49], that articles 1 and 3 of the ECHR on the one hand and section 2 of the DPA and articles 31 and 37 of the VCDR on the other, were irreconcilably in conflict.

10. Conversely, the SSFCDA submitted that the DPA and the VCDR codified one of the oldest principles of customary international law. The Divisional Court made that clear by quoting extensively from the judgments in *Al-Malki v. Reyes (SSFCDA intervening)* [2017] UKSC 61, [2019] AC 735 (*Reyes*) (see also *Basfar v. Wong* [2022] UKSC 20, [2022] 3 WLR 208 (*Wong*) at [16]-[18]). The VCDR is the cornerstone of international relations and has withstood the test of centuries. It is intended to protect diplomats against the most serious of charges, and it operates reciprocally to protect diplomats from all countries both between democratic states and states where there is less mutual trust. The UK cannot unilaterally change the provisions of the VCDR, and there have in fact never

been any amendments to it. The VCDR provides its own remedies, within its terms, for the situation in which diplomats break the laws of the receiving state. For example, the sending state may voluntarily waive immunity, the receiving state may declare a diplomat to be *persona non grata*, and, in an extreme case, the receiving state may require the mission to be scaled back or closed. The VCDR provides a clear and well understood international framework for the exchange of diplomatic missions between 192 contracting states. At [49]-[56], the Divisional Court had set out the risks to the safety of the UK's diplomats if the VCDR were not adhered to, as had been explained in the detailed evidence of Ms Alison Macmillan MVO, deputy director of the protocol directorate at the FCDO.

11. In essence, the SSFCDA submitted that there was no case in which the ECtHR had decided that article 3 was either incompatible with or should be held to outweigh the VCDR. The principles established by Lord Bingham in *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 had been endorsed at the highest level and repeated recently in Lord Reed's judgment in *R (AB) v. Secretary of State for Justice* [2022] AC 487 (*AB*) at [50]-[60]. The ECtHR, but not the domestic courts, could develop its jurisprudence beyond existing case-law. The task of the domestic courts was to keep pace with ECtHR jurisprudence, neither more nor less. They should not go further than they could be fully confident that the ECtHR would go (see [57] of *AB*). The domestic court could and should, where possible, anticipate how the ECtHR would decide the case on the basis of established principles (see [59] of *AB*). It was not, however, open to the domestic court, under the Human Rights Act 1998 (HRA), to decide an appeal on the basis of principles which ought now to be adopted in the light of a body of material concerned with other international instruments (see [60] of *AB*).

12. In these circumstances, the SSFCDA submitted that this court must, in effect, bite the bullet. The court had to decide, as the Divisional Court had effectively done, that it was not reasonably practicable to apply the precautions, procedures and means of enforcement, which would have protected AG from harm, to the children of diplomats covered by the DPA and VCDR. The repercussions would be too serious. The methods available to protect the children of diplomats were not perfect, but were the best that could reasonably practicably be achieved. Those methods were those provided for within the VCDR itself and by the other consensual processes. There was, in the circumstances, no incompatibility that could or should be made the subject of a declaration under section 4(2) of the HRA.

13. I have decided, for reasons that I shall explain, that the submissions of the SSFCDA are broadly to be preferred, and that the appeal should be dismissed.

14. In this judgment, I will now set out some of the essential factual background, the main legislative provisions, before dealing in a little more detail with the Divisional Court's judgment and with the issues raised by the arguments. I have identified those issues as follows: (i) the precise content of the systems obligation on the contracting state provided for by article 3, (ii) whether the Divisional Court was right to decide that there is no conflict between the ECHR on the one hand and the DPA and the VCDR on the other hand, (iii) whether the Divisional Court was right to decide that neither article 3 nor ECtHR jurisprudence required the UK to breach the VCDR, and (iv) if there is a conflict between article 3 and the DPA and the VCDR, should a declaration of incompatibility be made?

Essential factual background

15. I do not intend to recite all the facts, which are summarised in the Divisional Court's judgment, to which reference should be made for the detail. The following summary is largely taken from [8]-[30] of that judgment.

