Neutral Citation Number: [2022] EAT 51

Case No: EA-2020-000380-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 March 2022

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

KUWAIT INVESTMENT OFFICE	**Appellant**
- and -	
Mr SIMON HARD	**Respondent**

- -
- -

Professor D Sarooshi QC and **Mr P Webster** (instructed by Bates Wells) for the **Appellant**
Mr J Laddie QC and **Mr N Roberts** (instructed, respectively, by Judge Sykes Frixou and Shepherd and Wedderburn LLP) for the **First** and for the former **Second Respondent**

Hearing date: 3 & 4 February 2021

- -

JUDGMENT

SUMMARY

JURISDICTIONAL POINTS, PRACTICE AND PROCEDURE

In advance of a preliminary hearing to determine whether the Appellant benefited from state immunity under the State Immunity Act 1978, the First Respondent and the former Second Respondent (whose claim has since been withdrawn) sought an order for specific disclosure, following the standard disclosure previously given by the Appellant. The Appellant sought orders (1) debarring the Respondents from advancing any positive factual case on state immunity unless that case were first set out in a pleading, to which it would then be given the opportunity to respond, and (2) deferring consideration of the Respondents' application for specific disclosure, pending completion of that process. In any event, the Appellant asserted that (1) it could not be compelled to give the disclosure sought, because it formed part of the Kuwaiti diplomatic mission in the UK and, accordingly, benefited from diplomatic immunity under the Vienna Convention on Diplomatic Relations 1961 ('the VCDR'), which it had not waived; and (2) the specific disclosure sought was irrelevant to the issues arising for consideration in relation to its plea of state immunity.

The employment tribunal refused the Appellant's application and went on to determine the Respondents' application for specific disclosure. It held that, as a separate entity from the state of Kuwait, the Appellant could not benefit from diplomatic immunity and that the documentation sought by the Respondents was relevant to the issue of state immunity and disclosable (in certain cases, without a right of inspection).

The Appellant appealed from the above orders, contending that the employment tribunal had erred in its conclusions as to diplomatic immunity; in particular (1) having concluded that certain documentation created a rebuttable presumption of diplomatic immunity, in going on to conclude that the Appellant's status as a separate entity necessarily precluded such immunity (ground 5), and (2) in

failing to defer to the executive's alleged recognition of the Respondent as forming part of the Kuwaiti diplomatic mission in the UK, in breach of the 'one voice' doctrine (ground 4). Three further grounds of appeal (6 to 8) related to the asserted consequences of its diplomatic immunity. In any event, the Appellant maintained its position on the need for a further pleading by the Claimants (grounds 1 and 2) and on the irrelevance to the substantive preliminary issue of the disclosure sought (ground 3).

The EAT allowed ground 5 and dismissed grounds 1 to 4 of the appeal. In consequence of its conclusions on ground 4, grounds 6 to 8 fell away. The employment tribunal had erred in concluding that, as a matter of principle, a separate entity could not benefit from diplomatic immunity. Nevertheless, on the available evidence, Her Majesty's Government had not expressly recognised the Appellant as forming part of the Kuwaiti diplomatic mission, such that the one voice doctrine was not engaged. As a matter of law, there was no scope for implied recognition, but, in any event, the available evidence would not have supported such an inference. The EAT made observations regarding (1) the relationship, where diplomatic immunity exists, between a claimant's Article 6 ECHR rights and a respondent's rights under Articles 24 and 27(2) of the VCDR; and (2) the scope and effect of the latter articles. The employment tribunal had made no error of law in refusing to order a further pleading by the Respondents, or in its approach to determining the relevance of the specific disclosure which it had ordered the Appellant to give.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE:

Judgment

Table of Contents

Introduction

1. This is an appeal from the decision of London Central Employment Tribunal (Employment Judge Brown, sitting alone – 'the Tribunal'), sent to the parties on 18 June 2020, following a preliminary hearing. It concerns separate claims, brought by two claimants against the same former employer, which had been joined for the purposes of determining, at a later stage, a common preliminary issue — whether the tribunal lacks jurisdiction in light of the former employer's assertion that it has immunity under the State Immunity Act 1978 ('the SIA'). For the purposes of this appeal, it is not necessary to set out the nature of the substantive claims advanced by each claimant. Subsequent to the hearing of their appeal, but prior to the handing down of judgment, the former second claimant withdrew her tribunal claims. I record below the submissions made at a time when she was still a party to this appeal, referring to the parties by their statuses before the Tribunal.

2. The preliminary hearing had been listed to determine the Claimants' applications for specific disclosure and the Respondent's application to debar the Claimants from advancing any positive factual case on the issue of state immunity unless that case were first set out in a pleading to which the Respondent would be given the opportunity to respond. It was the Respondent's position that the Claimants' applications for specific disclosure related to material which was irrelevant and were reliant upon an unpleaded positive factual case as to the alleged non-sovereign nature of funds managed by the Respondent, alternatively ought to be adjourned pending the further round of pleadings which it contended ought to be required. In any event, in respect of the majority of the disclosure sought the Respondent asserted diplomatic immunity on behalf of the state of Kuwait, of the diplomatic mission of which it contended that it formed a part. Its position was that, pursuant to Articles 24 and 27(2) of the Vienna Convention on Diplomatic Relations 1961 ('the VCDR'), the documents, archives and official correspondence of the mission were

inviolable, there had been no waiver of immunity and the Tribunal could not compel disclosure of the relevant documentation.

The Respondent's application before the Tribunal

3. The Tribunal refused the Respondents' application, holding that there was no procedure under **The Employment Tribunals Rules of Procedure 2013** (as amended – 'the 2013 Rules') for a reply and rejoinder. There was an implied joinder of issue with the defence raised. Excessive formality was to be avoided in a jurisdiction in which litigants in person were commonplace. Even under the more formal Civil Procedure Rules, a claimant who did not file a reply was not taken to admit matters pleaded in a defence, and a rejoinder was prohibited unless specifically permitted by the court. The Respondent had not asserted that it was for the Claimants to establish the absence of state immunity. The Respondent had made clear that it relied upon section 14(2) of the SIA, which provided that, '*A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b)the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.'* Having regard, by analogy, to the principles in **Byrne v The Financial Times Ltd** [1991] IRLR 417, EAT, further formal pleadings were not required. The issue was clear. Consistent with the overriding objective, if any facts set out in the Claimants' witness statements took the Respondent by surprise, it would be permitted to file supplementary statements in reply. That provision, together with a detailed list of legal and factual issues and the exchange of skeleton arguments, would remove any risk that the Respondent would be unaware of the Claimants' case on state immunity. Accordingly, it was appropriate to determine the Claimants' applications for specific disclosure.

The Claimants' applications before the Tribunal

4. The Tribunal:

4.1. rejected the Respondent's assertion of diplomatic immunity. In particular, it held that the Respondent could not, at one and the same time, contend that it was a separate entity, distinct from the executive organs of the government of the state and capable of suing or being sued, for the purposes of section 14(2) of the SIA, whilst asserting that it was part of the Kuwaiti mission, protected by Articles 24 and 27(2) of the VCDR;

4.2. accepted that the listing of the Respondent in the London Diplomatic List as a representative of the state of Kuwait, together with certain correspondence, created a presumption that the Respondent was part of the Kuwaiti mission, concluding that that presumption had been rebutted by the Respondent's own position in these proceedings;

4.3. held that, albeit that the above conclusion was determinative of the issue of diplomatic immunity, the Respondent had not waived diplomatic immunity by taking steps in the proceedings, going on to hold that documentation and e-mail communications sent by the Respondent to third parties would have lost the benefit of diplomatic immunity in any event, there having been no suggestion that they remained under the control of the Respondent;

4.4. held that permitting the Respondent to give selective disclosure would be fundamentally inconsistent with Article 6 of the European Convention on Human Rights ('the ECHR'); the principles of natural justice; and the overriding objective and would appear to make a fair hearing almost impossible; certainly, the parties would not be on an equal footing. If forced

to proceed on that basis, it would be open to the Tribunal to draw appropriate adverse inferences to the effect that the documents withheld would demonstrate exactly that which the Claimants asserted them to demonstrate and had been withheld for that reason;

4.5. determined that the disclosure sought was relevant to the issues engaged by section 14(2)(a) of the SIA, requiring a consideration of the Respondent's relevant activities and those in which the Claimants were engaged, and necessary for a fair determination of the state immunity issue. In **Trendtex Trading Corporation Ltd v Central Bank of Nigeria** [1977] 1 All ER 881, the Court of Appeal had set out factors which were likely to be relevant for the purposes of determining whether a particular institution, organisation or body constituted a 'department' or organ of a state body, under section 14(1) of the SIA, stating that the general test required the totality of the evidence to be considered, including, in particular, the constitution, functions and activities of the body claiming immunity and the extent to which the body's central government retained control over it, in order to determine whether there was any satisfactory basis upon which to conclude that the body was so related to the government of the state in question as to form part of that government. Whilst not directly relevant to the test under section 14(2) of the SIA, similar factors were likely to arise for consideration in that context. The Fund documents sought would be likely to show whether and on what terms (a) the Respondent managed funds on behalf of entities other than the state of Kuwait; and (b) non-state entities also managed funds on behalf of the Respondent and/or the state of Kuwait and, thus, whether the work undertaken by the Claimants had been in the exercise of sovereign authority. The tax relief documents and the database of legal, compliance, finance and operational agreements regarding the application of regulations to the Respondent would show whether the funds were being treated as sovereign funds. Accordingly, subject to other factors, including costs and proportionality, the documents sought were disclosable;

4.6. held that the Respondent should be ordered to provide disclosure, but not inspection, of the e-mails sought, to ensure that the exercise was proportionate and to save costs. The parties were to agree redactions of all confidential and commercially sensitive parts of the documentation to be put before the Tribunal, in so far as the latter were not necessary for a fair hearing;

4.7. held that the period for disclosure was to run from 1 September 2017 until the date on which the relevant Claimant's employment had ended;

4.8. noted the parties' agreement that communications between the Respondent and the Foreign and Commonwealth Office ('the FCO'[1]), regarding whether diplomatic status of certain Respondent employees was recognised by the FCO, were relevant and that some disclosure had been given by the Respondent. The Tribunal refused the Claimants' application for unredacted copies of certain documents and for specific disclosure of others having regard to the Respondent's lawyers' duties to the Tribunal and assertions that (1) the redacted text was irrelevant, such that all redactions had been properly made, and (2) there were no further relevant documents in the Respondent's, custody, possession or control, such that an order for specific disclosure would be pointless. The Tribunal noted the ongoing duty of disclosure, should any other relevant documents exist or be discovered; and

4.9. went on to give directions.

