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ITEM 7.a: STATE IMMUNITIES: STATE PRACTICE

CASE AZIZ V. AZIZ (JUDGMENT)

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Case No: A2/2006/0120

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
MR JUSTICE GRAY AND MR JUSTICE UNDERHILL
HQ05X00091

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2007

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE SEDLEY
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between :

MARIAM AZIZ	**Claimant**
- and -	
AZIZ & ORS	**Defendants**
-and-	
HM THE SULTAN OF BRUNEI	**Intervener/ Appellant**

- -
- -

Sir Frank Berman QC and Mr Neil Hart (instructed by SJ Berwin) and **Mr Tim Taylor** (**SJ Berwin**) for the Intervener/Appellant
Sir Michael Wood (Advocate to the Court) (instructed by **HM Treasury Solicitor**)
Mr Max Mallin (instructed by **Davenport Lyons**) for the **Claimant**
Mrs Aviva Amir, 10th Defendant/Respondent, in person

Hearing date: June 11, 2007

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Approved Judgment

Lord Justice Lawrence Collins:

I Introduction

1. This is an extraordinary case. The claimant, Mariam Aziz, met the tenth (and main) defendant, Mrs Aviva Amir, at a casino in 2003. Mrs Amir is a fortune-teller born in Iraq, but now of Israeli nationality. The claimant came to regard Mrs Amir as a trusted friend and confidant. In early 2004 Mrs Amir purported to introduce the claimant over the telephone to a gentleman called Mr Aziz. The claimant and Mr Aziz never met, but over the following months they developed what appeared to be a close relationship conducted by telephone and text message, and involving exchanges of gifts. Between May and November 2004 the claimant made bank transfers totalling over £1 million which were intended for Mr Aziz, as well as payments of more than £1 million in cash via Mrs Amir's driver. The claimant in the summer of 2004 recorded for Mr Aziz, and had delivered (as she believed) to him, two audio cassette tapes containing material of a confidential nature.

2. Although Mr Aziz was originally named as first defendant it became the claimant's case that Mr Aziz never existed and that the other party to most, if not all, of her telephone and text message exchanges was in fact Mrs Amir, using an assumed voice on the telephone, and that it was Mrs Amir who had the benefit of the £2 million and who had possession of the cassettes. Mr Aziz was named as first defendant but he has never been traced or served. After a trial in 2006, Underhill J found for the claimant against Mrs Amir, and ordered return of the payments and awarded damages in relation to the value of the gifts.

3. The second unusual aspect of the case (and which gives rise to the present appeal) is that the claimant is the former wife of HM the Sultan of Brunei ("the Sultan"), from whom she was divorced in February 2003.

4. The status of the Sultan first arose in connection with a committal application by the claimant against Mrs Amir, which was heard before Gray J in November 2005. Early in the proceedings an order was made anonymising them, and interlocutory orders were made prohibiting Mrs Amir from disclosing the confidential information on the audio cassettes. The claimant alleged (inter alia) that, in breach of these orders, Mrs Amir, in the course of a meeting with the Sultan's representative, Pengiran Yusof ("Mr Yusof"), had disclosed to him information which was likely to lead to the identification of the claimant as a party to the action, and had disclosed to him the nature of the tape recorded information; and also that what was said by Mrs Amir at her meeting with Mr Yusof amounted to improper pressure directed at the claimant to withdraw the proceedings, in particular by threatening to reveal confidential information said to have been supplied by the claimant about her married life with the Sultan.

5. The Sultan, relying on his status as a foreign head of state, sought directions preventing the publication of his name, or the publication of any matters which could lead to him being identified, in connection with the proceedings.

6. He relied on the application to a head of state by section 20 of the State Immunity Act 1978 ("the 1978 Act") of Article 29 of the Vienna Convention on Diplomatic Relations (1961) ("the Vienna Convention"), which is given the force of law by the Diplomatic Privileges Act 1964 ("the 1964 Act") and which, it is said, requires the United Kingdom (including its courts) to "treat him with due respect and … take all appropriate steps to prevent any attack on his … dignity."

7. On November 1, 2005, Gray J refused the relief which the Sultan sought, and following a hearing made a suspended committal order on November 8, 2005. Underhill J gave judgment in January 2007 for the claimant following trial, and committed Mrs Amir to prison following further contempts.

8. On this appeal the Sultan seeks to reverse Gray J's judgment of November 1, 2005 denying the relief sought as head of state, and seeks redactions to the judgments of Gray J on the committal application and to Underhill J's judgments to remove any material which would lead to him being identified.

II The proceedings

9. The proceedings were commenced in January 2005. Mr Aziz was named as first defendant. On January 12, 2005 Butterfield J made an order anonymising the name of the claimant and preventing publication of her identity.

10. On January 18, 2005 Field J gave the claimant permission to join Mrs Amir to the proceedings and enjoined her from "communicating, disseminating, divulging or otherwise disclosing" the audio cassette recordings, and ordered her to deliver them up to her solicitors. He also granted a worldwide freezing injunction.

11. On April 15, 2005 Roderick Evans J made a further order which restrained Mr Aziz and Mrs Amir from communicating, disseminating, divulging or otherwise disclosing any of the audio cassettes or other recordings referred to in a letter received by the claimant on April 10, 2005. This letter was addressed to the claimant purportedly from Mr Aziz and contained threats to reveal matters of a personal nature about the claimant and the Sultan.

12. Mrs Amir refused to deliver up the audio cassettes, and the claimant applied by notice dated August 12, 2005 for her committal.

13. Shortly before the application to commit her for contempt was to be heard, Mrs Amir applied to discharge the anonymity order. On the claimant's application and Mrs Amir's application, Sir Franklin Berman QC appeared on behalf of the Sultan, on the basis that the Sultan had an interest in the preservation of the claimant's anonymity and in ensuring the privacy of the proceedings.

14. Sir Franklin Berman QC sought on behalf of the Sultan orders that the evidence on the committal application should be taken in private; that legal submissions be subject to an express prohibition on any reference to the name of the Sultan or any matter which could lead to his identification; and that directions be given preventing the publication of his name in connection with the proceedings and preventing the publication of any matters which could lead to his being identified in connection with the proceedings. Those orders were sought on the footing that there would be continued anonymity for the claimant herself.

15. In his judgment, on November 1, 2005, Gray J said that he was not persuaded that it would be right to rule that the committal proceedings should in their entirety be private and permanently remain so. In particular he said that he did not think he would be justified in taking the exceptional course of directing, pursuant to CPR 39.2(4), that the identity of the claimant should not be disclosed, nor that information that she was the former wife of the Sultan should be withheld.

16. The judge accepted that particular care needed to be taken to ensure that third parties to litigation were not inappropriately injured by the fact that proceedings took place in public. But he held that the Sultan did not have, independently of the claimant, a right as head of state to insist that no mention be made in public of the fact that the claimant was his former wife. As a practical matter he decided that the balance between privacy and publicity for the committal proceedings should be achieved by directing that the whole of the hearing would be in private, and that at the conclusion of the hearing he would be able to give a direction, pursuant to section 11 of the Contempt of Court Act 1981, as to those matters publication of which would be prohibited.

17. The committal application was heard on November 1 to November 4, 2005, and on November 8, 2005 Gray J delivered judgment, and held Mrs Amir in contempt. He decided in particular that Mrs Amir had breached the anonymity order in that, in the course of a meeting with Mr Yusof, she had disclosed to him information which was likely to lead to the identification of the claimant as a party to the action, and she had also disclosed to him the nature of the tape recorded information in breach of the order of Roderick Evans J. She had also attempted by threats and/or other forms of improper persuasion directed at the claimant to influence her to withdraw the proceedings and/or to discharge the freezing order and/or to discharge other injunctions made against Mrs Amir by threatening to disclose the information, and the disclosure of the Aziz letter, in conjunction with what was said by Mrs Amir at her meeting with Mr Yusof, amounted to further threats or other improper pressure directed at the claimant.

18. Gray J committed Mrs Amir to prison for three months, suspended for twelve months. He also ordered Mrs Amir not to communicate in any way with the claimant except through her solicitors.

19. Following the committal application an order was made, pursuant to section 11 of the Contempt of Court Act 1981, prohibiting publication of those parts of the judgment which disclosed information about other proceedings to which the claimant was a party; the contents of any of the audio cassettes; and information of a confidential nature contained in the letter sent on April 10, 2005.