16. The 6 children of the family varied in age in 2020 between 5 and 18. Barnet received a safeguarding referral in November 2019, which they investigated under section 47 of the Children Act 1989. The parents relied on their immunity to refuse to allow their schools to provide information or to allow Barnet to speak to the children. In January 2020, Barnet received a second safeguarding referral from the 2 youngest children's school, and, as a result, spoke to 5 of the 6 children, who complained, in effect, that their parents used excessively harsh discipline and punishment, well beyond the point of cruelty. The parents again claimed immunity and denied hitting their children.

17. Barnet applied for an emergency protection order under section 44 of the Children Act 1989 on 21 January 2020. Barnet Family Court transferred the case to the High Court. On 22 January 2020, Mostyn J was considering a further application for an interim care order. He adjourned the question of diplomatic immunity, warning the parents that their conduct should not be repeated.

18. After a period of absence in the sending state, the parents signed an agreement on 29 February 2020 with Barnet allowing it to speak to their children and to make visits to the family home. The parents also agreed not to hit their children or to use physical punishment.

19. On 16 March 2020 (after a hearing on 3 March 2020), Mostyn J stayed the proceedings, finding that there was "a formidable case of deliberate historic harm and risk of future harm, both physical and psychological" (*A Local Authority v. AG* [2020] 3 WLR 133). He was sympathetic to Barnet's case, but thought it would be a step too far to use the interpretative provision in section 3 of the HRA to interpret the VCDR as subject to a further exception to immunity for public law applications to protect children or vulnerable adults at risk within the diplomat's family. Mostyn J said that, whilst no application had been made for a declaration of incompatibility, his very provisional view was that articles 31 and 37 of the VCDR were irreconcilable and therefore incompatible with articles 1 and 3 of the ECHR.

20. Barnet then asked the SSFCDA to seek a waiver from the sending state. A waiver was refused, but the sending state recalled the father with immediate effect. On 6 April 2020, the SSFCDA informed the sending state that the father and his family were *personae non gratae* and were required to leave the UK at the first opportunity, which was on 18 April 2020.

21. Before 18 April 2020, the 4 elder children left home and claimed asylum in the UK. After the parents and the two youngest children left on 18 April 2020, Mostyn J made a care order in respect of AG.

22. Barnet then made an application for a declaration of incompatibility, which was opposed by the SSFCDA on the grounds that it was academic. Mostyn J gave permission for the application to proceed in a judgment dated 28 May 2020 (*A Local Authority v. AG (No. 2)* [2020] EWHC 1346 (Fam)) on grounds including the importance of the issues raised, the fact that his decision of 16 March 2020 conflicted with 2 earlier first instance decisions (*Re B (A Child) (Care Proceedings: Diplomatic Immunity)* [2003] Fam 16 (*Re B*) and *A Local Authority v. X* [2018] EWHC 874 (Fam), [2019] 2 WLR 202 (*ALA v. X*),

and that there were 23,000 people including children in the UK benefitting from diplomatic immunity.

23. The Divisional Court dismissed the application on 13 May 2021 (having heard argument on 2 and 3 March 2021 - *London Borough of Barnet v. AG* [2021] 3 WLR 875).

The Divisional Court's judgment

24. Having set out the facts and the relevant legislative provisions, the Divisional Court recorded at [79]-[80], the 4 steps required when considering whether to make a declaration of incompatibility. The first question was to ask whether the VCDR immunities prevented Barnet and the court taking the statutory steps which it otherwise would have done, notably in this case an emergency protection order and/or an interim care order. The second question was whether, on their natural meaning and effect, the material provisions of the DPA and VCDR were incompatible with (now) articles 1 and 3 of the ECHR. The third question arose only if there was incompatibility; it was to ask whether the conflict could be resolved by a reading down interpretation. The fourth question, if that could not resolve the incompatibility, was to ask whether the court should exercise its discretionary power to make a declaration under section 4 of the HRA.

25. The first question was not in issue, so the Divisional Court proceeded to the second question, which it answered in the negative at [83]-[106]. At [83], the Divisional Court made clear that the immunity was from suit not legal liability. Such immunity did not mean that the diplomat was not within the jurisdiction within the meaning of article 1. The scope for conflict arose because article 3 had been interpreted by the ECtHR as encompassing a positive obligation necessary to secure the rights and to make them fully effective.