[1] The Foreign, Commonwealth and Development Office ('the FCDO') was launched on 2 September 2020.

The Respondent's appeal

5. The Respondent advances eight grounds of appeal from the Tribunal's decision. In summary, it is said that the Tribunal:

5.1. erred in permitting the Claimants to advance a case on state immunity outside the scope of, or inconsistent with, their pleaded case and that advanced in earlier correspondence; and failed to record the Respondent's position that, where state immunity is asserted by a respondent, the burden is on the claimant to establish jurisdiction; instead, asserting that no such position had been advanced. It then took account of impermissible or irrelevant factors in dismissing the Respondent's application (ground 1);

5.2. erred in granting the Claimants' application for specific disclosure, notwithstanding the absence of a pleaded positive case on which it was predicated and which was inconsistent with the case which had been pleaded (ground 2);

5.3. ordered specific disclosure of material which was not relevant to the determination of state immunity under section 14(2) of the SIA, by reference to authority which was not on point (ground 3);

5.4. erred in concluding that the Respondent did not have the benefit of diplomatic immunity which would itself operate as a bar to the orders for specific disclosure sought by the Claimants. In particular, it is said that the Tribunal:

5.4.1. had no jurisdiction to make a finding that the Respondent was not part of the diplomatic mission of Kuwait and, in so finding, acted in breach of the 'one voice' doctrine (ground 4);

5.4.2. wrongly conflated state and diplomatic immunity, including by reference to the Respondent's pleaded case that it was prepared to proceed on the basis that it was a separate entity for the purposes of section 14(2) of the SIA (ground 5);

5.4.3. applied the wrong legal test for loss of protection of diplomatic immunity under Article 24 of the VCDR, including by failing to have taken account of the Respondent's submission that documents would have been sent to third parties in the context of a lender and borrower, bailor and bailee, or principal and agent relationship and, as such, remained in the Respondent's control (ground 6, alternatively ground 7); and

5.4.4. failed to address the Respondent's argument, pursuant to Article 27(2) of the VCDR and to hold that its 'official correspondence' was inviolable and protected by diplomatic immunity even if sent to third parties (ground 8).

Preliminary applications made by the Respondent

6. Shortly prior to the appeal, the Respondent applied in writing to:

6.1. amend its pleaded Particulars of Assertion of State and Diplomatic Immunity in order additionally to rely upon section 14(1) of the SIA, an application said to derive from the Claimants' position that the Respondent's reliance upon section 14(2) precluded it from benefiting from diplomatic immunity under the VCDR. The amendment sought was in the

following terms, said to rely on facts already pleaded[2], and was the subject of an extant application before the employment tribunal, made on 23 September 2020:

'11. The First Respondent is part of the state of Kuwait for the purpose of s.14(1) of SIA 1978. This is supported by a certificate from the Embassy of Kuwait dated 23 September 2020 which provides in terms that the KIO is part of Kuwait's Mission in the United Kingdom and part of the State of Kuwait.

~~*11.*~~ *12. In the event the Tribunal does not agree the KIO is part of the State of Kuwait, in the alternative and f~~F~~or the purposes of this Assertion only, without admission as to the same, KIO is prepared to proceed on the basis that it would be regarded as a separate entity under s.14(2) of SIA 1978.'*;

6.2. make related amendments to its grounds of appeal, should that be necessary; and

6.3. to rely on '*two very limited and discrete pieces of evidence that were not before the ET, which provide further support* [for] *the Employment Judge's initial view that the Respondent is part of Kuwait's mission in the UK….These documents are important as they go to the question whether the Respondent is part of the Kuwaiti Mission and in respect of the FCO letter whether HM Government recognises it as such*[3].' The two documents in question were a letter from the Embassy of Kuwait, addressed 'to whom it may concern', dated 23 September 2020, and an FCO note to that embassy, dated 7 November 2005.

[2] See the Respondent's application, dated 25 January 2021, at paragraph 15(b).

[3] Respondent's skeleton argument, paragraph 86(3).

7. In the event, the first two applications were not pursued (although the first remains for the employment tribunal to determine) and, pragmatically, the Claimants did not resist the third.

The parties' submissions

8. Before me, the Respondent was represented by Professor Dan Sarooshi QC and Mr Peter Webster (who did not appear below) and the Claimants by Messrs James Laddie QC and Nathan Roberts. Mr Roberts appeared before the Tribunal but Mr Laddie did not. I am grateful to them all for their written and oral submissions. All parties concentrated their oral submissions on grounds 3 to 8 of the appeal, essentially relying upon their written submissions in relation to grounds 1 and 2. It is convenient to set out each party's submissions in relation to grounds 3 to 8 first.

The Respondent's submissions

9. Professor Sarooshi addressed grounds 3 to 8 collectively, advancing the following propositions:

    9.1. Through the FCO/FCDO, Her Majesty's Government ('HMG') has recognised the Respondent as forming part of the Kuwaiti diplomatic mission in the United Kingdom. That recognition is irrebuttable and binding and ought to have been accepted as such by the Tribunal, which erred in treating the evidence upon which the Respondent relied as establishing only a rebuttable presumption (ground 4). If allowed, this ground was dispositive of the appeal.

    9.2. The Tribunal further erred in basing its decision on diplomatic immunity upon the Respondent's pleaded assertion, as part of its broader case on state immunity, that it is a

separate entity from the state of Kuwait, for the purposes of section 14(2) of the SIA (ground 5).

9.3. As part of the Kuwaiti diplomatic mission, the Respondent enjoys diplomatic immunity under Article 24 of the VCDR, imported into domestic law by the Diplomatic Privileges Act 1984 ('the DPA'). Accordingly, the documents in its archives form part of the archives of the mission and are not disclosable for that reason and the Tribunal erred in holding that immunity would be lost in connection with documents sent outside the Respondent to third parties (grounds 6 and 7).

9.4. The Respondent's status as part of the Kuwaiti mission, means that its official correspondence is inviolable under Article 27(2) of the VCDR and is not disclosable on that basis (ground 8), an argument which the Tribunal did not address.

9.5. Article 6 of the ECHR does not affect the rights conferred by Articles 24 and 27 of the VCDR. It is doubtful whether Article 6 applies in connection with specific disclosure, but, if it does, the VCDR affords a justified qualification of the rights which it confers. (Professor Sarooshi expressly did not submit that Article 6 does not apply to the open preliminary hearing which has been listed to determine the issue of state immunity.)

9.6. In the alternative, the Tribunal erred by ordering disclosure of material which was irrelevant to the issue of state immunity and applied the wrong legal test when considering that question (ground 3).

Professor Sarooshi's submissions, developing the above points, are summarised below.

The effect in law of HMG's recognition of the Respondent

10. At paragraphs 65 and 66 of its Reasons, the Tribunal:

> *"65. ...accepted the Respondent's submission that the current version of the publicly available London Diplomatic List, listing the Kuwait Investment Office as a representative of the State of Kuwait, created a presumption that the Kuwait Investment Office is part of the Kuwaiti mission. Likewise, correspondence from the FCO to Mr Al-Ateeqi, the President of the KIO, dated 31 October 2019...*
>
> *66. However, I decided that this presumption was rebutted by the Respondent's own position in these proceedings. The Respondent is a separate entity distinct from the executive organs of the government of the State and is not a part of its mission."*

That had been an error. There ought to have been three steps in the Tribunal's analysis, which would have led to the conclusion that the Respondent enjoys diplomatic immunity:

10.1. The decision as to which bodies should form part of a foreign state's recognition in the United Kingdom is a matter for HMG, as falling squarely within its prerogative power to conduct foreign relations.

10.2. Once recognition has been granted, UK Courts are bound by that decision, in accordance with the 'one voice' principle.

10.3. As the evidence before the Tribunal (augmented before the EAT) demonstrates, HMG has recognised the Respondent as part of the Kuwaiti mission and the Tribunal erred in finding to the contrary.

11. In support of the above propositions, Professor Sarooshi referred to **R (Miller and another) v Secretary of State for Exiting the European Union (Birnie and others intervening)** [2018] AC 61, SC ('Miller 1'), relying, first, upon the Divisional Court's statement, at paragraph 32, that, *'The Crown's prerogative power to conduct international relations is regarded as wide and as being outside the purview of the courts…*' and, then, upon the following observations of the Supreme Court, at paragraphs 49 and 52 to 54:

'49. …There are important areas of governmental activity which, today as in the past, are essential to the effective operation of the state and which are not covered, or at least not completely covered, by statute. Some of them, such as the conduct of diplomacy and war, are by their very nature at least normally best reserved to ministers just as much in modern times as in the past…

…

52. The fact that the exercise of prerogative powers cannot change the domestic law does not mean that such an exercise is always devoid of domestic legal consequences. There are two categories of case where exercise of the prerogative can have such consequences. The first is where it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others….