20. On October 25, 2006 the claimant issued an application for an order to activate Gray J's suspended committal order on account of further breaches. That application was listed to be heard at the same time as the trial, but Underhill J subsequently ruled that it should be dealt with as a separate matter following judgment.

21. After judgment on the committal application had been given on November 8, an application was made on behalf of the Sultan for Gray J to reconsider his judgment of November 1, 2005 on the basis that he had made an error when he referred to the Sultan's application as having been brought in a capacity distinct from his sovereign capacity. He refused that application, and indicated that the proper course to be taken on behalf of the Sultan was to pursue the issue by way of an appeal to the Court of Appeal. On November 29, 2005 Gray J granted permission to appeal and ordered that no publicity should be given to the committal proceedings pending the outcome of the appeal.

22. The trial of the action came on for hearing before Underhill J on November 27, 2006. On the third day of the trial he directed that the hearing be in private and that consideration of the anonymity issue should be deferred until closing submissions. This was on the basis that if the proceedings were in open court the confidentiality of the contents of the tapes and of the other confidential matters disclosed, or allegedly disclosed, by the claimant to Mr Aziz was liable to be lost. For the same reason he provided a redacted version of his judgment in favour of the claimant, which was given on January 29, 2007.

23. Underhill J also held the application for committal of Mrs Amir (on which he gave judgment on February 1, 2007) in private in accordance with RSC Order 52, Rule 6(1)(d). That judgment was given in private, but he gave a short summary in open court at the conclusion of the full judgment. He activated the three month term of imprisonment on Mrs Amir imposed by Gray J on November 8, 2005 for contempt of court, but suspended on condition that she committed no further contempts.

24. The judgments of Gray J of November 8, 2005 and of Underhill J dated January 29, 2007 were redacted by Underhill J to remove material of a confidential nature. They were not redacted in any other way.

25. On this appeal the Sultan seeks orders the effect of which would be that the judgments given in these proceedings by Gray J and Underhill J be redacted to remove any references which could lead to him being identified and that the publication of any matters which could lead to him being identified in connection with the proceedings would be prohibited; in particular the Sultan seeks the continued anonymisation of the claimant's name, the names of his personal representative in London, and the claimant's niece, housekeeper and bodyguards. Most of them gave oral or written evidence, which went in particular to whether Mrs Amir had been guilty of contempt in relation to incidents in which she had spoken to them on the telephone or in person.

26. This appeal first came on for hearing on December 18, 2006, when the court ordered that it should be adjourned so as to enable the court to request the Attorney General to appoint an advocate to the court to make written and oral submissions, and to invite the Foreign and Commonwealth Office to intervene in the appeal or to make representations to the court on the issues arising on the appeal.

27. In particular the assistance of an advocate to the court was requested on the following matters: (a) whether Article 29 of the Vienna Convention (as applied by the 1964 Act and section 20 of the 1978 Act) enured for the protection of a serving foreign head of state ratione personae, i.e. without regard to whether the affected interest touches his personal life or his public functions; (b) what modifications (if any) under section 20 of the 1978 Act were necessary or appropriate in the application of the terms of Article 29 to a serving head of state, as opposed to a serving ambassador; (c) what should be understood, in the terms of Article 29, by an "attack" on the head of state's "dignity"; (d) what steps were open to an English court to take for the protection of a third party who is not a head of state but who is or may be affected by offensive materials, and in what circumstances may it be open to and appropriate for the court to take such steps, for example by prohibiting publication of the name of the third party in connection with the proceedings or of any other matters which could lead to his being identified in connection with the proceedings; (e) what steps might be thought to be appropriate to be taken to "prevent" an attack on the dignity of a head of state; (f) whether Article 29 imposed any direct obligation on an English court hearing judicial proceedings to which a head of state was not a party, but in the course of which one of the parties adduced or might adduce offensive material touching on the personal life of the head of state; (g) whether it was a matter of discretion or of obligation for the court to give effect to Article 29 in such a case; (h) what measures were appropriate for an English court to take in the light of Article 29 and of the normal rule that proceedings in the English courts take place in public, and of CPR 39.2 and the reference to a public hearing in Article 6 of the European Convention on Human Rights.

28. This appeal was heard in private, because to have heard it in public would have defeated the object of the Sultan's appeal.

29. On this appeal this court has had the great benefit of argument from two former Legal Advisers to the Foreign and Commonwealth Office, Sir Franklin Berman QC on behalf of the Sultan, and Sir Michael Wood as advocate to the court (who, in

particular, drew attention to such points as might properly be made on behalf of Mrs Amir in opposition to the appeal), as well as a written submission from the Foreign and Commonwealth Office. The court also had the assistance of Mr Max Mallin, counsel for the claimant, as regards the procedural history, and Mrs Amir also made submissions through an interpreter, but these were not directed to the matters in issue on the appeal.

III The Arguments

A Submissions on behalf of the Sultan

30. Sir Franklin Berman QC argued that Gray J was wrong to refuse the order sought on the ground that the Sultan was making the application in his personal capacity. In its application to a head of state (through section 20 of the 1978 Act) Article 29 protects the person of the head of state in whatever capacity he acts.

31. There is a very wide variation between the duties and functions conferred on the head of state by the constitutional dispensations of different States, ranging from virtual dictatorships, through executive presidencies and constitutional monarchies, to the largely or entirely ceremonial; but even a head of state who was a mere ceremonial figurehead with no executive duties of any kind would be entitled to claim the same immunities, privileges and other courtesies as any other head of state.

32. Attacks on dignity are not linked or limited to physical assault, or to acts which impede the head of state in the carrying out of his functions. The attack on the dignity of the Sultan consists simply in the attempt to gain publicity, through the process of the court, for embarrassing and scurrilous material. The sting can be drawn from that material by protecting the Sultan's identity from disclosure.

33. Article 29 refers to "all appropriate steps", which the receiving State "shall take". This is the language of obligation, not discretion; and while the obligation allows the State to select the most suitable means in all the circumstances of the case, the test of their "appropriateness" is not their convenience to the receiving State but their effectiveness in aiming at the stated result. The duty of the court is a duty to prevent Mrs Amir from being able to carry out such an affront through the process of the court – provided that the means necessary to that end would be an "appropriate step".

34. Particular weight should be given to the fact that the party seeking the restriction may not be the claimant – because, unlike the claimant, that party did not choose to bring the proceedings – and even more weight if the party seeking the restriction is a third party, i.e. if it is not the defendant either: *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966 .

35. Even if the Sultan were a private individual with no official status, it would be appropriate for the court to take steps to protect his identity by ordering the relief sought. He is neither the claimant nor the defendant, nor even a witness in the proceedings; he did not choose to bring the proceedings, and yet the allegations in them are uniquely embarrassing to him. There is room for the inference that his name was drawn into the transactions that led to the underlying litigation by Mrs Amir with the deliberate intention of using that unique embarrassment as a means of bringing pressure to bear on the claimant in that litigation, a point which relates directly to the responsibilities falling to the court under Article 29.

36. It cannot properly be expected of the Sultan that he should descend into the arena of the domestic court in order to defend his reputation. That would be at odds with the immunity which a head of state enjoys from the jurisdiction of domestic courts, which extends to immunity from being indirectly impleaded. There would be no way in which, even hypothetically, the Sultan could appear for the sole purpose of correcting false imputations, since any such appearance would amount to a waiver of his immunity.

37. The directions sought would not impinge on the ability of either party to advance its case before the court, or on the ability of the court to do justice between the parties. The Sultan has not sought to interfere in any way with the conduct of Mrs Amir's case, or to prevent her or her representatives advancing whatever arguments they think best in her defence against the claimant's actions; the issue is simply that of wider publicity outside the court. Such interest as Mrs Amir may lay claim to, to gain wider currency for scurrilous allegations, is not an interest entitled to respect in circumstances in which the allegations are neither matters before the court nor ones on which the court can or will pronounce.

38. There is nothing in the Human Rights Act 1998, or the jurisprudence of the European Court of Human Rights which affects this conclusion. The State of Brunei is not party to the European Convention on Human Rights, and it cannot affect third party States: Vienna Convention on the Law of Treaties 1969, Articles 34, 35, and 36. The general public interest in the administration of justice (even within the specific human rights regime created by the European Convention) does not stand in the way of the implementation by States of their obligations towards one another under international law: *Al-Adsani v. United Kingdom* (2001) 34 EHRR 273; *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573, 1588. It is therefore not open to the court to balance the asserted right of a private litigant against an international obligation owed by the United Kingdom to a foreign State and its head of state.