26. Having considered in some detail the nature of the systemic, investigative and operational duty under article 3, the Divisional Court concluded at [94] that it was clear that the legal framework represented by the Children Act 1989 represented a system that complied with article 3. Although diplomats were not free (under article 41 of the VCDR) from an obligation to comply with those laws, they were not as practical or effective in their application to a diplomat's children as they were for others, because of the operation of the VCDR. Some protection had been achieved for the four children still in the UK. Immunity might have been waived and the return to the sending state might have led to protective measures there. Declaring a person as *persona non grata* under the VCDR could give practical effect to the article 3 obligation. There was no blanket excision from the ECHR in respect of the children of diplomats. The facts here show that Barnet and the SSFCDA took the steps they could take to investigate and to protect the children. The DPA limited Barnet's powers, but the duty under the ECHR required the FCDO to act under the VCDR with the best interests of the children in mind. It was against that background that the Divisional Court reached the conclusions it did at [98] set out at [4] above.

27. Having considered authorities on the limitations on the absolute nature of the article 3 duty, the Divisional Court concluded at [105] that the natural meaning of article 3, as developed by the ECtHR, provided no basis for saying that the DPA, or more realistically, the VCDR, was incompatible with it. No ECtHR authority suggested that that was so.

28. The Divisional Court then dealt with a series of arguments based on the UNCRC, concluding at [113] that the children were not without protection, even if that protection was not the same as others within the jurisdiction of the receiving state. In the interests

of reciprocal diplomatic immunity, understood and applied on a global basis, the children were to be protected in the receiving state only if the sending state waived immunity. Otherwise, they were to receive the protection of the sending state, following either recall or a declaration of *persona non grata*, where the case was seen as sufficiently severe.

29. At [116], the Divisional Court also concluded that the ECtHR "would not interpret any provision of the ECHR so as to create an obligation on the member states of the Council of Europe to disapply the VCDR to children and their diplomat parents, where the investigatory and protective obligations in Article 3 would otherwise apply". It would take account of "the general principles of international law, mindful of its special character as a human rights treaty, but interpreted as far as possible in harmony with other principles of international law".

30. The Divisional Court disagreed with the views as to the relationship between the DPA and the UNCRC or ECHR expressed *obiter* by Dame Elizabeth Butler-Sloss P in *Re B*, and by Gwynneth Knowles J in *ALA v. X*.

31. Having said that it did not need to consider whether the DPA could be read down under section 3 of the HRA, the Divisional Court expressed its view at [120]-[125]. It then dealt with article 6 of the ECHR and inviolability, which were not issues before us. It said that it would not anyway have granted a declaration of incompatibility in the exercise of its discretion.

The main legislative provisions

32. I will not repeat all the legislative and treaty provisions mentioned above, but it is useful to record in one place the central provisions of the HRA, the DPA and the VCDR as follows.

33. Section 3(1) of the HRA provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights [including article 3]".

34. Section 4 of the HRA provides that "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right. (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility".

35. Section 2 of the DPA provides that the articles of the VCDR set out in schedule 1 "shall have the force of law in the United Kingdom".

36. Article 30 of the VCDR included in schedule 1 to the DPA provides that "[t]he private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission".

37. Article 31 of the VCDR included in schedule 1 to the DPA provides that:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of [inapplicable exceptions for real property, succession and professional or commercial activity] …
>
> 2. A diplomatic agent is not obliged to give evidence as a witness.

> 3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
>
> 4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

38. Article 32.1 of the VCDR included in schedule 1 to the DPA provides that: "The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State".

39. Article 37.1 of the VCDR included in schedule 1 to the DPA provides that "[t]he members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36".

40. Article 41.1 of the VCDR (which is not scheduled to the DPA) provides that: "[w]ithout prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state".

41. It is also unnecessary to reproduce in this judgment the coercive provisions of the Children Act 1989. Suffice it to say that the court has significant powers to make orders that are effective against parents and others to protect the child's welfare, which is expressed in section 1 to be the court's paramount consideration.