53. The second category comprises cases where the effect of an exercise of prerogative powers is

to change the facts to which the law applies… These are examples of where the exercise of the prerogative power alters the status of a person, thing or activity so that an existing rule of law comes to apply to it. However, in such cases the exercise has not created or changed the law, merely the extent of its application.

54. The most significant area in which ministers exercise the Royal prerogative is the conduct of the United Kingdom's foreign affairs. This includes diplomatic relations, …'

12. Professor Sarooshi submitted that, where (as here) HMG has recognised the Respondent as part of Kuwait's diplomatic mission in the United Kingdom, it has altered the status of the Respondent, whether or not the latter has a separate legal personality. That is an irrebuttable fact by virtue of which the DPA applies. The Respondent's assertion of independent status under section 14(2) of the SIA is irrelevant, as a matter of law, because HMG has recognised the Respondent and neither the Tribunal nor the EAT can go behind that recognition. There might be a separate question as to whether the Respondent had chosen to waive any aspect of its diplomatic immunity, but that would have no bearing upon the analysis of the issue currently under consideration.

13. Professor Sarooshi further relied upon **Al Attiya v Hamad Bin-Jassim Bin-Jaber Al Thani [2016] EWHC 212 (QB)**, in which Blake J had applied the one voice principle to diplomats, as part of HMG's power to conduct diplomatic relations. In that case, the question arising had been whether the defendant Qatari politician enjoyed diplomatic immunity from claims, having been appointed to part of a diplomatic mission to the United Kingdom. The claimant had argued that, in order to determine whether the defendant enjoyed the immunity claimed, the court could decide whether, as a question of fact, he had been exercising diplomatic functions. Blake J had held that to be impermissible; at paragraphs 59(i) to (iv) accepting, as a correct summary of the law, the following propositions:

13.1. Questions of whether a state, or a head of state, or a government of state is recognised are matters within the exclusive jurisdiction of the FCDO and the information provided must be acted on by the court as a fact of state, as the UK cannot speak with two voices on the same question;

13.2. The recognition of foreign diplomats is also a prerogative function of the FCDO, as an aspect of the conduct of foreign relations;

13.3. Whether immunity attaches to a diplomat, or a person claiming to be a diplomat, is a matter of law for the court to determine;

13.4. The facts contained in a section 4 DPA certificate are conclusive evidence of the certified facts in the proceedings before the court and any other expression of a question of fact that is within the exclusive competence of the FCDO (such as approval of a special mission) may be treated similarly as a fact of state;…"

Professor Sarooshi submitted that the same principles apply to the FCDO's recognition of the mission itself, to which diplomatic immunity separately attaches. Once its status has been recognised, it is then for the court or tribunal to determine the consequences in the particular case; here, whether Article 24 and/or 27 of the VCDR applies and the effect of any transmission of the documents sought to third parties. The Respondent did not contend that a section 4 DPA certificate had been provided by the FCDO in this case, but did assert that the FCDO had expressed a question of fact to the same effect (see below). Further, as had been observed at paragraph 77 of **Al Attiya**, a receiving state may be content to accept a member of diplomatic staff even if that person is not engaged in such a function full-time.

14. Professor Sarooshi submitted that, so far as material to the circumstances of the instant case, Article 7 of the VCDR provides that the sending state may freely appoint the members of staff of the mission and indicates that those staff have automatic immunity in such circumstances. The evidence before the Tribunal, in the form of the London Diplomatic List and the letter sent by the FCO to the Kuwaiti Embassy, provided evidence that the staff sent to the Respondent were accepted as part of the Kuwaiti mission. Similarly, in **Khurts Bat v Investigating Judge of the Federal Court of Germany** [2013] QB 349 (QB), the Divisional Court had been concerned with HMG's recognition of a special mission, holding that the essential requirement therefor was that the receiving state had given its prior consent to such a mission and thereby recognised its special nature and the status of inviolability and immunity which participation in it conferred upon the visitor. That, submitted Professor Sarooshi, was to be contrasted with the position of an ordinary mission and the individuals who work within it. However, what was common to both situations was the fact that HMG's position on the issue is determinative. At paragraph 33 in **Khurts Bat**, Moses LJ had held:

'33. It seems to me that the analogy with the inviolability and immunity of accredited members of permanent missions and the importance of consent illuminate resolution of the issue as to whether the FCO letter… is conclusive. The acceptance of accreditation to a permanent diplomatic mission is a matter within the discretion of the executive, or, more accurately, the Royal Prerogative….',

going on to hold, at paragraph 34, that 'facts of state' were:

'…facts which the court accepts, not so much because they are within the exclusive knowledge of the UK Government, but because they represent matters which are exclusively for decision by the

Government and not for the courts. It is for the UK Government to decide whether to recognise a mission as a special mission, just as it is for the Government to decide whether it recognises an individual as a head of state. As Brooke LJ said in Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883, para 349: "Her Majesty's Government has never given up the right to inform the courts as to its recognition or non-recognition of states, and the public policy need for the courts to follow that information, spoken to by Lord Atkin and others, remains.'

15. Professor Sarooshi also placed reliance upon **Dr Ali Mahmoud Hassan Mohamed v Mr Abdulmagid Breish and others** [2020] EWCA Civ 637, a case intended to resolve the question of which of four competing claimants ought to be recognised by the English Courts as the validly appointed chairman of the Libyan sovereign wealth fund, for certain purposes. At paragraph 57, the court had observed that the one voice principle was rooted in the constitutional allocation of the roles of executive and judiciary; a consequence of the constitutional separation of powers which dictates that it is the sole prerogative of the executive to determine which foreign states and governments to recognise. It had gone on to refer to earlier authority to similar effect, concerning state immunity, before concluding, at paragraphs 62 and 63:

'62. That being so, it follows that the English Court would be acting outside its proper constitutional sphere in saying anything which is inconsistent with the statements of HMG's recognition (or non-recognition) of a foreign government as sovereign, because they are a matter for HMG as the Crown acting in its executive capacity.

… it also follows as a matter of principle that the Court must not express a contrary view for any purpose, which would include such contrary view as an essential step of its reasoning. To do so would undermine the very fabric of the doctrine…'

16. Professor Sarooshi submitted that, under Article 2 of the VCDR, the establishment of permanent diplomatic missions takes place by mutual consent. Article 12 provides that the sending state may not, without the prior express consent of the receiving state, establish offices forming part of the mission in localities other than those in which the mission itself is established. Once such matters have been decided, the only role of the court is to determine whether the receiving state has made such a decision. That principle is as applicable to the diplomatic immunity of a mission as it is to state immunity, though the caselaw does not include a decided case in the former context. Having regard to the authorities concerning which diplomats form part of the mission (**Al Attiya** and **Khurts Bat**), the principles are clearly applicable and buttressed by those in **Breish** and in **Duff Development Co Ltd v Government of Kelantan** [1924] AC 797, HL, to which it refers; HMG has prerogative power to recognise a foreign state, from which it must follow that it is an exercise of the prerogative power to decide which entities form part of the foreign state's mission. Any foreign entity so recognised is entitled to enjoy immunities.

17. Professor Sarooshi submitted that the analysis in **Breish** applies, by analogy, to any office which is determined to form part of the mission. Similarly, in **Al Attiya** (see paragraph 66), the argument had been that the defendant did not enjoy immunity because he had not been exercising diplomatic functions in the UK. In support of that submission, reliance had been placed upon two public statements which had been made, to the effect that he was a private person and not representing the government of Qatar. Notwithstanding the acknowledged absence of evidence as to the activities in which the defendant had actually been engaged, the court had held [75]:

'There would be real difficulties and uncertainties if the court were to undertake the inquiry that the claimant contends it should. The sending state is not obliged to provide evidence and the nature of any exchanges in which the person concerned may have engaged might well be something that both states would prefer not to disclose. A functional enquiry may well result in

information not known to the FCO being examined and opens the door to the real possibility that conflicting factual findings are made between the court and the FCO, with the result that the one voice principle is undermined.'

That passage had been endorsed by Lord Dyson MR, in **Estrada v Al-Juffali (Secretary of State for Foreign and Commonwealth Affairs intervening)** [2016] EWCA Civ 176 [33] and disposed of the Claimants' argument (at footnote 12 of their skeleton argument), to the effect that the Respondent's activities did not appear to meet any of the functions of a diplomatic mission. In **Estrada**, the Court of Appeal had considered the authority (amongst others) on which the Claimants relied in that connection (**R v Governor of Pentonville Prison, Ex p Teja** [1971] 2 QB 274), noting, at paragraph 37, that the Divisional Court had held that a foreign state's unilateral action in appointing a diplomatic agent did not confer diplomatic immunity. Until the receiving state had accepted and received the intended representative as a persona grata, he was not immune from proceedings in the English courts. Lord Dyson had gone on to observe that Lord Parker CJ's observations that it was almost impossible to say that a man who is employed by a government to go to foreign countries to conclude purely commercial agreements, and not to negotiate in any way or have contact with the other government, can be said to be engaged on a diplomatic mission at all had been obiter dicta. In any event, the ratio of the decision could not assist the respondent in **Estrada** because the appellant had not only been appointed by the foreign state but been accepted and received by the FCO. At paragraph 39, Lord Dyson had considered **R v Secretary of State for the Home Department, ex p Bagga** [1991] 1 QB 485, stating his view that it was inconsistent with the proposition that, in deciding whether immunity applies, the court can inquire into the nature of an individual's activities. Professor Sarooshi emphasised Lord Dyson's dicta at paragraphs 34 and 35 of **Estrada**, following his endorsement of Blake J's analysis at paragraphs 74 to 78 of **Al Attiya**:

'34. This is consistent with the common law approach to establish entitlement to diplomatic immunity which was authoritatively explained by the House of Lords in Engelke v Musmann [1928] AC 433. As the Attorney General said, at p437:

> *"28… if the court can go behind [a statement made on behalf of the UK Government that a person has or has not been recognised as a member of the diplomatic staff of a foreign ambassador] and themselves seek to investigate the facts, compelling the person on behalf of whom immunity is claimed to submit to legal process for that purpose, it would be impossible for His Majesty to fulfil the obligations imposed on him by international law and the comity of nations, since the steps taken to investigate the claim would in themselves involve a breach of diplomatic immunity which in the event the court might decide to have been established."*

This was accepted by the House: see per Lord Buckmaster at pp446—447, Viscount Dunedin at p448 and Lord Phillimore at p455.