B Submissions of the Advocate to the court

39. Sir Michael Wood accepts the Sultan's contention that Article 29 applies, by virtue of section 20 of the 1978 Act, to a serving foreign head of state *ratione personae*, without distinction between his personal or public acts. To the extent that Gray J based his decision on a distinction between a head of state in his public and his private

capacity, so as to remove the private sphere from the scope of section 20, he misdirected himself.

40. In the second half of the third sentence of Article 29 ("take all appropriate steps to prevent any attack on his person, freedom and dignity") **"**attack**"** primarily or principally imports a physical act that is aimed at infringing the dignity of the head of state. In the alternative, it means an act, whether physical or not, that is immediate and direct and that has as its purpose the infringement of the dignity of the head of state. An attack on the **"**dignity**"** of a head of state would only occur if the action concerned was deliberately offensive and serious enough to impede the exercise of the head of state's functions.

41. The obligation "to take all appropriate steps to ensure" leaves a wide discretion to the court. The negotiating history shows that the inclusion of the word "appropriate" was deliberate, and intended to qualify the duty on the State.

42. Disclosure in the judgments of the material in question would not amount to either a failure by the court to treat the Sultan with due respect or to an attack on his dignity.

43. In the alternative, even if disclosure of the material in question could amount to an attack on the dignity of a head of state, redaction of the judgments in the way sought by the Sultan would not be an appropriate step. The protection afforded by the English courts to a person who is not a head of state is sufficient to fulfil the duty under international law to take all appropriate steps to prevent an attack on the dignity of a head of state that may be caused by disclosures in court proceedings.

44. English law already strikes a balance between the publicity of judicial proceedings and the protection of certain interests of individuals. The ordinary rules are sufficient to meet the requirements of international law. To introduce and apply special measures would probably violate Article 6(1) of the European Convention: *Colombani v France* [2002] ECHR 521.

45. There is no suggestion that denying the Sultan the privacy he seeks will have any impact on justice being done in the substantive proceedings. Potential embarrassment is not sufficient. That a person's identity has no relevance to the substantive issues to be determined in the case, and that therefore the administration of justice will not be prejudiced, does not mean that anonymity should be granted.

C Submissions of the Foreign and Commonwealth Office

46. The submissions of the Foreign and Commonwealth Office were that the English court was under a duty to comply with the obligations in Article 29; the use of the term "appropriate" allowed the court a margin of appreciation; Article 29 applied to a foreign head of state ratione personae, without any distinction between his or her

personal or public acts; an attack on "dignity" must have a wider application than a purely physical attack; an attack on the dignity of a head of state can occur even when he or she is not present in the state where the acts prejudicial to his or her dignity have occurred, and they include verbal abuse and the publication of insulting material; there was a proper analogy between the dignity of a diplomatic mission, as referred to in Article 22, and the dignity of an individual under Article 29, but in agreement with Sir Franklin Berman QC the concept may not be identical in its application in both cases; the obligation to treat a head of mission (and by extension a head of state) with due respect, and take all appropriate steps to prevent attacks on his dignity, derived as much from the "representative character" theory as from considerations of strict functional necessity.

47. An "attack" on the "dignity" of a foreign head of state must entail some element of deliberately offensive or insulting words or behaviour, and mere protest, no matter how noisy, or criticism, no matter how robust, would not appear to be sufficient.

48. Where an "attack" is threatened in the course of litigation, the court as the appropriate organ of the State has a wide margin of appreciation determining what steps may be appropriate in preventing it and should assess the matter in the light of all the circumstances of the case, and should, in particular, strike a balance between its duty to prevent such attacks and the rights of the parties in litigation.

IV Conclusions

The application of section 20 of the 1978 Act

49. Section 14(1)(a) of the 1978 Act provides that references to a State in Part I of the Act include references to the sovereign or other head of that State "in his public capacity." Section 20 provides:

> "(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;
>
> …
>
> as it applies to the head of a diplomatic mission ….
>
> ….
>
> (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."

50. In the course of the proceedings in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No.3)* [2000] 1 AC 147 it emerged that what became section 20 originally related to a sovereign or head of state "who is in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom": [2000] 1 AC at 203. But those words were deleted, and the present form of section 20 was introduced, according to the mover of the clause, to ensure that heads of state would be treated like heads of diplomatic missions "irrespective of presence in the United Kingdom."

51. Consequently it was accepted by all of the members of the House (except Lord Phillips of Worth Matravers, at 291-292, and perhaps Lord Browne-Wilkinson, at 203) that section 20 was not designed merely to equate visiting heads of state with diplomats. But it is clear from the speeches that section 20 was not intended to confer on heads of state any privileges or immunities beyond those conferred by customary international law: see Lord Browne-Wilkinson, at 203; Lord Hope of Craighead, at 240.

Article 29 of the Vienna Convention

52. Section 20 of the 1978 Act applies the 1964 Act to heads of state. Section 2(1) of the 1964 Act provides that the Articles of the Vienna Convention set out in Schedule 1 to the 1964 Act are to have the force of law in the United Kingdom. Among those Articles is Article 29:

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

53. The International Law Commission's draft articles, which were the basic text before the Conference which drew up the Vienna Convention, referred to "all reasonable steps". At the Conference a proposal simply to delete the word "reasonable" was adopted, whereupon the British delegate explained that removal of the word "reasonable" would give the article unlimited scope, and impose an impossible task on receiving States, and the Conference thereupon decided to introduce the word "appropriate": Denza, *Diplomatic Law*, 2nd ed 1998, p 212. Article 1 of the Institute of International Law, *Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Annuaire, vol 69, 2000-2001, p. 743, which largely reflects the language of Article 29 of the Vienna Convention, but is limited to cases where the head of state is in the territory of another State, refers to "all reasonable steps" to be taken to prevent any infringement of his or her person, liberty or dignity.

54. Whether the obligation is to take "appropriate steps" or "reasonable steps" may not matter. What matters is that the obligation is not an absolute one to prevent an attack on the dignity of a head of state.

Personal immunity

55. The first question which arises on this appeal is whether Gray J was wrong in deciding that the protection afforded by Article 29 (if it applies) was not available to a head of state in his personal capacity. Sir Franklin Berman QC and Sir Michael Wood were in agreement that he was wrong, and I agree with their submissions.

56. Although the existence and scope of the relevant duty is in issue, and for reasons given below is not a rule of immunity, I accept that it enures to the head of state in his personal capacity. A head of state is entitled to immunity *ratione personae.* In 1885 the Sultan of Johore came to England, and according to the plaintiff, Miss Mighell, took the name Albert Baker and promised to marry her. It was held that the Sultan was entitled to immunity even though up to the time of suit "he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual:" *Mighell v Sultan of Johore* [1894] 1 QB 149, 159, *per* Lord Esher MR. More than 100 years later, Article 3.2 of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property provided: "The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*."

57. I have no doubt that the obligations of the United Kingdom under Article 29 as applied to heads of state by section 20 or by customary international law apply equally to the foreign head of state in his personal capacity as they apply in his public capacity. This is consistent with *Harb v King Fahd Abdul Aziz* [2005] EWCA Civ 632, in which it was assumed that Article 29 was capable of applying (through section 20) in support of an application that a claim to immunity in divorce proceedings against the King of Saudi Arabia be heard in private.

58. There was some discussion at the hearing of the question whether the privileges and immunities of a head of state are functional. First, if functional immunity connotes that the privilege or immunity is limited to official acts of the head of state, then I am satisfied that it is not a functional immunity.

59. Secondly, the concept of functional immunity has also been used to connote that Article 29 applies where the interference is with the carrying out of the functions of the embassy. It was used in this sense in the context of diplomats and diplomatic missions in two Partial Awards of the Eritrea Ethiopia Claims Commission dated 19 December 2006, to which the court was referred: Diplomatic Claim, *Ethiopia's Claim 8*; Diplomatic Claim, *Eritrea's Claim 20*). In *Ethiopia's Claim 8*, the Claims Commission considered Ethiopia's claim that Eritrea was liable for injuries sustained by Ethiopia's diplomatic mission and personnel in Eritrea as a result of Eritrea's violation of diplomatic law. The Claims Commission held that:

> "26. A critical standard for the Commission in applying international diplomatic law must be the impact of the events complained about on the functioning of the diplomatic mission. Particularly in light of the limited resources and time allocated

> to this Commission and the serious claims of international humanitarian law violations presented by the Parties, and remaining attentive to the principle of reciprocity, the Commission again is constrained to look for serious violations impeding the effective functioning of the diplomatic mission.
>
> ….
>
> 35. Similarly, the Commission dismisses the related claim that the Respondent violated Article 29 of the Vienna Convention …by failing to protect the Chargé from students allegedly throwing rocks at his car …. The Claimant failed to prove that this relatively minor incident chilled the Chargé's performance of his functions."