Issue 1: What is the precise content of the systems obligation on the state provided for by article 3?

42. As I have already said, only the positive systems obligation under article 3 was argued on appeal. The content of that obligation relevant to this case was, as I have also said, seemingly agreed as being to establish a framework of laws, precautions, procedures and means of enforcement which would protect children from such conduct to the greatest extent reasonably practicable.

43. The common ground unfortunately ended with that formulation. The SSFCDA argued that the words "reasonably practicable" incorporated the concepts of: (i) reasonableness in all the circumstances (*E v. Chief Constable of the RUC* [2009] 1 AC 536 per Baroness Hale at [10]), (ii) the obligation being interpreted in such a way as not to impose an impossible or disproportionate burden upon the state (*Osman v. United Kingdom* (2000) 29 EHRR 245 (*Osman*) at [115]-[116], and *Smiljanic v. Croatia* (2022) 74 EHRR 10 (*Smiljanic*) at [70]), and (iii) the state having failed to take measures that were within the scope of its powers (*Osman* at [116]). The SSFCDA submitted that the concepts of national and international legality were included here.

44. In response, AG and Barnet rejected these limitations on what they contended to be an absolute obligation upon the state, albeit with a different content from the duty on the state not itself to torture or to subject people to inhuman or degrading treatment or punishment. They submitted that the qualifications being spoken about in both *Osman* and the other cases (including specifically *Mamazhonov v. Russia* (2017) 64 EHRR 26 (*Mamazhonov*) at [173]-[174]) were to the operational, not the systems duty. Moreover, AG drew a clear distinction between cases concerning the qualified rights under article 6, and the cases concerning the absolute obligations in article 3. AG contended that it

was, anyway, not impossible or disproportionate to expect the UK to seek amendments to the VCDR, nor did that impose an excessive burden on the state.

45. The parties cited numerous authorities in addition to those that I have mentioned, but I do not intend to refer to them all. That is because, in my judgment, there is something of a disconnect in these arguments. The content of the relevant systems duty under article 3 is agreed between the parties and supported by the authorities I have already cited. The difficult question, which it is accepted has never been determined before, is whether that duty requires the UK to breach or seek amendments to the VCDR. That depends on whether it is reasonably practicable for the UK to do so, and upon the approach that the ECtHR has taken to the reconciliation of obligations upon states arising under international law. The systems duty is plainly different from the operational duty, but authoritative decisions do make clear that even the systems duty under article 3 only requires the state to act to the greatest extent reasonably practicable.

46. With that approach in mind, I turn to the question of whether the Divisional Court was right in [98] to say that there was in fact no conflict between article 3 and the immunity granted under the VCDR.

Issue 2: Was the Divisional Court right to decide that there is no conflict between the ECHR and the DPA and the VCDR?

47. AG submitted that it was obvious that the limited steps that Barnet and the authorities could take to protect the children of diplomats, without engaging the coercive powers of the court, were inadequate. The Divisional Court held, in effect, that they were less good than the full protection afforded by the Children Act 1989, but were not in conflict with the article 3 duties on the UK. Moreover, as the SSFCDA pointed out, those steps (waiver of immunity, the protection of the sending state, the declaration of individuals as *personae non gratae* and recall) were envisaged by the VCDR itself. There is no relevant exemption in the VCDR, so the considerations addressed in *Reyes* and *Wong* are not directly applicable here.

48. It was accepted, as the Divisional Court held at [94], that the legal framework implemented by the Children Act 1989 represented a system that complied with the requirements of article 3. The question is whether the reduced legal framework which compliance with the VCDR requires also represents compliance with the systems duty under article 3. I think it is hard to say that a system that is deprived of any legal compulsion is a framework of laws, precautions, procedures and means of enforcement which can protect children from such conduct to the greatest extent reasonably practicable. In other words, I would be prepared to accept, for the sake of argument, that there could be a type of conflict in the sense that the legal compulsion, which is negated or reduced in effectiveness by the VCDR and its own mechanisms, reduces the overall efficacy of the measures that were in place to protect the children. But that conflict only exists before one considers whether the Divisional Court was right to say later in [98] that article 3 "did not require … in its text, and there is no jurisprudence which requires the Contracting Parties to breach the VCDR in order to avoid a breach of the ECHR". That question depends on a consideration of ECtHR jurisprudence and its approach to situations in which there is an actual or apparent conflict between the ECHR and other international law obligations. It is, therefore, to those questions that I now turn, in order to inform the answer to the ultimate question of whether the provisions of the DPA and the VCDR are properly to be regarded as incompatible with the systems duty in article 3.