35. Mr Hickman submits that the common law is irrelevant because the position is now governed by statute. But it would be surprising if Parliament had intended to effect the fundamental change in the law relating to diplomatic immunity for which Mr Hickman contends. We have seen nothing to indicate that Parliament intended to effect such a change which would potentially hamper the conduct of foreign relations and the work of international organisations. No reason has been advanced to suggest why Parliament would or might have wished to do this.'

18. The reference to international law within the passage cited at paragraph 34, in the instant case, is to the VCDR. Whilst paragraph 35 refers to immunity for organisations, the same analysis applies

to the work of foreign missions in the United Kingdom and to the determination of whether the Respondent in this case forms part of the mission, submitted Professor Sarooshi.

The evidence of the Respondent's membership of the Kuwaiti diplomatic mission

19. In the course of the hearing, Professor Sarooshi referred to three documents which, so the Respondent submitted, demonstrated that it has been recognised by HMG as part of the Kuwaiti mission:

19.1. The first in time had not been before the Tribunal and is a note, dated 7 November 2005, from the FCO to the Kuwaiti Embassy, expressly responsive to a prior note received from the Embassy, dated 4 October 2005, which had not been produced at or before the hearing of the appeal (but see further, below). The relevant paragraphs state:

'Protocol Division wishes to confirm, for and on behalf of the Secretary of State for Foreign and Commonwealth Affairs, that under section 1 of the Diplomatic and Consular Premises Act 1987, consent is hereby given for Wren House, Carter Lane, London, EC4V 5EY to be deemed diplomatic premises, to be used for the purposes of the Kuwait Investment Office.

This consent is conditional upon the Embassy obtaining the necessary planning permission from the relevant local authorities and may be withdrawn if it is not so obtained.'

That, it is said, demonstrates that express consent has been given, in accordance with Article 12 of the VCDR, for Kuwait to establish an office forming part of the mission, in

a locality other than that in which the mission itself is established and, accordingly, confirms HMG's express recognition of the Respondent's offices as forming part of the Kuwaiti mission. Under section 1(1) of the 1987 Act, to which the note refers, *'... where a State desires that land shall be diplomatic… premises, it shall apply to the Secretary of State for his consent to the land being such premises.'* Under section 1(3) of the same Act, *'In no case is land to be regarded as the State's diplomatic… premises for the purposes of any enactment or rule of law unless it has been so accepted or the Secretary of State has given that State consent under this section in relation to it…'*. Professor Sarooshi submitted that, at no time subsequently has Kuwait ceased to use the land for the purposes of its mission, or the Secretary of State withdrawn his/her acceptance or consent in relation to the land. As Wren House is the authorised office for which consent has been given, it must follow that the Respondent is part of the Kuwaiti mission.

19.2. The second was before the Tribunal, in partially redacted form. It is a letter from the Protocol Directorate of the FCO to the President and CEO of the Respondent, dated 31 October 2019. It opens by thanking Mr Al-Ateeqi for coming into the FCO earlier that month, to discuss the proposed new premises and staffing of the Respondent, going on to record the number of staff members at the investment office in 2012, according to the FCO's record, and that the FCO had agreed to grant privileges and immunities to 75 of them, with the non-Kuwaiti and locally engaged staff granted immunity only for the official acts performed in the exercise of their functions, in accordance with Article 38 of the VCDR. The balance of the letter sets out the way forward in the event that the investment office required privileges and immunities for staff in addition to the 75 originally agreed.

19.3. The third is the London Diplomatic List, as revised in May 2020, sub-headed *'Alphabetical list of the representatives of Foreign States and Commonwealth Countries in London with the names and designations of the persons returned as composing their Diplomatic Staff. Representatives of Foreign States and Commonwealth Countries & their Diplomatic Staff enjoy privileges and immunities under the Diplomatic Privileges Act 1964....'* Under 'Kuwait', the following are listed: Embassy of the State of Kuwait; Cultural Office; Kuwait Military Office; Kuwait Health Office; and the Respondent, the address for which is stated to be Wren House. There follows a list of named individuals, including Mr Al-Ateeqi, described as 'Financial Attaché (Head of the Kuwait Investment Office)'.

20. Professor Sarooshi submitted that there is no prescribed form which an expression of recognition must take. Whilst it can take the form of a certificate by the FCO/FCDO, it need not do so. As section 4 of the DPA provides, a certificate issued by or under the authority of the Secretary of State stating any fact relating to whether or not any person is entitled to any privilege or immunity under the DPA is conclusive evidence of that fact. If some other form of evidence is advanced, it will be for the court to rule on whether it evidences the status contended for. In **Central Bank of Venezuela v Governor and Company of the Bank of England and others** [2020] EWCA Civ 1249, at paragraph 71, Lord Justice Males had held, concerning the recognition of a government:

'71. Recognition may be either express or implied. This is explained for example in Oppenheim's International Law, 9th ed (2008), vol 1, at para 50:

> *"Recognition can be either express or implied. Express recognition takes place by a notification or declaration clearly announcing the intention of recognition, such as a note addressed to the state or government which has*

requested recognition. Implied recognition takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it…."

72. One way in which recognition may be implied is the establishment or maintenance of diplomatic relations with the ruler or government of the foreign state. For example, Oppenheim at para 50 refers to "the formal initiation of diplomatic relations" as one of the "legitimate occasions for implying recognition of states or governments". Such implied recognition is contrasted with a situation where, following a revolutionary change of regime, diplomatic representatives accredited to the previous government are left in place for an interim period and may have unofficial contact with the new regime, which unofficial contact would not amount to implied recognition.'

21. Nothing in that passage indicated the need for recognition to take a particular form, submitted Professor Sarooshi. Paragraph 59(iv) of **Al Attiya** (cited above) was in similar vein. The London Diplomatic List had previously been relied upon by courts as evidence of HMG's fact of state; **Propend Finance Pty Ltd & others v Sing & another** [1997] WL 1103759, CA was an example. In that case, a question had arisen as to whether the first defendant, a detective superintendent in the Australian Federal Police Force, who, between 1989 and 1993, had been an accredited diplomat at the Australian High Commission in London, had lost his diplomatic immunity, under Article 39(2) of the VCDR, when he had subsequently left the UK, because the relevant acts had not been performed by him 'in the exercise of his functions as a member of the mission'. At paragraph 2 on page 6, Leggatt LJ had relied on the fact (amongst others) that the first defendant had appeared in the London Diplomatic List as evidencing that they had. In **Estrada**, at paragraph 16, reference had been made to the Diplomatic List. Whilst it had not been dispositive of the appellant's status, because other evidence had been used to support it, it had been the only piece

of evidence from the FCDO itself which had been cited by Lord Dyson MR. The Claimants' written submissions sought to undermine the importance of the Diplomatic List, but focused only on the role of the list in relation to staff and ignored its function in indicating which offices formed part of the mission itself. That, submitted Professor Sarooshi, constituted an attempt to muddy the waters; the issue in this case related to the mission, not to individual diplomats (although some evidence could be gleaned from the status of individuals).

22. Professor Sarooshi observed that the FCO's letter of 31 October 2019 had been sent to the office of the Respondent (Wren House) which (see the FCO's 2005 note) the FCO had consented to forming part of the Kuwaiti mission. The letter referred to Article 38 of the VCDR, indicating HMG's recognition that the Respondent's staff were members of the mission in the UK. Article 38(1) provided that, *'Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.'* Staff hired locally gained immunity under Article 38(2). That letter, submitted Professor Sarooshi, evidenced the fact that the FCO was treating the Respondent's officials as members of the Kuwaiti mission. A determination made by HMG under Article 38 is one with which the Court cannot interfere. Whilst the VCDR does not define 'the mission', it was to be noted that the 'premises of the mission' are defined, in Article 1(i) of the VCDR, to mean *'the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission'.* By letter to the FCO Protocol Directorate, dated 13 February 2020, Mr Al-Ateeqi had noted the Respondent's wish, in light of the substantial growth, over the previous eight years, in the assets of the State of Kuwait which the Respondent managed out of London, to increase the number of locally employed staff roles which enjoyed privileges and immunities, from the previously agreed number of 75 to 120. The Claimants were wrong to contend that any diplomatic

status of staff within the Respondent appeared to derive from their status as secondees of the State of Kuwait; all were 'members of the mission', defined in Article 1(b) of the VCDR to mean *'the head of the mission and the members of the staff of the mission'*. The Claimants' contention was wrong for four reasons:

22.1. Whether or not staff had been posted or seconded by the State of Kuwait to the Respondent said nothing about the Respondent's status in the United Kingdom as part of the mission;

22.2. Staff enjoy diplomatic status precisely because they are part of the Respondent, which is part of the mission;

22.3. As indicated by the FCO's letter of 31 October 2019, the Respondent has 75 other staff who have been granted diplomatic immunity, acknowledged as members of the mission;

22.4. All employees of the Respondent are civil servants of the State of Kuwait, as had been common ground between the parties in **Sarrio SA v Kuwait Investment Authority** [1997] I.L.Pr. 481, CA [59]. In any event, the fact that only certain employees have diplomatic status is irrelevant to the status of the Respondent as part of the mission. In the circumstances specified, Article 11 of the VCDR enables a receiving state to require that the size of the mission be kept within limits considered by it to be reasonable and normal. It was that right which was being exercised in the manner referred to in the FCO's letter of 31 October 2019, itself providing further evidence of the Respondent's status as part of the Kuwaiti mission.