60. Thirdly, the concept of functional immunity may connote that the immunity has a functional basis. Functional immunity in this sense is reflected in the preamble to the Vienna Convention, which states: "… [T]he purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". It was used in this sense, in relation to the privileges and immunities of heads of state in the Institute of International Law, *Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Annuaire, vol 69, 2000-2001, p. 743. The third preamble to the resolution reads:

> "*Affirming* that special treatment is to be given to a Head of State or a Head of Government, as a representative of that State and not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole."

61. Sir Michael Wood suggested that, applied to a head of state, the relevant offensive conduct must interfere with performance of the head of state's functions in the second sense. I am satisfied that it is not a functional immunity in the sense that it can only be invoked where in the particular case the head of state would be prevented from carrying out his or her functions. That would be an inappropriate test in the case of a serving head of state. In my judgment it is functional in the third sense, namely that it has a function in international relations to protect the ability of the head of state to carry out his functions and to promote international co-operation.

Content of the obligation and the concept of "dignity"

62. Sir Michael Wood and Sir Franklin Berman QC are agreed that authority on the content and scope of the obligation is very scant.

63. The emphasis on the dignity of a foreign sovereign as the basis for sovereign immunity, and on the dignity of an ambassador for the purposes of diplomatic immunity, goes back at least to Vattel in the eighteenth century.

64. In the famous decision in 1812 of the United States Supreme Court on sovereign immunity, *The Schooner Exchange v M'Fadden*, 11 US (Cranch) 116, 137 (1812), Marshall CJ said that a foreign sovereign was "bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another…"

65. In *The Parlement Belge* (1880) LR 5 PD 197, at 206-7, Brett LJ said that the reason for immunity was "the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind," and he referred to Vattel's statement: "S'il est venu en voyageur, sa dignité seule, et ce qui est dû à la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute juridiction." Brett LJ went on to say that the exercise of jurisdiction "would be incompatible with his regal dignity – that is to say, with his absolute independence of every superior authority" (at 207); and that the same immunity must be granted by each state to similar property of all other states, because "the dignity and independence of each state requires this reciprocity" (at 210). See also e.g. *Novello v Toogood* (1823) 1 B&C 554, 564 (KB); *The Cristina* [1938] A.C. 485, 498; *I Congreso del Partido* [1983] 1 AC 244, 262. The formulation in Article 29 itself can be traced back to Article 17 of the 1932 Harvard Draft on Diplomatic Privileges and Immunities (AJIL Supp, vol 26, p 90), which provided: "A receiving state shall protect a member of a mission and the members of his family from any interference with their security, peace, or dignity."

66. According to the current edition of Oppenheim, *International Law*, 9th ed (1992, ed Jennings and Watts), vol 1, para 115:

> "**Consequences of the dignity of states**. Traditional international law has ascribed certain legal consequences to the dignity of states as inherent in their international personality. These are chiefly the right to demand that their Heads of State shall not be libelled and slandered; that their Heads of State ... shall be granted special treatment when abroad, and that at home and abroad in the official intercourse with representatives of foreign states they shall be granted certain titles; ... But while a government of a state, its organs, and its servants are bound in this matter by duties of respect and restraint, it is doubtful whether, apart from obligations in such matters as the protection of diplomatic and consular property, a state is bound to prevent its subjects from committing acts which violate the dignity of foreign states, and to punish them for acts of that kind which it was unable to prevent. There is, of course, nothing to prevent a state from enacting legislation calculated to ensure respect for the dignity of other states, and many have done so.

> Mere criticism of policy, judgment concerning the past attitude of states and their rulers, or utterances of moral indignation condemning immoral acts of foreign governments and their Heads of State, need neither be suppressed nor punished. The position is different when the persons in question are in governmental service or otherwise associated with the government of the country."

67. The previous edition, 8th ed 1955, ed Sir Hersch Lauterpacht, also contained this passage (para 120), which in substance dates from the first edition in 1912 (para 120):

> "The majority of text-book writers maintain that there is a fundamental right of reputation attaching to every State. Such a right, however, does not exist, because no duty corresponding to it can be traced within the Law of Nations. Indeed, the reputation of a State depends just as much upon behaviour as that of every citizen within its boundaries. A State which has a corrupt Government and behaves unfairly and perfidiously in its intercourse with other States will be looked down upon and despised, whereas a State which has an upright Government and behaves fairly and justly in its international dealings will be highly esteemed."

68. The first edition of Oppenheim included the following passage (which was in substance repeated in later editions by McNair and Lauterpacht, but omitted by Sir Hersch Lauterpacht in the 7th edition in 1947):

> "No law can give a good name and reputation to a rogue, and the Law of Nations does not and cannot give a right to reputation and good name to such a State as has not acquired them through its attitude. There are some States – *nomina sunt odiosa!* – which indeed justly possess a bad reputation."

69. Sir Arthur Watts, *The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers*, in Hague Academy of International Law, *Recueil des Cours*, Volume 247 (1994-III), pp. 35 to 48, discusses "dignity" in relation to foreign heads of state.

70. Sir Arthur makes the following points (pages 41-45): (a) dignity is "an elusive notion, although it is still a convenient label"; (b) the dignity of a head of state may be violated whether or not he is present in the State where the acts prejudicial to his dignity have occurred, and particularly with the publication of offensive material, it would usually be the case that the head of state is not present when publication occurs; (c) in the respect owed to the dignity of a head of state is respect for the office of head of state, rather than the personal dignity of the individual for the time being holding the office; (d) a State is under a duty in international law to refrain from offensive conduct against the head of another friendly State, and accordingly if an

official representative of a State makes offensive remarks about the head of another State, the latter is entitled to complain and request appropriate redress.

71. But he goes on to say that it is uncertain to what extent international law imposes a positive obligation on States to prevent offensive conduct by private individuals directed against foreign heads of state, or requires them to punish such conduct if it nevertheless occurs; State practice is limited, but States periodically complain to other States about what they perceive to be undignified and offensive treatment of their heads of state, and the States to which complaint is made do not seem to deny in principle the right to complain, and have sometimes taken action against those who have perpetrated the offensive conduct and have apologised to the offended State; but it is not always clear that the apology is anything more than a diplomatic courtesy rather than any recognition of legal fault; States called upon to suppress and punish statements which are said to be defamatory of foreign heads of state may have to reconcile such a request with their traditions of, and constitutional guarantees of, freedom of speech, and "the State where the offensive conduct occurs has a considerable margin of appreciation as to the kind of conduct which is sufficiently offensive to call for punitive action against the offender" (p 44). He concludes (at p. 45):

> "During the eighteenth and nineteenth centuries, and in the early years of [the twentieth] century, States tended to treat particularly severely the publication of offensive material about foreign Heads of State. In more modern times this tendency is much less marked, and States have been less willing to take action against the publication of material which foreign Heads of State perceive to be offensive to them."

72. This is borne out by the state practice in relation to heads of state and heads of government collected in Parry, *Digest of International Law*, vol 7, 1965, pp 84-90 and in Whiteman, *Digest of International Law*, vol 5, 1965, pp 154 et seq. From the early nineteenth century the Law Officers consistently advised that the remedy for the foreign sovereign (or ambassador) lay in the ordinary law of the land. When the Spanish Ambassador complained in 1815 about newspaper reports of insults to the King of Spain in the House of Commons, the Law Officers said that any failure to act did not "originate in any disinclination in any persons forming part of His Majesty's Government .. to render prompt and ample justice to the King of Spain, but is imposed upon them by difficulties growing out of our free form of Government over which as far as regards the administration of our Courts of Justice the executive Government has not the least power or control." When in 1850 Bavaria asked Britain to confirm that it would on the basis of reciprocity introduce a law against libelling a foreign sovereign the Law Officers advised: "A Libel published in England of or concerning a Foreign Sovereign or the Chief of a Foreign Sovereign State, would not be treated and punished by the English law differently from one published of or concerning any private person." (Parry, p 89).