Issue 3: Was the Divisional Court right to decide that neither article 3 nor ECtHR jurisprudence required the UK to breach the VCDR?

49. In my judgment, this is the key issue in the appeal. I have already set out the competing contentions of the parties at [7]-[8] and [11]-[12] above.

50. The basic principles that the domestic court must apply are contained in [50]-[60] of Lord Reed's judgment in *AB*. As Lord Reed emphasised at [57], the danger is that "if domestic courts go further than they can be fully confident that the [ECtHR] would go, and the [ECtHR] would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected". Here, of course, it was accepted that this was indeed a "blank slate" case where there was no existing guidance from the ECtHR. Although AG and Barnet denied that they were asking the court to decide this case (as was suggested at [60] in *AB*) on the basis of principles which they wanted to be adopted "in the light of a body of material concerned with other international instruments", that was the import of their reliance on the powerful principles contained in the UNCRC, the UNCAT, and applicable to refoulement. The problem is that this court cannot be confident, let alone fully confident, that the ECtHR would regard the systems duty in article 3 as overriding the long-established international law principles enshrined in the VCDR.

51. Neither article 31(3)(c) of the VCLT, which is applicable to the proper interpretation of the ECHR (which requires account to be taken of applicable and relevant rules of international law), nor any of the cases relied upon, in my judgment, serve to give the court any such confidence.

52. First, in *Matthews*, the ECtHR did hold that the voting rights of the people of Gibraltar under article 3 protocol 1 displaced the provisions of the Maastricht treaty. But there, the article 3 protocol 1 right was unqualified and pre-existing. As the ECtHR said at [34] the "suggestion that the United Kingdom might not have effective control over the state of affairs complained of" could not affect the position, because it derived "from its having entered into [subsequent] treaty commitments".

53. Secondly, in *Al-Adsani*, the ECtHR declined to hold that the implementation of state immunity principles constituted a violation of article 6 (c.f. also *Manoilescu and Dobrescu v. Romania* (60861/00) 3 March 2005 at [80]-[81] where the ECtHR said that it was "not aware of any trend in international law towards a relaxation" of the rules of sovereign immunity, and *Estrada v. Al-Juffali* [2016] EWCA Civ 176, [2017] Fam 35 at [44] in a case about diplomatic immunity and article 6). It is true that the ECtHR acknowledged in *Al-Adsani* at [53] that the right of access to the courts was not absolute, but the principles enunciated at [55]-[56] are applicable, at least by analogy, here where the systems duty under article 3 is subject to the qualification of reasonable practicability. It was not suggested that state immunity was different in principle from the rights under the VCDR. After referring to article 31(3)(c) of VCLT, the ECtHR said:

> The [ECHR] … cannot be interpreted in a vacuum. The Court must be mindful of [its] special character as a human rights treaty, and it must also take the relevant rules of international law into account. The [ECHR] 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 State immunity … It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a

> disproportionate restriction on the right of access to court as embodied in Article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

54. In *X v. Latvia*, the ECtHR adopted an harmonious interpretation of article 8 of the ECHR and the Hague Child Abduction Convention (see [92]-[97]). *Al-Dulimi* was another example of an harmonious interpretation. In that case, the ECtHR said that Switzerland could and should have implemented judicial supervision under article 6 when giving effect to the UN Security Council's sanctions resolution. It is not an example of a case where one rule of international law was held to overrule another.

55. In *Sabeh El Leil v. France* (2012) 54 EHRR 14, the ECtHR did not override sovereign immunity. It held that the chief accountant, whose article 6 rights were impugned, was not entitled to such immunity (see [61]-[67]).