23. In the instant case, submitted Professor Sarooshi, the Tribunal had found that the evidence before it demonstrated that the Respondent formed part of the Kuwaiti mission, on the basis that the FCO had recognised it as such. Its error was to consider that evidence rebuttable, but its primary finding stood. There had been no evidence to the contrary and it would be for the Claimants to seek to overturn that finding. To uphold the Tribunal's finding that the evidence was rebuttable would result in serious consequences for the United Kingdom's foreign relations with Kuwait. Furthermore, the EAT had an independent obligation to give effect to diplomatic immunity, even if that required it to have regard to evidence which had not been before the Tribunal: **Republic of Yemen v Aziz** [2005] ICR 1391, CA applied, as did **Arab Republic of Egypt v Gamal-Eldin** [1996] ICR 13, EAT; and **United Arab Emirates v Abdelghafar** [1995] ICR 65, EAT (albeit that all were decisions as to state immunity). The additional evidence upon which reliance was now placed had been provided to the Claimants on 17 April 2020. Whilst the new evidence before the EAT would not necessarily satisfy all three stages of the conjunctive test in **Ladd v Marshall [1954] EWCA Civ 1**, it need not do so.

24. It was Professor Sarooshi's submission that, where a court considers the available evidence of recognition to be inadequate, it is for the court to ask the FCDO for a certificate, or to order a party to seek such a certificate. No such certificate had been requested by the Respondent in this case, he stated, because, in its view, the existing evidence sufficed. A court was not entitled to determine for itself whether an entity qualified for recognition, or to decline to reach a conclusion as to whether it has been recognised by HMG on the basis of insufficient evidence. In **Central Bank of Venezuela** [127-128], the Court of Appeal had decided that, before a definitive answer could be given to the recognition issues arising in that case, it would be necessary to determine two prior questions, which would best be determined by posing a further question, or questions, of the FCO. For that purpose, it remitted the matter to the Commercial Court, to give the parties and the court an opportunity to consider the appropriate formulation of the questions (and any

other questions which might need to be asked), in the light of its judgment. The position in the instant case was analogous, submitted Professor Sarooshi: if there is doubt as to what is meant by the evidence provided by the Respondent, this tribunal should seek clarification from the FCDO. In the event of any inconsistency in the available evidence as to recognition, it would be for the EAT to resolve that inconsistency, if necessary by itself seeking a certificate from the FCDO.

The Respondent's pleaded status as a separate entity for the purposes of the SIA

25. In this case, submitted Professor Sarooshi, the EAT was being asked to rule only on whether the Respondent forms part of the Kuwaiti mission and enjoys diplomatic immunity under the DPA. Under section 16(1) of the SIA, *'This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964…*'. As section 14 of the SIA, which restricts the circumstances in which a separate entity is immune from the jurisdiction of the courts of the United Kingdom, falls within 'this Part' of the SIA, a party's status for the purposes of that section had no effect upon any immunity conferred by the DPA. Thus, the Respondent's pleaded case for the purposes of section 14(2) of the SIA was of no relevance to the issue here under consideration. The Respondent's pleaded case expressly related to state, not diplomatic, immunity and, in any event, at paragraph 13, stated (with emphasis added), *'For the purposes of this assertion only, without admission as to the same, KIO is prepared to proceed on the basis that it would be regarded as a separate entity under s.14(2) of SIA 1978.'*

26. In summary, Professor Sarooshi submitted:

26.1. The Tribunal had erred in failing to apply section 16(1) of the SIA. Each statute separately determines the circumstances in which the immunity which it confers applies. Under the DPA and the VCDR which it implements, the question is whether an entity is part of the

mission. The existence or otherwise of state immunity has no bearing upon that question. The only limitation is consent-based, regarding the establishment of diplomatic relations and which offices can form part of the mission (see Articles 2 and 12 of the VCDR). That is a matter for HMG to decide. There is no requirement that all entities form part of the same legal person. The Respondent enjoys diplomatic immunity, as a result of which none of the documents sought by the Claimants is disclosable.

26.2. Further, the fact that a body has separate personality under the law of a foreign state does not mean that HMG cannot accept it as part of a state's mission: **Al-Malki v Reyes** [2019] AC 735, SC, per Lord Sumption, at paragraph 6:

'... As it stands, the Convention provides a complete framework for the establishment, maintenance and termination of diplomatic relations. It not only codifies pre-existing principles of customary international law relating to diplomatic immunity, but resolves points on which differences among states had previously meant that there was no sufficient consensus to found any rule of customary international law.'

In light of the Claimants' reliance upon Article 6 of the ECHR, the following dicta of Lord Sumption were also worthy of note [7]:

'... Nor do I doubt that diplomatic immunity can be abused and may have been abused in this case. The judge can properly regret that it has the effect of putting severe practical obstacles in the way of a claimant's pursuit of justice, for what may be truly wicked conduct. But he cannot allow his regret to whittle away an immunity sanctioned by a fundamental principle of national and international law. As the fourth recital of the Vienna Convention points out, "the purpose of such privileges and immunities is not to

benefit individuals but to ensure the efficient performance of diplomatic missions as representing states".'

Articles 24 and 27 of the VCDR

27. Professor Sarooshi submitted that Article 24 of the VCDR confers immunity in relation to all documents the subject of the Tribunal's orders. That Article provides that *'The archives and documents of the mission shall be inviolable at any time and wherever they may be.'* The Tribunal had erred in its reliance upon **Shearson Inc v MacLaine, Watson & Co Ltd (No 2)** [1988] 1 WLR 16, HL and **R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs** [2018] UKSC 3, each of which related to the different question of whether documents sent from the mission to third parties retained immunity *in the hands of those third parties*. That was particularly clear from Lord Bridge's statement in **Shearson**, at 24H:

'*We are not in this appeal in any way concerned with documents held by the I.T.C. Ex hypothesi the categories of documents in the assumed facts are held by third parties. No claim is made against the I.T.C. requiring them to produce documents which they hold. Thus the central question at the heart of the dispute which has to be asked in relation to each category is whether the documents in that category "belong to" the I.T.C.'*

There is a fundamental difference between documents held in the mission and those which are outside it and no longer within its ownership, submitted Professor Sarooshi. In **Bancoult**, at 1006C, Lord Sumption JSC had drawn a distinction between documents communicated to a third party with the actual or ostensible authority of the responsible personnel of the mission (in respect of which any immunity is lost) and the inviolability of the archive of the mission. In that case, the court had been concerned only with the version of a document which had been sent from the

United States Embassy in London to the United States Federal Government, in Washington D.C, and which had been hacked whilst there and published, without authority, on a website. The question had been whether the published version was admissible as evidence in court.

28. Professor Sarooshi submitted that the same principles govern the application of Article 27(2) of the VCDR, which provides that, *'The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions'*.

29. In the course of his submissions on day one of the appeal, I asked Professor Sarooshi whether, had the Claimants applied for an order for specific disclosure, by third parties, of documents in the form communicated by the Respondent to those third parties, the Respondent would, or could, have had any legitimate objection under the DPA/VCDR. He replied that it would not and could not have done so, because (see **Bancoult**, at paragraph 71) *'in the form communicated, it is no longer the mission's document'*. The objectionable feature of the Claimant's application was that it had been made against the Respondent (which formed part of the Kuwaiti mission) itself.

30. Given that an exhaustive list of third parties to whom relevant documents had been communicated by the Respondent would not necessarily be known to the Claimants, I went on to ask Professor Sarooshi whether the Respondent would, or could, have any objection under the DPA/VCDR to an order that it provide such a list to the Claimants. Professor Sarooshi submitted that such an order would be objectionable because compilation of the list would necessarily require the Respondent to access its archive and official correspondence, contrary to its rights under Articles 24 and 27 of the VCDR. He produced no authority supportive of that proposition, including between days one and two of the appeal, and notwithstanding his provision of additional authority in connection with other propositions during that period.