73. State practice makes it clear that when a State complains about offence given to its head of state or its head of government by private parties the State against which

complaint is made regularly refers the complainant State to the remedies available in its courts, but subject to its constitutional guarantees of free speech. So when the German Government complained to the US State Department in 1934 about a proposed mock trial of Hitler in Madison Square Garden, the State Department reminded the German Ambassador of the constitutional guarantee of freedom of expression: Whiteman, p 161.

74. In *Harb v King Fahd Abdul Aziz* [2005] EWCA Civ 632 Mrs Harb issued proceedings against His Majesty King Fahd Bin Abdul Aziz for maintenance under the Matrimonial Causes Act 1973. The King challenged the jurisdiction of the court on the ground of State immunity. Dame Elizabeth Butler-Sloss P acceded to an application that the challenge should be heard in private, and subsequently upheld the claim to immunity, and ordered that her judgment on the matter should neither be published nor refer to the Kingdom of Saudi Arabia. The question for the Court of Appeal was whether the appeal from her judgment should be heard in open court. Counsel for the King, relying on Article 29 as applied to heads of state by section 20 of the 1978 Act, argued that the Court of Appeal was a limb of the United Kingdom, and that were the Court of Appeal to sit in public, the court would be failing in its duty to prevent an attack on the King's dignity. The King also sought an anonymity order under CPR 39.2(4).

75. The argument was rejected. Thorpe LJ held that a claim to State immunity was a public claim which demanded open litigation. There was no legitimate ground for imposing reporting restrictions which would thinly disguise the identity of the King. The identity of the sovereign was relevant to any public debate of the issues raised by the plea of immunity. Wall LJ said (para 40):

> "In my judgment, Article 29 is not breached either by the court hearing the issue relating to sovereign immunity in open court, or by this court hearing an appeal in public against the President's decision to hear the sovereign immunity issue in private. The prevention of any attack on the [King's] person, freedom or dignity seems to me a concept which goes to the substance of the [King's] argument that he is entitled to immunity from suit because enforced engagement in litigation relating to his private life is an attack on his dignity: it does not seem to me an argument which - certainly on the facts of this case - can properly be raised to protect the [King] from publicity arising from the deployment of his plea of sovereign immunity in open court."

76. The reference in this decision to "dignity" does no more than confirm that the notion of dignity underlies immunity, but it is not authority for the proposition that respect for dignity requires confidentiality of court proceedings.

77. In *Wei Ye v Jiang Zemin*, 383 F 3d 620 (7th Cir 2004) the plaintiffs were practitioners of Falung Gong, and sued Jiang Zemin (the President of China at the time of the

commencement of proceedings) and the Falung Gong Control Office, alleging (inter alia) genocide and torture. Service was purportedly effected on the President (both in his personal capacity and on behalf of the Control Office) on a visit to the United States. It was held that the President was immune from suit; and that service on the Control Office through service on the President was invalid. The court deferred to the view of the United States Government that permitting service on heads of state is often viewed by foreign governments and their heads of state as an affront to the dignity both of the leader and the State; and that such attacks on the dignity of a visiting head of state could easily frustrate the US President's ability to reach the diplomatic objectives of the United States. It is easy to understand why the US State Department took the view that a foreign head of state while in the United States could not be served with process.

78. I do not find much assistance in the material which touches on the duty to take appropriate steps to prevent an attack on the dignity of diplomats or diplomatic premises. They are concerned with the right of the receiving state under its own law to impose restrictions on its citizens to demonstrate outside embassy premises. They do not throw any light on the content of the duty to prevent an attack on the dignity of diplomats or diplomatic premises, and consequently do not assist in relation to the content of the duty (if any) to do the same in relation to a head of state. They are concerned with Article 29 (inviolability of the person of diplomats) and also with Article 22 on the inviolability of diplomatic premises, which provides:

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

79. The decision of the Australian Federal Court in *Minister for Foreign Affairs and Trade v Magno* (1992-3) 112 ALR 529 concerned the validity of Regulations enacted to enable the Minister to certify that in his opinion the removal of prescribed objects from prescribed land was an appropriate step within the meaning of Articles 22 and 29 of the Vienna Convention. Armed with such a certificate, the police could remove the objects.

80. The Regulations had been made to enable the removal of 124 white crosses planted outside the Indonesian Embassy in Australia in protest against a massacre perpetrated by Indonesian troops in East Timor. The question was whether the Regulations were within the power under the Australian Diplomatic and Privileges Act 1967 to make regulations prescribing matters required or permitted by the Act or necessary or

convenient to be prescribed for carrying out or giving effect to the Act. By a majority, the Federal Court upheld the validity of the Regulations.

81. French J said that the notion of the "dignity" of the mission in Articles 22 and 29 of the Vienna Convention would extend to enjoin some classes of "mere insult," but he accepted that the content of the "dignity interest" divorced from security considerations was more contentious: paras 25 and 29. After referring (at para 30), to offensive or insulting behaviour in the vicinity of and directed to the mission, or the burning of the flag of the sending State, or the mock execution of its leader in effigy in the immediate vicinity of the mission, he went on:

> "But subject to protection against those classes of conduct, the sending State takes the receiving State as it finds it. If it finds it with a well established tradition of free expression, including public comment on matters of domestic and international politics, it cannot invoke either Article 22(2) or Article 29 against manifestations of that tradition."

82. Gummow J referred to *Wright v McQualter* (1970) 17 FLR 305, 321, where Kerr J had said:

> "If there were in the last analysis no more in this case than a quiet peaceful gathering on the lawn (in front of the premises of the United States Embassy) of persons shouting slogans and carrying placards of the kind in question here, with no risk of intrusion or damage to the premises, I would have some doubt whether there was any basis for believing that such action in such a place could reasonably amount to impairing the dignity of the mission, which is, after all, a political body. As such, it must presumably accommodate itself to the existence of strong disagreement with some of the policies of its government and to the direct and forceful verbal expressions of such disapproval. I appreciate that something may turn on the closeness of those concerned to the premises and on the extravagance or insulting nature of the language used, but, for myself, I would like to keep this whole subject open until, if ever, it arises for decision."

83. In the wake of the shooting of WPC Fletcher from the Libyan People's Bureau in St. James' Square in 1984, the House of Commons Foreign Affairs Committee considered the duty to protect mission premises in their report on the abuse of diplomatic immunities and privileges. The Foreign Affairs Committee also noted that in the case of *R v Roques* (1984, unreported), the Chief Metropolitan Magistrate had refused to uphold the right of the police to move demonstrators from the pavement immediately outside the South African Embassy, taking the view that the dignity of mission premises was impaired only if there was abusive or insulting behaviour or actual violence. The Committee considered that to impose higher standards of protection would impinge on British political freedoms: Denza, *Diplomatic Law*, 2nd

ed. 1998, pp 144-145. The Foreign Office response was: (a) the duty of the United Kingdom to protect the peace of diplomatic missions could not be interpreted so widely that no demonstrations were allowed outside them: (b) the essential requirements were that the work of the mission should not be disrupted, that mission staff were not put in fear, and that there was free access for staff and visitors. It said: "… how to preserve the peace and dignity of a mission is essentially a matter of sensible policing practice rather than a question of law": Misc No 5 (1985), Cmnd 9497, p 17.

84. The decision of the United States Supreme Court in *Boos v Barry*, 485 US 312 (1988) concerned the constitutionality of a provision in the District of Columbia Code which prohibited the display of any sign within 500 feet of a foreign embassy if the sign tended to bring the foreign government into public odium or disrepute, and also prohibited any congregation of 3 or more persons within 500 feet of a foreign embassy. The law was said by the Mayor of Washington DC and his officials, and by the United States Government as intervener, to be justified (among other reasons) on the basis of the obligation in Article 22(2) of the Vienna Convention to take appropriate steps to prevent the impairment of the dignity of a foreign mission. The Supreme Court upheld the prohibition on congregation, because it was crafted to prevent disruption of normal embassy activities. But the law was found by the Supreme Court to be contrary to the free speech guarantee of the First Amendment to the extent that it prohibited displays of banners containing critical statements.