56. It is clear, therefore, both from what I have said, and from AG's acceptance that this is a "clean slate" case, that there is no previous decision of the ECtHR which indicates that it would hold that the UK's systems duty under article 3 required it to override the immunities provided by the VCDR in order to protect the children in this case. Moreover, I do not think that the cases give any "clue" that this case would be decided in that way by the ECtHR (see Baroness Hale's formulation at [22] in *Rabone*).

57. As I have said, the SSFCDA urged the court to "bite the bullet" in deciding this point. I believe we should do so. In my judgment, applying the principles in *AB*, even if there is the type of conflict between the systems obligation in article 3 and the VCDR that I have described in [48] above, it is not open to this court to declare them incompatible. The ECtHR has not gone close to suggesting any such thing and, if there are clues in its jurisprudence, they point in favour of the inviolability of the immunities and privileges under the VCDR.

58. None of that is, however, conclusive according to AG and Barnet. They submitted that any result other than that for which they contended (i) would impermissibly impair the very essence of article 3 (contrary to *Al-Adsani* at [52]-[53]), (ii) would prevent the ECtHR from performing its duty in full (*X v. Latvia* at [94]), and (iii) would mean that the VCDR was not consonant with the ECHR (*Al-Dulimi* at [139]). The question, in essence, is whether AG was right to say that the systems right in article 3 was a peremptory norm of customary international law that could not be overridden by the immunities in the VCDR.

59. The VCDR encapsulates long-established principles of customary international law as explained in detail by Lord Sumption in *Reyes*. There are provisions within the VCDR that provide both the limits of the exceptions to be allowed from it and the ways in which situations of this kind can be dealt with (i.e. the possible measures relied upon by the Divisional Court at [94]-[97] namely waiver of immunity, the protection of the sending state, the declaration of individuals as *personae non gratae* and recall). It would place an impossible and disproportionate burden upon the state if its obligations under the VCDR were held to be incompatible with the systems duty under article 3 (see *Osman* [115]-[116] and *Smiljanic* at [70]).

60. I would not go quite as far as the Divisional Court in suggesting that these measures were adequate to protect the children of diplomats in situations of this kind. They were, as I

have said, plainly less effective than would have been the case if the coercive powers of the court under the Children Act 1989 had been available against the diplomat and his wife. That does not, however, mean that this court can hold that the systems obligation in article 3 mandates that the UK should breach or seek to amend the VCDR. It cannot, in my view, do so in the absence of an ECtHR decision pointing clearly in that direction.

61. I have, therefore, concluded that the Divisional Court was right to decide that neither article 3 nor ECtHR jurisprudence required the UK to breach the VCDR or to seek an amendment to it. The consequences of breaching the VCDR would, as Ms Macmillan's evidence explained, be serious for the UK's own diplomats abroad and for international relations generally. I would endorse the submissions of the SSFCDA in this connection that I have recorded above at [10] and [12]. On the current state of the law, the UK cannot and should not impugn the validity of the immunities and privileges in the VCDR in a case of this kind. These reasons mean that the systems obligation in article 3, namely an obligation to establish a framework of laws, precautions, procedures and means of enforcement which would protect children from such conduct to the greatest extent reasonably practicable, does not require the UK to breach or seek amendments to the VCDR. It would not be reasonably practicable for the UK to do so. The fetter on the absolute nature of the systems duty means that the systems duty under article 3 is not incompatible with the VCDR.

Issue 4: If there is a conflict between article 3 and the DPA and the VCDR, should a declaration of incompatibility be made?

62. In the circumstances I have described, it is not appropriate to make a declaration of incompatibility, even if there is a conflict of the kind I have described in [48] between the systems obligation under articles 1 and 3 on the one hand, and the DPA and the VCDR on the other hand. There is no conflict in the sense I have described in [57] above.

63. I agree with the Divisional Court that it would not be appropriate in the exercise of the court's discretion to make a declaration of incompatibility.

Conclusions

64. For these reasons I have given, I would dismiss AG's appeal and uphold the decision of the Divisional Court to refuse to make the declaration of incompatibility sought.

Lord Justice Moylan:

65. I agree.

Lord Justice Baker:

66. I also agree.