Article 6 of the ECHR

31. As to the Claimants' and the Tribunal's reliance upon Article 6 of the ECHR, and assuming that Article 6 is relevant to an application for specific disclosure (which was not accepted), Professor Sarooshi submitted that regard must be had to **Estrada** [44], per Lord Dyson MR:

'...the clear and consistent position taken by the courts is that for a claim to immunity to be regarded as a proportionate restriction on the right of access to a court enshrined in Article 6 of the ECHR, it is necessary to do no more than determine whether the grant of immunity reflects generally recognised rules of public international law. This test was developed by the ECHR in the context of State immunity. But its application in the context of diplomatic immunity has been expressly endorsed by the decision of this court in Al-Malki v Reyes (Secretary of State for Foreign and Commonwealth Affairs intervening) [2016] 1 WLR 1785, para 70 where I said:

> *"In short, the court held that compliance with a State's international law obligations is conclusive on the issue of proportionality. In my view, although there are important differences between State immunity and diplomatic immunity, these differences are immaterial to the point of principle that the court enunciated at para 36 [of the ECHR decision in Fogarty v United Kingdom (2001) 34 EHRR 12]. The central point is that restrictions on the right of access to court which reflects generally recognised rules of public international law cannot in principle be regarded as disproportionate. The court added that this is so even if international practice as to the meaning or scope of an international obligation is inconsistent, provided that the interpretation applied by the state in question is reasonable and falls within currently accepted international standards."'*

32. It follows, contended Professor Sarooshi, that immunity conferred by the VCDR operates to 'trump' a party's Article 6 rights, alternatively constitutes a justified interference with them. That is the case even if the party enjoying the relevant immunity has given selective disclosure. For whatever reason, the Respondent had not asserted diplomatic immunity under Articles 24 or 27 of the VCDR in relation to an earlier order for standard disclosure. It was now doing, and entitled to do, so in relation to the specific disclosure sought by the Claimants. Its earlier stance did not preclude its later approach unless consent to and/or the giving of standard disclosure had amounted to a waiver of its immunity under the DPA. That had not been the case — any waiver must be expressly given by the ambassador, or by someone acting on his instructions in his absence. In support of that submission, Professor Sarooshi relied upon **Aziz** [56], per Pill LJ:

> *'Section 2(3)* [of the SIA] *should, however, be read in the light of authority of long-standing establishing the importance of state immunity and the importance of its not being waived except with appropriate authority. The fact that the step in proceedings alleged to constitute the waiver is taken by solicitors instructed by the embassy does not conclude the matter. A solicitor acting without authority cannot waive the immunity. The solicitor's actions establish a waiver only if they have been authorised by the state, which includes authority exercised or conferred by the head of the state's diplomatic mission. That would include a step authorised by the head of mission himself or herself. Authority may be conferred on the solicitors either directly or, in my view, indirectly by a member of the mission authorised by the head of mission to do so.'*

33. In any event, submitted Professor Sarooshi, as the Tribunal had recognised there are other means by which to ensure a fair trial, including by the drawing of adverse inferences in connection with the relevant substantive issues, arising from disclosure which is considered to be unfairly selective.

Relevance

34. In the alternative, Professor Sarooshi submitted that the Tribunal had erred in concluding that the documents of which it had ordered specific disclosure were relevant to the substantive issues to be determined at the open preliminary hearing. That contention formed no part of his oral submissions, albeit that, with one qualification (see below), he did not abandon the Respondent's written submissions on the issue. By those submissions, in summary, the Tribunal was said wrongly to have had regard to **Trendtex**, as being a case which had pre-dated the SIA and had been concerned with whether the central bank, having a separate legal personality, should be considered to be an emanation, or department of government, of the state of Nigeria. By contrast, at the open preliminary hearing in this case, the tribunal will need to consider whether, as a separate entity, the Respondent itself has state immunity; an issue about which **Trendtex** had nothing to say.

35. The issues arising in respect of whether the Respondent has state immunity are:

35.1. whether '*the proceedings relate to anything done by* [the Respondent] *in the exercise of sovereign authority'* (section 14(2) of the SIA);

35.2. whether each claimant is a *'member of the mission'*, such that the employment exception within section 4 of the SIA does not apply (section 16(1)(a) of the SIA); and

35.3. (in light of the Claimants' assertion that, pursuant to EU law, the provisions of the SIA in relation to certain claims must be 'disapplied') whether customary international law requires the UK to confer immunity in respect of those claims, adopting the approach in

Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening) [2019] AC 777, SC.

36. Professor Sarooshi submitted that the matters identified by the Tribunal were of no relevance to the first such issue; the second issue would not depend upon the nature of the work carried out by the Claimants, or by the Respondent generally; and, as had been made clear in **Benkharbouche**:

36.1. *'In the great majority of cases arising from contract, including employment cases, the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise. This will in turn depend on the functions which the employee is employed to perform.'* ([54], with emphasis added);

36.2. the restrictive doctrine of immunity in customary international law had the following formulation *'confining the immunity in employment disputes to cases where the making of the contract all the acts giving rise to the complaint were exercises of sovereign authority, or the dispute is between a state and one of its own Nationals'* [74].

Accordingly, for the purposes of the third issue, the fact decisive of whether the Respondent is immune under customary international law is the nature of the relationship between the parties, itself dependent upon the functions which the Claimants were employed to perform. If the making of the contract of employment had been an exercise of sovereign authority, that would suffice to confer immunity. By definition, tribunal proceedings relating to that contract will satisfy section 14(2) of the SIA. The Tribunal had given no reasons for its conclusion that broader issues were engaged and had erred in so concluding.

37. Contrary to the position adopted in writing, Professor Sarooshi submitted that, in the event that the EAT considered the Tribunal to have erred in its analysis of the legal principles by reference to which it had determined the relevance of the specific disclosure sought, the matter ought to be remitted for an assessment of its relevance in accordance with the correct legal principles (subject to the outcome of those grounds of appeal which relate to immunity and inviolability).

The Claimants' pleaded case

38. Finally, submitted Professor Sarooshi, grounds 1.1 and 2 of the Respondent's notice of appeal essentially made the same procedural point; the Tribunal had been wrong to have entertained the Claimants' application for specific disclosure in the absence of a properly pleaded case by the Claimants as to state immunity. The Respondent's position was that:

    38.1. where an issue of immunity is in play, the burden of proof lies on the Claimants to establish jurisdiction: **JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry** (1987) 3 BCC 413, at 418-419;

    38.2. in general, a party's case should be set out in a pleading, even in the employment tribunal: **Chandhok v Tirkey** [2015] ICR 527 [16-18]; and

    38.3. when determining an application for specific disclosure, it was important to analyse the pleadings in order to identify the factual issues in dispute: **Harrods Ltd v Times Newspapers** [2006] EWCA Civ 294 [12].

39. In this case, submitted Professor Sarooshi, the Claimants are at liberty to advance such factual case as they choose, without first needing to set it out, meaning that there is also no pleaded

response to that case, which might narrow the issues to which disclosure and the evidence need go. Despite that, orders had been made for disclosure of sensitive material. When considering whether the Tribunal had erred in its approach, the test to be applied was that set out in **Noorani v Merseyside TEC Ltd** [1999] IRLR 184, CA [32]:

'Such decisions are, essentially, challengeable only on what loosely may be called Wednesbury grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was "outside the generous and it within which a reasonable disagreement is possible"…'

Applying that test, submitted Professor Sarooshi, the Tribunal's decision had been flawed, in particular given the need to give proper effect to immunities, and the EAT ought to consider the application afresh and grant it.

The Claimants' submissions

40. Mr Laddie QC opened his submissions with the general observation that Professor Sarooshi had recognised that the logic of the Respondent's case was that it could have its cake and eat it, too, in its approach to disclosure, by making voluntary disclosure of the material which suited its case, whilst concealing that which did not assist it, under the cloak of diplomatic immunity. The only tool available to the Tribunal in such circumstances, in order to guard against unfairness, was its ability to draw adverse inferences, which would be difficult for it to do whilst being unaware of all documentation which did, or might, exist. The Respondent's position in relation to the First Claimant was particularly stark, given that it was separately suing him, as a blatant act of retaliation for his tribunal claims, in the High Court. That state of affairs informed the Claimants'

position. As a matter of natural justice, courts and tribunals ought to strive to achieve equality of arms. The Respondent's approach constituted a particularly egregious example of cynicism at play, in relation to disclosure and the wider litigation in which the First Claimant and the Respondent were engaged.

41. Mr Laddie first turned to address ground 5, then 4, of the appeal. In response to the Respondent's essential submission that the Tribunal had been wrong to find that it did not form part of the Kuwaiti diplomatic mission, the Claimants made two essential points:

    41.1. The Respondent cannot constitute a mission, or part thereof, because it is a separate legal entity from the state of Kuwait, as the Tribunal had concluded. In any event,

    41.2. Assuming the application of the one voice doctrine, on the facts of this case HMG had not expressed itself in a way which sufficed to satisfy the Tribunal, or should satisfy the EAT, that it had recognised the Respondent as part of the mission (whether or not regard was had to the additional evidence before the EAT which had not been before the Tribunal).

Separate legal entity

42. Dealing with the first point, it was necessary to consider the Respondent's pleaded case in its Particulars of Assertion of State and Diplomatic Immunity. There was no magic to the heading of that document, or to the strangely worded saving clause at paragraph 11 – the document set out the Respondent's factual and legal case on the discrete questions of diplomatic and state immunity. In that connection:

42.1. at paragraph 7, the Respondent was said to be a branch office of the Kuwait Investment Authority ('the KIA');

42.2. at paragraph 9, under Kuwaiti law as pleaded, the KIA (and, by extension, the Respondent) was said to be an *'independent public authority with… juridical status'*;

42.3. at paragraph 10, it was said that the KIA's status (which is equally applicable to the Respondent) pursuant to section 14 of the SIA had been the subject of prior litigation before the English Court, in **Sarrio**. Whilst recording certain matters which had been noted at paragraph 59 of the report in that case [I interpose as being *'common ground'*], the Respondent had omitted to record the following matter, observed at paragraph 6 (with emphasis added): *'The defendants are the Kuwait Investment Authority ("KIA"), which may be described as the investment arm of the government of Kuwait, though with a separate legal identity from the government and State."*;

42.4. at paragraphs 11 and 12, it was said:

> *'11. For the purposes of this Assertion only, without admission as to the same, KIO is prepared to proceed on the basis that it would be regarded as a separate entity under s.14(2) of SIA 1978.*
>
> *12. A "separate entity" is immune from the jurisdiction of the Court and Tribunals if (a) the proceedings relate to anything done by it in the exercise of sovereign authority and (b) the circumstances are such that a state would have been immune.'*

43. Mr Laddie submitted that the Claimants' case as to the Respondent's separate legal identity did not stand or fall on the latter's pleaded position as to section 14(2) of the SIA, but on the facts on which it had relied in the preceding paragraphs, consistent with its factual case in **Sarrio**. On that basis, it could not benefit from diplomatic immunity; only the state of Kuwait itself has such immunity. The position could not be any clearer than in **Bancoult**, at paragraph 65:

'The basis in modern international law for the protection of the documents of a diplomatic mission is article 24 of the Vienna Convention on Diplomatic Relations (1961), which provides that "the archives and documents of the diplomatic mission shall be inviolable at any time and wherever they may be." Article 27(2) which provides for the inviolability of "the official correspondence of the mission" was added (as part of an article about freedom of communication) in order to deal with the problem of the interception en route of communications not made by diplomatic courier or diplomatic bag, which would not necessarily be part of the mission's archives or documents at the time of interception… These provisions have the force of law by statute in the United Kingdom, under the Diplomatic Privileges Act 1964."