85. The fact that what was described as the "dignity interest" in Article 22 of the Vienna Convention was recognised in international law did not make it "compelling" for the purposes of the first amendment. Justice Sandra Day O'Connor, delivering the opinion of the Court, said (at 347):

> "Thus, the fact that an interest is recognised in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis. We need not decide today whether, or to what extent, the dictates of international law could ever require that First Amendment analysis be adjusted to accommodate the interests of foreign officials. Even if we assume that international law recognises a dignity interest and that it should be considered sufficiently 'compelling' to support a content-based restriction on speech, we conclude that [the law relating to display of signs] is not narrowly tailored to serve that interest…"

86. What this practice indicates is that in the context of diplomatic immunity mere speech (except perhaps of an extreme kind), as distinct from conduct which impedes the conduct of the activities of a mission, is not conduct which the receiving State is obliged to take steps to prevent, or which it is constitutionally entitled to prevent.

87. This is consistent with the fact that the obligations in Articles 22 and 29 are mainly concerned with protection against physical attack or obstruction. Thus according to

Denza, *Diplomatic Law,* 2nd ed., 1998 (a noted authority), at p. 212 the third sentence of Article 29 provides for "the positive duty to treat the diplomatic agent with due respect and to protect him from physical interference by others with his person, freedom or dignity." This is because the requirement of the physical protection of diplomats and diplomatic premises is a fundamental requisite for the conduct of diplomatic relations: see *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* 1980 ICJ Rep 3, at 38; and also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, judgment of 19 December 2005 (physical attacks on Ugandan diplomatic staff by Democratic Republic of the Congo army personnel); *Federal Democratic Republic of Ethiopia v State of Eritrea*, Eritrea Ethiopia Claims Commission, Partial Award, Claim 8, December 19, 2005 (detention and mistreatment of diplomats).

88. What then is the present state of international law on the right to dignity of a head of state? There is no doubt that a State is obliged to take steps to prevent physical attacks on, or physical interference with, a foreign head of state who is in this country. This would be so equally under customary international law, and the combination of section 20 of the 1978 Act and Article 29. Nor would I doubt that the duty would apply to acts in this country preparatory to, or directed at, some form of physical attack against a head of state who is in his or her own country or in a third country.

89. But, outside physical attack or interference, the material in relation to the prevention of offensive conduct supports the view that to the extent there is any uniform practice (which is doubtful) it amounts to no more than courtesy or comity. That view is in substance suggested by what Sir Arthur Watts QC (co-editor of Oppenheim's International Law, and a former Legal Adviser to the Foreign and Commonwealth Office), said in his Hague lectures *The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers*, in Hague Academy of International Law, *Recueil des Cours*, Volume 247 (1994-III), pp. 35 to 48, to which I have already referred. Sir Arthur draws a distinction between offensive conduct by an official representative of the State, and conduct by a private party. As regards the latter, Sir Arthur says that it is uncertain to what extent international law imposes a positive obligation on States to prevent offensive conduct by private individuals directed against foreign heads of state, or requires them to punish such conduct if it occurs. His view is that it is not clear in State practice whether it is a matter of diplomatic courtesy rather than a recognition of legal responsibility.

90. A similar view is expressed that it is "rather a matter of etiquette or comity than of law" in Eagleton, *International Government*, 3rd ed 1957, quoted in the passages from Whiteman, *Digest of International Law*, vol 5 (at 154), to which the court referred counsel. But Whiteman also quotes Stowell, *Courtesy to our Neighbors*, in (1942) 36 A.J.I.L. 99, who says that it is a generally recognised principle of international law that a head of state should not be insulted or treated with disrespect; and that when the head of state is responsible for foreign policy a certain latitude of criticism abroad must be tolerated, but this should not involve the person of the head of state or the use of opprobrious language. He gives examples of Secretary of State Cordell Hull's apology to Japan in 1935 for a cartoon of the Mikado published in Vanity Fair, and

President Roosevelt's apology in 1941 to Chile for a reference to the President of Chile as "spending more and more time with the red wine he cultivates."

91. The establishment of a rule of customary international law requires settled state practice on the basis that the practice is rendered obligatory by the existence of a rule of law requiring it: Oppenheim, vol 1, p 28, quoting *North Sea Continental Shelf Cases*, 1969 ICJ Rep. 3, at 44. I am far from convinced by the material before us that there is a rule of customary international law which imposes an obligation on a State to take appropriate steps to prevent conduct by individuals which is simply offensive or insulting to a foreign head of state abroad.

92. This is not a case in which the Attorney-General has been instructed to intervene (as, for example, in *Re Westinghouse Uranium Contract* [1978] AC 547) to submit that the court should exercise its powers in a particular direction on the ground that foreign relations are affected. The submission by the Foreign and Commonwealth Office to this court is, quite properly, limited to the applicable legal principles, but it does indicate the view of Her Majesty's Government on the current position in international law. The Foreign and Commonwealth Office submitted that an "attack" on the "dignity" of a foreign head of state must entail some element of deliberately offensive or insulting words or behaviour, and mere protest no matter how noisy, or criticism, no matter how robust, would not appear to be sufficient: para 13. The view of Her Majesty's Government was set out as follows (submission, para 15):

> "… States have been reluctant to take any action against the publication by the press and other media of offensive material about foreign Heads of State. In the United Kingdom, the Government takes the view that, given the legal right to freedom of expression, it would be inappropriate to curtail publication even of offensive material and that its obligation under Article 29 is satisfied by the existence of the ordinary law on defamation which would enable Heads of State to seek a remedy themselves in appropriate cases."

93. I have said that I am far from convinced of the existence of a rule of customary international law requiring States to take steps to prevent individuals from insulting foreign heads of state abroad, and if it were necessary to do so I would have decided that there is insufficient material to support such a rule. But it is not necessary to do so because I am satisfied that there was no relevant attack on the dignity of the Sultan, and that in any event all appropriate steps have been taken to prevent any such attack.

94. Sir Franklin Berman QC submitted that "an attack on the dignity of a head of state" connoted simply a deliberate act intended to lower the estimation of the head of state or to injure his honour or that of his office. I cannot accept so wide a proposition, which would be a wholly impermissible invasion of the principle of free speech.

95. As the Law Officers advised in the nineteenth century, a head of state who is subject to false vilification may have a remedy in defamation.

96. I find it extremely difficult, if not impossible, to envisage any situation in which speech, otherwise permitted under English law, could be prohibited on the ground that it was an attack on the dignity of a foreign head of state.

97. What seems to me beyond doubt is that, whatever the content of the duty in international law of the United Kingdom to take appropriate steps to prevent an attack on the dignity of a foreign head of state, there is not the slightest trace of any conduct in the present case which could, even on the most extensive interpretation of the notion of "attack on dignity", be such an attack. First, mentioning the identity of the claimant's former husband could not possibly be an "attack" itself. Second, the fact that in some way the judgments have come about because of conduct by Mrs Amir in meetings with the Sultan's representative which was designed to embarrass the Sultan is neither itself an "attack" nor could it possibly be complicity in any such attack.

98. Nor is there any interference with the "dignity" of the Sultan. The fact that he was married to the claimant is of course well-known, and to identify him as the former husband of a claimant who has been defrauded, or as the employer of an official through whom Mrs Amir tried to put pressure on the Sultan in order to cause the claimant to withdraw the proceedings, does not, in my judgment, affect his dignity in the sense that it is used in the international law authorities.

Remedies

99. Sir Franklin Berman QC was at pains to emphasise that the Sultan was not submitting to the jurisdiction and thereby waiving immunity in making the application. But in my judgment the final sentence of Article 29 or any equivalent principle in customary international law is not a rule of immunity at all. It is about the obligation of the United Kingdom to take appropriate steps to prevent an attack on the diplomat or (as the case may be) head of state.

100. It was, quite rightly, always said from the nineteenth century onwards, that where a foreign head of state had been publicly insulted, the remedy was in the law of defamation, and subject to constitutional guarantees of free speech. The remedy of the foreign State lay either in international law (by formal protest or more extreme measures) or in national law, by an action in the ordinary courts. Where the head of state or head of government took the latter course, no question of immunity would arise. There would be a submission to the jurisdiction.

101. This is not, of course, a case in which the head of state sues because offensive and actionable statements have been made. Here the question is whether, on the application of the head of state, the judgments should be further redacted.

102. *Scott v Scott* [1913] AC 417 is still the leading authority on the general principle that justice should be open. All the speeches emphasised the fundamental importance of the general rule in favour of public justice, both in order to ensure appropriate

behaviour on the part of the court, and to maintain public confidence in the administration of justice.

103. Viscount Haldane LC referred (at 435) to "the broad principle which requires the administration of justice to take place in open Court". He said (at 437):

> "As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration."

104. Lord Loreburn (at 445) referred to the inveterate rule that justice shall be administered in open court, and went on to say (at 446):

> "… in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court."

105. The mere consideration that the evidence is of an unsavoury character is not enough, and a mere desire to consider feelings of delicacy or to exclude from publicity details which it will be desirable not to publish is not enough: pp 438- 439.

106. By CPR 39.2(1): "The general rule is that a hearing is to be in public." But by CPR 39.2(3) a hearing, or any part of it, may be in private if (inter alia) "publicity would defeat the object of the hearing": CPR 39.2(3)(a); or "if it involves confidential information … and publicity would damage that confidentiality": CPR 39.2(3)(c); or "if the court considers this to be necessary, in the interests of justice": CPR 39.2(3)(g).

107. RSC Order 52 (in CPR, Sched 1), provides in Rule 6(1) that the court hearing a committal application may sit in private in certain cases, including "(d) where it appears to the court that in the interests of administration of justice ... the application should be heard in private", but except in such cases "the application shall be heard in public." By Order 52, Rule 6(2) if the court hearing an application in private by virtue of rule 6(1) decides to make an order of committal against the person sought to be committed, it shall in public state the name of that person; in general terms the nature of the contempt; and the length of the period for which he is being committed. These provisions are reflected in the Practice Direction, paragraph 9.

108. By CPR 39.2(4) the court may order that the identity of "any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness." There was some discussion on the present appeal of the question whether the word "party" is used in the sense of party to proceedings, or in the more general sense of any person. In my judgment it does not matter. The Sultan is an intervening party, and even if he were not a party, and the expression were used in its technical sense I have no doubt that the court would have an inherent jurisdiction to order that the identity of any person not be disclosed if it were necessary to protect the interests of that party.

109. In *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966 the Legal Aid Board made a decision to withdraw the legal aid franchise of a firm of solicitors because of dishonesty. The firm challenged the decision in judicial review proceedings, and sought an order of anonymity. An order was refused, and the firm appealed to the Court of Appeal, where it sought an order that the appeal be heard in private, and indicated that if the order were refused it would withdraw the appeal or consent to its dismissal. The Court of Appeal refused to make the order and indicated that it would not consent to withdrawal of the appeal.

110. The starting point was that there was a general presumption in favour of open justice. Lord Woolf MR, giving the judgment of the court, made (at 978) the following points. In deciding whether to accede to an application for protection from disclosure of the proceedings it is appropriate to take into account the extent of the interference with the general rule which was involved. In particular, if the restriction related only to the identity of a witness or a party that was less objectionable than a restriction which involves proceedings being conducted in whole or in part behind closed doors. A distinction could also be made depending on whether what was being sought was anonymity for a claimant, a defendant or a third party. It was not unreasonable to regard the person who initiated the proceedings as having accepted the normal incidence of the public nature of court proceedings. A witness who had no interest in the proceedings had the strongest claim to be protected by the court if he or she would be prejudiced by publicity, since the courts and parties might depend on their co-operation. In general, however, parties and witnesses had to accept the embarrassment and damage to their reputation and the possible consequential loss inherent in being involved in litigation. The protection to which they were entitled was normally provided by a judgment delivered in public which would refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule. There must be some objective foundation for the claim to anonymity.

111. There is no doubt that the court has a power to order that any judgments or orders, or any part of them, should be private (as contemplated by PD39, paras 1.12 to 1.13). By section 11 of the Contempt of Court Act 1981, where a court allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.

112. By PD39.1.4A, in deciding whether to hold a hearing in public or in private the judge should have regard to Article 6(1) of the European Convention on Human Rights, and in particular the judge may need to consider whether the case is within any of the exceptions permitted by Article 6(1).

113. By Article 6(1) of the European Convention on Human Rights, in the determination of his civil rights and obligations, everyone is entitled to "a fair and public hearing." It goes on to provide that (a) "Judgment shall be pronounced publicly" and (b) "but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

114. Article 6(1) provides that "judgment shall be pronounced publicly" and the specific exceptions referred to above relate, at least expressly, only to the public hearing. But the European Court of Human Rights has held that a judgment need not be pronounced publicly if to do so would frustrate the aims of the trial being held in private: *B v United Kingdom* (2002) 34 EHRR 529; contrast *Moser v Austria* [2006] ECHR 12643/02.

115. In *Martinie v France*, No. 58675/00, 12 April 2006, the Grand Chamber said (at paras. 39 and 40), repeating consistent earlier jurisprudence:

> "The Court reiterates that the public character of proceedings before the judicial bodies referred to in art 6(1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of art 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society …
>
> [A]rt 6(1) does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle … [H]olding proceedings, whether wholly or partly, in camera, must be strictly required by the circumstances of the case …"

116. Sir Franklin Berman QC suggested that the guarantees in the European Convention on Human Rights could not be relied upon to defeat the Sultan's application. The argument was as follows: first, the State of Brunei is not bound by the Convention; second, both the European Court of Human Rights and the English courts have held that the rules of public international law relating to State immunity are not affected by the Convention: *Al-Adsani v. United Kingdom* (2002) 34 EHRR 273; *Holland v. Lampen-Wolfe* [2002] 1 WLR 1573; thirdly, accordingly there is no warrant for the

proposition that the general public interest in the administration of justice (even within the four walls of the specific human rights regime created by the ECHR) stands in the way of the implementation by States of their obligations towards one another under international law.

117. I do not consider that these authorities are of any assistance. In *Al-Adsani v United Kingdom* (2002) 34 EHRR 273 the question was whether the immunity granted by the English court to the Government of Kuwait in respect of a civil action for torture was in conformity with the prohibition on torture in Article 3 and the right to access to a court under Article 6. It was held unanimously that the United Kingdom was not under a duty to provide a civil remedy in respect of torture, and that (by a bare majority) the limitation on access to a court as a result of the application of state immunity was a legitimate limitation proportionate to the aim pursued, namely compliance with international law to promote comity and good relations between States through the respect of another State's sovereignty. The court, while noting the growing recognition of the overriding importance of the prohibition of torture, did not find it established that there was yet acceptance in international law of the proposition that the States were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. See also *Jones v Ministry of the Interior of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270.

118. In *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573, 1588 Lord Millett said:

> "Article 6 requires contracting states to maintain fair and public judicial processes and forbids them to deny individuals access to those processes for the determination of their civil rights. It presupposes that the contracting states have the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting states adjudicative powers which they do not possess. State immunity, as I have explained, is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself."

119. All that these cases decide is that application of the rules of state immunity is compatible with the right to a hearing under Article 6(1). In my judgment, this is not on any view a classic case of immunity. It is not a case in which it is suggested that the European Convention on Human Rights is overriding any immunity or privilege. It is a case which is analogous to the State practice in which the State whose nationals have been guilty of allegedly abusive conduct informs the complaining state that it has remedies in the national court but reminds the complaining State of the free speech guarantees under its law. In such a case the foreign head of state has an option to sue for (say) libel, but will plainly have to submit to the jurisdiction and waive its immunity if it does so. I do not consider that an application like that in the present case is any different in principle.

120. In *J.A.M. v Public Prosecutor* (1969) the Dutch Supreme Court held that a conviction for a scurrilous attack on a foreign head state by displaying a banner with the words "Johnson War Criminal" was compatible with the right of freedom of speech under Article 10 of the ECHR: 73 ILR 387. But in *Colombani v France* [2002] ECHR 521, the European Court of Human Rights held that a French Law of 1881, which made it an offence "publicly to insult a foreign head of State", infringed Article 10. The editor-in-chief of *Le Monde* and a journalist were convicted under the Law for insulting the King of Morocco, and fined. The European Court of Human Rights accepted that the rationale behind the law was to protect senior foreign political figures from certain forms of attack on their dignity (para 24), similar to the provision in the same law relating to the President of the Republic. It mentioned that the Cour de Cassation had ruled in 1986 that the actus reus of the offence of insulting a foreign head of state was constituted by any expression of contempt or abuse or any accusation which was liable to undermine the honour or dignity of the head of state in his or her private life or in the performance of his or her functions (para 25). The Court noted that there was no defence of justification (para 66), and held that the offence of insulting a foreign head of state was liable to inhibit freedom of expression without meeting any pressing social need. It said:

> "68. The Court notes that the effect of a prosecution under section 36 of the Act of 29 July 1881 is to confer a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted. That, in its view, amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained.
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> 69. Accordingly, the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any "pressing social need" capable of justifying such a restriction. It is the special protection afforded foreign heads of State by section 36 that undermines freedom of expression, not their right to use the standard procedure available to everyone to complain if their honour or reputation has been attacked or they are subjected to insulting remarks.''