Whilst the EAT had been taken to **Bancoult** by the Respondent, in connection with Articles 24 and 27 of the VCDR, the critical paragraph, for current purposes, was paragraph 68 (with emphasis added):

'A diplomatic mission is not a separate legal entity. Its archives and documents belong to the sending state. But the protection of article 24 is limited to the archives and documents of the mission. It does not extend to those of any other organ of the sending state. The latter may be protected by other rules of law: for example by the criminal law, the law of confidence or the law of copyright. But they are not protected by the Vienna Convention…'

44. The genesis of the law relating to diplomats is that they are seen, jurisprudentially, as the extension of the sovereign body, submitted Mr Laddie. That does not mean that separate entities cannot exercise sovereign authority in certain respects, but any diplomatic mission cannot operate as a separate legal entity from the sending state. Thus, a service company is separate from the embassy and the sending state and is not part of the mission. It does not follow from that that those employed by it do not have diplomatic privileges.

45. Mr Laddie submitted that it is important to note that the analysis in **Bancoult** is not isolated; it is supported by three pieces of distinguished academic commentary:

45.1. an article by Hazel Fox (as she then was), Director, British Institute of International and Comparative Law; formerly Fellow of Somerville College Oxford, entitled *Enforcement jurisdiction, Foreign State Property and Diplomatic Immunity (1985) 34 ICLQ*, in which she had stated:

''Under English law the diplomatic mission is not a person in law; it has no power to act independently of one of its diplomatic staff who may do so as agent, not for the mission but for the state itself.'

In footnote 45 to that article, Ms Fox had stated, *'In November 1982, in reply to an enquiry, the UK Foreign and Commonwealth Office wrote: "[We] should say first that an Embassy, Consulate or High Commission does not appear to be itself a legal person. The proper defendant in an action will normally be the Ambassador/High Commissioner or the State itself": (1982) 52 BYIL 422…'*;

45.2. The revised and updated third edition of *The Law of State Immunity*, by Hazel Fox CMG QC and Philippa Webb, in which, under the heading 'Statehood', they had stated, at pages 342-343:

'... both theory and practice recognise the State and/or the individual diplomat as the proper party to proceedings; the mission, though it may have some form of corporate existence under the internal law of the sending State is not recognised in international law to have a personality separate or distinct from that State…'

Albeit that the passage continued, *'An agency or State trading organisation may be sued in its own name, and this will not necessarily prevent it from raising a plea of immunity, provided it can show itself to be sufficiently closely connected to the central government or to be acting on the State's behalf 'in the exercise of sovereign authority''*, that proposition related to state, rather than diplomatic, immunity. Whilst there were many similarities between the two forms of immunity, the applicable principles were not identical and a separate legal personality was fatal to a claim of diplomatic immunity, submitted Mr Laddie.

45.3. *Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations*, Fourth Edition, edited by Eileen Denza, under the sub-heading, *'What are the "archives and documents of the mission"?'*:

'It should be noted that since 'the mission' does not have legal personality, archives belong strictly to the sending State.'

In Mr Laddie's contention, the above commentary explains why, typically, a claim against an embassy is brought against the sending state. In this case, the Claimants had brought their claims against the Respondent, which does have a separate legal personality and, accordingly, diplomatic immunity does not arise. That was dispositive of the primary bases of the Respondent's appeal and would leave only the pleadings point and the relevance of the specific disclosure ordered as live issues.

46. The Respondent's answer to the above submission, as advanced at paragraphs 45 and 46 of its skeleton argument, was, first, that HMG had conclusively recognised the Respondent as part of the Kuwaiti mission and, consistent with the one voice doctrine, the Tribunal could not go behind that recognition. That, submitted Mr Laddie, was to assume that which the Respondent was obliged to prove. In the alternative, the Respondent submitted:

46.1. at paragraph 46(1), that there was nothing to prevent the receiving state from choosing to recognise and accept an entity which had separate legal personality under the law of the sending state as part of the latter's mission. That, submitted Mr Laddie, reflected neither the practice, nor the law as set out in **Bancoult**. Article 2 of the VCDR did not cover that issue;

46.2. at paragraph 46(2), that the VCDR was an international instrument which was to be interpreted to apply to all states having differing constitutional arrangements. Whilst that proposition was not contested, it was of no relevance to the issue under consideration;

46.3. at paragraph 46(3), that Fox and Webb's *The Law of State Immunity, Third Edition*, at pages 338-339 (cited above) specifically acknowledged that a mission can have separate legal personality under the law of the sending state and still benefit from the protections

of the VCDR. However, the relevant point to note was that, whatever the position under the law of the sending state, international law does not recognise the mission to have a personality separate or distinct from that state;

46.4. at paragraph 46(4), that the proposition at paragraph 46(3) is supported by the fact that other privileges under the VCDR can be enjoyed by those who are not employed by the sending state, provided that they are carrying out functions on behalf of that state (such as private security contractors, whom the UK has made it its policy to notify as administrative and technical staff and, hence, members of the mission). That, submitted Mr Laddie, is irrelevant because it considers the diplomatic immunity of individuals, not missions.

46.5. at paragraph 46(5), that Lord Sumption JSC, at paragraph 68 of **Bancoult**, had not been addressing the situation which arises in this case, which did not arise in that one, and had not been writing with the instant circumstances in mind: it was well accepted that a foreign entity having a separate legal personality could be treated as part of a foreign state (see, for example, **Baccus Srl v Servicio Nacional Del Trigo** [1957] 1 QB 438, CA). That, Mr Laddie characterised as a lacklustre attempt to deal with the majority decision in **Bancoult**. Whilst obiter, Lord Sumption's analysis reflected the academic texts on which both parties relied. In any event, his statement had been one of broad principle, which did not cater for contextual analysis and was applicable in all situations. Whilst it was accepted that a foreign entity having separate legal personality could be treated as part of a foreign state for certain purposes, **Baccus** had been a state immunity case and irrelevant for current purposes. The question here was whether a mission could have separate legal personality. In **La Générale des Carrières et des Mines v FG Hemisphere Associates LLC** [2012] UKPC 27, a state immunity case, FG Hemisphere

had purchased two substantial arbitration awards against the Democratic Republic of the Congo ('DRC'). In order to enforce the debts under those awards, it had applied to attach the assets of LGCM, a company based in Jersey, which had been formed by DRC, ostensibly to further its mining activities. It had been the company's position that it was a separate juridical entity and that it (and its assets) should be treated no differently from any other company or corporation, in accordance with established common law and international law principles, which recognised a distinction between the state and its organs, on the one hand, and state-owned corporations, on the other. At first instance, the Royal Court of Jersey had allowed the application, on the basis that LGCM was an organ of the state and, therefore, could be equated with it and fixed with liability for DRC's debts. An appeal from that decision had been rejected by the Court of Appeal of Jersey, but upheld by the Privy Council. At paragraphs 28 to 30, the latter court had considered the correct approach to distinguishing between an organ of the state and a separate legal entity, the following extract of which (with emphasis added) was instructive:

'[29] Separate juridical status is not however conclusive. An entity's constitution, control and functions remain relevant: [25], above. But constitutional and factual control and the exercise of sovereign functions do not without more convert a separate entity into an organ of the state. Especially where a separate juridical entity is formed by the state for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the state forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant

constitutional arrangements, as applied in practice, as well as of the state's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the state were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the state and vice versa.'

Mr Laddie submitted that the emphasised text reflected the position in the instant case. Further, paragraph 29 served to indicate the relevance of the specific disclosure sought (going to the Respondent's activities and functions) to the question of state immunity and, as such, was also material to ground 3 of the Respondent's appeal; and

46.6. at paragraph 46(6), that Lord Sumption's statement should not be applied to a situation in which, despite having separate legal personality, the entity is viewed as part of the state for the purposes of section 14(1) SIA. That proposition was not contested but was not a case being advanced by the Respondent (other than by way of an application to amend its response form, which had yet to be determined by the employment tribunal and which the Respondent was no longer asking the EAT to determine).

Thus, submitted Mr Laddie, nothing in paragraphs 45 or 46 of the Respondent's skeleton argument undermined the solidity of the Claimants' primary contention — the Respondent had separate legal personality, ipso facto it could not be part of the Kuwaiti diplomatic mission. Whilst, as a matter of principle, it might, nevertheless, establish state immunity, it would be difficult for it to do so, in all the circumstances. It was that issue which the tribunal would need to determine at the open preliminary hearing and which would require it to consider the provisions of the SIA.

The one voice doctrine

47. Mr Laddie then turned to consider the one voice doctrine, observing that there was substantial agreement between the parties. First, in none of the authorities on which either party relied had there been any discussion as to whether the doctrine applied to missions, or parts thereof, with the possible exception of **Khurts Bat** (which concerned a special mission). Nevertheless, in the EAT, for current purposes, the Claimants accepted that the scope of the Crown Prerogative would extend to missions, as well as individuals, and that a principle akin to the one voice doctrine applied to a mission, or part of it. That being so, the Claimants further accepted that recognition was a question of fact, capable of conclusive resolution by a statement by HMG.