121. The French Government does not seem to have argued that the interference with freedom of expression was justified by international law. The argument appears to have been that the legislation pursued a legitimate aim, namely the protection of the reputation and rights of others: see para 47. But I accept the submission by Sir Michael Wood that the decision strongly suggests that the court would not lightly accept that greater protection should be given to the dignity of a head of state than to ordinary members of the public.

122. The duty of a judge to give reasons has been the subject of many recent decisions: see in particular *English v Emery & Strick Ltd* [2002] 1 WLR 2409. In that decision Lord Phillips of Worth Matravers MR said (para 12) that the European Court of Human Rights required that a judgment contain the reasons which were sufficient to demonstrate that the essential issues which had been raised by the parties had been addressed by the national court and how those issues had been resolved. He pointed out that common law countries had developed a tradition of delivering judgments which detailed the evidence and explained the findings in much greater detail than was to be found in the judgments of most civil law jurisdictions.

123. The duty to give reasons is a function of due process and therefore justice, both at common law and under Article 6. Justice will not be done if it is not apparent to the parties why one has lost and the other has won. That is the minimum duty of a judge, but of course it is common for judges to go beyond the minimum necessary and to expound fully the facts and background circumstances. Judges vary greatly in the degree of detail or background material which they include in their judgments, and in my judgment it would be quite wrong for the Court of Appeal to interfere with the way in which judgments are composed.

124. Judges are, however, normally sensitive to the interest of parties and non-parties, particularly to the need to avoid making findings of fact adverse to persons who have not been given an opportunity to be heard.

125. In my judgment, Gray J and Underhill J have dealt sensitively with the confidential and personal information which was before them, and have made appropriate orders. CPR 39.2(3)(a) deals with cases where publicity would defeat the object of the hearing, and Gray J and Underhill J made orders for privacy in relation to the committal applications and to the trial to the extent necessary to alleviate this danger. Similarly, with regard to CPR 39.2(3)(c) (situations where the hearing involves confidential information), there is no suggestion that any confidential information will be disclosed, since it is already covered by the order of Gray J of November 8, 2005. Their judgments have been redacted to remove confidential or potentially embarrassing material.

126. The alterations which the Sultan seeks in relation to the redacted judgment of Gray J of November 8, 2005 are to (a) delete the name of the claimant; (b) remove the identification of the Sultan as the claimant's former husband, substituting in its place a reference to the claimant being the ex-wife of a foreign head of state, and remove all references to the Sultan or to Brunei; (c) substitute for the name of Mr Yusof a reference to a London representative of the head of state; (d) delete references to Brunei. Similar alterations are sought to the judgment of Underhill J of January 29 and February 1, 2007, except that (no doubt in error) no deletion of the name of the claimant is sought. Ms Hussain, the claimant's niece, gave evidence at the trial, about the claimant's state of mind when she discovered that Mr Aziz and Mrs Amir were one and the same person. The Sultan seeks the deletion of Ms Hussain's name from the judgment of January 29, 2007. In his judgment of February 1, 2007 Underhill J found that Mrs Amir had spoken to Ms Lim, the claimant's bodyguard, on June 16

and 17, 2006. One of the conversations was recorded. Underhill J said it was not necessary to set out what was said, but found that the conversation was a breach of the order not to communicate with the claimant. He also found that what she said to Mr Al Cader, the claimant's housekeeper (whose affidavit was relied on by the judge), on July 6, 2006 and September 9, 2006 and to Ms Minudin, one of the claimant's bodyguards, on September 21, 2006 was intended to be reported to the claimant and was designed to put pressure on the claimant. The Sultan seeks the deletion of the names of Ms Lim, Mr Al Cader, and Ms Minudin, and the substitution simply of a description of their positions in the claimant's household.

127. For reasons already given, I do not consider that the application by the Sultan is a claim to immunity. But I would, at least in this case, be prepared to accept that the Sultan is entitled to make the application that the judgments be redacted, without waiving his immunity for any other purpose. I would also accept that the court, in exercising its discretion to make part of a judgment private, may take into account the fact that the applicant is a foreign head of state, and may also take into account the international obligations of the United Kingdom to the foreign State of which he is head.

128. This is not on any view a case where mentioning the Sultan is irrelevant to the findings. The episode involving Mr Yusof was central to the committal proceedings. It was Mr Yusof who on about May 12, 2005 received a telephone call purportedly from Mr Aziz, in which he was told that Mr Aziz wanted to have a private letter delivered for the attention of the Sultan by a woman who would call and make an appointment. It was Mr Yusof who, on May 18, 2005, received a telephone call from Mrs Amir during which it was arranged that she would deliver the letter that afternoon. It was Mr Yusof who gave evidence that Mrs Amir had made it plain to him that the purpose of her visit was to try to find a way to put pressure on the Sultan and that she had threatened to cause embarrassment by making public allegations concerning the claimant's conduct and confidences concerning her private life during and after her marriage to the Sultan. Mr Yusof also gave evidence to the effect that Mrs Amir began speaking as if on behalf of Mr Aziz but the mask soon slipped and she dealt with him as if she were the principal.

129. Nothing discreditable is said about the Sultan in the judgments. No finding is made against him or about him. No confidential information relating to the Sultan is contained in the judgments. In substance what is said about him in Gray J's judgment of November 8, 2005 is that the letter sent on April 10, 2005 sets out private details which the writer ("Mr Aziz") says he had been told about Mrs Aziz's married life with her former husband; that Mrs Amir threatened, in her conversation with Mr Yusof on May 18, 2005, to cause embarrassment by making public allegations concerning confidences the claimant had revealed concerning her private life during and after her marriage to the Sultan; that Mrs Amir had told Mr Yusof that "Mr Aziz" wanted the letter to go the Sultan, so that he would put pressure on the claimant to withdraw the proceedings; that the letter refers to a "revelation" relating to the Sultan and to private information about the personal relationship between the Sultan and the claimant. Underhill J's judgments of January 29, 2007 and February 1, 2007 also record that in June 2006 the Sultan was sent a tape containing material from the audio

cassettes, and in the latter judgment he found that it was a further contempt by Mrs Amir.

130. I see no basis for the proposition that the identification of the Sultan in the judgments could be a breach of the international obligations of the United Kingdom, nor do I see any other reason why he should not be identified. Consequently in my judgment there is no basis for a further redaction of the judgments and the appeal should be dismissed.

Lord Justice Sedley:

131. I agree that the Sultan is entitled to expect no less protection from possible embarrassment than any other third party to litigation, but equally no more. Such protection is routinely given by judges. When damaging or distressing allegations are made in the course of public litigation about people who are not directly involved in it, judges can be expected to – and in my experience always do - take steps to ensure that such people are shielded from any serious embarrassment that is not an unavoidable consequence of doing justice in public. (Whether this ordinarily requires intervention at the bar of the court is more doubtful. One of the best-known phrases in the English language – "He would, wouldn't he?" – was prompted by counsel asking a witness whether she knew that a prominent individual, who was not a party to the proceedings, denied what she had alleged about him (*R v Ward*, June 29, 1963).)

132. Irrespective of his status as a head of state, the Sultan has been amply protected by both judges below from any unnecessary embarrassment in the course of this bizarre litigation. Whether this reflects a legal entitlement vested in him as an individual, or an obligation of the court carrying no correlative individual right, or no more than a salutary practice, does not fall for determination on this appeal. What does fall for determination is whether his claim to protection is enhanced by the State Immunity Act 1978. For the reasons fully and clearly set out by Lawrence Collins LJ, I agree that it is not. What makes the issue one of wider importance is that the obligations of courtesy and comity which states undertake towards one another do not determine the obligations of their citizens. It is the right of litigants to full and open justice in the courts, a limb of the state, which can generate a consequent tension. If it does, there is no supervening right in a foreign sovereign to complete protection irrespective of the interests of justice; but the courts will do all that can be done consonantly with the interests of justice to protect any third party, a foreign sovereign included, from the fallout of other people's litigation.

Sir Anthony Clarke MR:

133. I agree with both judgments.