48. Where the parties parted ways was over the standard of evidence required to demonstrate that the one voice doctrine was engaged, in any particular case. **Central Bank of Venezuela** was the most recent authority on that subject and contained extremely valuable guidance as to how that question was to be approached, Mr Laddie submitted. The Respondent relied upon paragraph 71 (cited above), but that related to recognition of a government, not of a person or entity for diplomatic purposes. If the Respondent's case was that implied recognition of the latter would suffice, paragraph 71 did not support that proposition and there was no room for implied recognition of a mission for diplomatic purposes. Nevertheless, even in the context of implied recognition of a government, the passage cited from Oppenheimer made clear that implied recognition must leave no doubt as to HMG's intention to grant it.

49. In fact, the relevant paragraphs of **Central Bank of Venezuela** were 91 and 92 (with emphasis added):

'One Voice

91. When a question arises whether HMG recognises a state, ruler or government, the usual practice is for the court to seek a formal statement of HMG's position. The practice was described by Viscount Finlay in Duff Development Co Ltd v Government of Kelantan [1924] AC 797, 813-814:

> *"It has long been settled that on any question of the status of any foreign power the proper course is that the court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his ministers upon the matter which is peculiarly within his cognizance…"*

92. Although such a letter is often referred to as a "certificate", no particular form is required… Indeed the letters relied on in Mohamed v Breish [2020] EWCA Civ 637 were addressed to and to be procured by one of the parties rather than the court, but <u>what mattered was that the FCO knew that the letters were intended to be produced and that they contained the carefully considered views of HMG for use in a public forum</u> (see per Popplewell LJ at para 37).'

50. Also relevant were paragraphs 106 to 109, to which Professor Sarooshi's contention ran contrary: whilst a statement as to recognition is conclusive for what it says, it is for the court to determine what it means. The Courts had recognised that a certificate might be incomplete or ambiguous, whether deliberately, for example in a case of particular sensitivity, or through inadvertence. In

such a case, it might be appropriate to seek clarification by posing a further question or questions to HMG, but the court was not bound to seek such clarification, nor was HMG bound to provide it, if requested to do so. In the event that clarification is not sought, or not forthcoming, the court will have to construe whatever statement has been given as best it can. Mr Laddie contended that, when construing the documents upon which reliance is placed, a tribunal must have regard to the fact that a mission cannot have separate legal personality from the state. In such circumstances, there would need to be the clearest statement by HMG that, in the knowledge of the Respondent's separate legal personality and the purpose for which the statement was being deployed, it formed part of the mission. At the core of the Respondent's case was the position that express consent to the mission (and its constituent elements) was required; it should have established that consent and the evidence produced was inadequate to that purpose.

51. In the knowledge that the SIA itself provides a certification regime, the Respondent had produced no certificate, submitted Mr Laddie. HMG had not certified that the Respondent is part of a diplomatic mission and could not do so because the Respondent had a separate legal personality. Whilst the Respondent's position before the EAT was that it had not sought a certificate because the evidence which it had produced sufficed, its appeal had followed a hearing before the Tribunal at which the Respondent had lost. It had retained the finest legal minds in the field to present its appeal and, in any event, it was verging on common knowledge that certification could be obtained. Given the legal principles set out in **Aziz**, the Claimants would have struggled to resist admitting a certificate obtained subsequent to the hearing below, but provided on appeal. Whilst the EAT could itself stay the matter in order to obtain a certificate, that would not be the appropriate course in this case, nor was it bound to do so; the Respondent had had its chance to provide appropriate documentation and had not done so. The litigation was stale, proceedings having been presented in 2019. If the EAT were, nevertheless, inclined to seek a certificate, the parties would need to be given an opportunity to consider the appropriate questions and their

formulation (see paragraph 128 of **Central Bank of Venezuela**) and the FCDO would need to be made aware of the purpose for which the certificate was being sought. There being no authority which shed any light on the burden of proof in establishing diplomatic immunity, in accordance with ordinary English law principles it was for the party asserting it to prove it. Further, the provision made by Article 2 of the VCDR, that the establishment of a permanent diplomatic mission takes place by mutual consent, means that the party claiming diplomatic immunity is the party with access to the evidence demonstrating its membership of the mission, or otherwise.

52. As to the caselaw on which the Respondent relied (**Khurts Bat**; **Al Attiya**; and **Breish**), in each such case certification had been sought or obtained from the FCO before the proceedings had started and clear certification had been received, Mr Laddie submitted. Those cases established a framework for the way in which a party such as the Respondent should go about establishing diplomatic immunity in good time, before, or at, the first instance hearing. Even now, the Respondent was not inviting the EAT to seek clarification, which was telling. Absent a clear statement from the FCO/FCDO that the Respondent is recognised as part of the diplomatic mission of Kuwait, the Respondent had failed to establish diplomatic immunity under the one voice doctrine on which it relied.

The evidence as to diplomatic immunity

53. Turning to the evidence on which the Respondent did rely, the EAT had more evidence than had been available to the Tribunal, before which no reference had been made to the one voice doctrine: the high point of the Respondent's case had been the London Diplomatic List, said to create an irrebuttable presumption. That proposition had been repeated on appeal but was inconsistent with (and unsupported by) authority. The London Diplomatic List did not state that the Respondent was part of the mission. At best, it showed that at least one person with diplomatic status worked

at the Respondent's office. As was clear from *Satow's Diplomatic Practice, Seventh Edition*, at paragraph 7.34, *'Neither entry on the Diplomatic List nor the possession of a diplomatic identity card are conclusive evidence of entitlement to privileges or immunities, but they have social and practical uses for individual members of diplomatic missions.'* The cases on which the Respondent relied stood for the opposite of the proposition advanced by Professor Sarooshi: it was clear, from paragraphs 16 and 17 of **Estrada**, that inclusion in the London Diplomatic List is not conclusive; had it been so, there would have been no need for the judge at first instance to have requested certification by the FCO (and that had been in relation to an individual, not a mission). In **Propend**, only a passing reference had been made to the inclusion of the superintendent in the London Diplomatic List, because the case had been about loss of immunity, there being no dispute that, originally, he had had it. Whilst it would be futile for the Claimants to contend that there is no diplomatic activity connected with the Respondent (recognising that some individuals who have the benefit of diplomatic immunity work out of the Respondent), that was not synonymous with the Respondent's position that the Respondent formed part of the mission. The Diplomatic List could not operate as a substitute for that which is required under the one voice doctrine, being a statement *'which leaves no doubt'*.

54. The documents which now appeared at pages 1 to 20 of the supplementary appeal bundle had been before the Tribunal, though not all in the form there appearing. Page 2 was now available in unredacted form, but had been partially redacted before the Tribunal. The document in question was a letter from the President and CEO of the Respondent to the Protocol Directorate of the FCO, dated 4 November 2011. The formerly redacted text, it could now be seen, stated as follows: *'The KIO currently has 23 Kuwaiti staff who are seconded from Kuwait and have diplomatic status. There are a further 4 vacancies for Kuwaiti staff, these are replacements for Kuwaiti employees who have left and are not new appointments'.* If the Respondent formed part of the Kuwaiti mission, there would be no basis for distinguishing between staff with diplomatic status

and those without, or those seconded from Kuwait and those employed by the Respondent. That passage should not have been redacted and served vividly to illustrate what happens when one party decides for itself what the Tribunal should see, submitted Mr Laddie.

55. The FCO's letter of 31 October 2019 had also been redacted before the Tribunal. An unredacted copy had been provided to the Claimants the day before the hearing of the appeal. It did not state that the Respondent is recognised as part of the Kuwaiti mission; the Respondent attempted to deduce that by reference to the diplomatic status accorded to the people who worked there. That was impermissible — even in redacted form, the document lacked the clarity demanded by the authorities; in unredacted form, the relevant paragraph read, *'In order to assist me in understanding the current staffing of the Investment Office, I would be grateful if you could send me a list of the officials working there, specifically highlighting those that are employed directly by the Kuwaiti government and those appointed as diplomatic agents and administrative and technical staff of the Kuwaiti Embassy, as well as those employed locally by the Embassy or Investment Office.'* Whilst it might be that the distinction between the staff groups mentioned was irrelevant, there was no clear statement that the Respondent formed part of the mission and the FCO had distinguished between the embassy and the Respondent.

56. A document headed 'To Whom It May Concern', dated 23 September 2020, from the Kuwait Embassy, asserting that the Respondent formed part of the Kuwaiti mission in London, had nothing to do with the one voice doctrine, because it did not constitute a representation from HMG, submitted Mr Laddie. In any event, **Al Attiya**, at paragraphs 70 and 71[4], made clear the dangers of relying upon evidence from a sending state when considering diplomatic immunity. That was especially so here, where the document in question bore the date on which the

[4] *'71. The court is not bound by comity or any other principle to accept without more what the state of Qatar has said through its representatives and the law reports are full of examples (such as Teja and Apex) where the court has been unable to accept assertions made by such representatives whether in letters or witness statements…'*

Respondent had applied to amend its response form in connection with section 14 of the SIA, thereby attempting to ride two horses at the same time.

57. The 2005 note had not been before the Tribunal, in any form. Given the position set out in **Aziz**, the Claimants did not contend that it should not be admissible before the EAT. Moreover, they would not wish it to be thought that the EAT was being asked to ignore a key document, submitted Mr Laddie. The note designated diplomatic premises from which the Respondent operates; no more, no less. Furthermore:

57.1. its opening paragraph referred to the Embassy's note of 4 October, of which the Claimants had sought disclosure. They had, first, been told that no such document existed and, then, that diplomatic immunity was asserted. Accordingly, the context of the 2005 note was unclear;

57.2. the 2005 note was a communication between the Protocol Division of the FCO and the Kuwaiti Embassy, not the Respondent;

57.3. the title deed for Wren House indicated that the registered owner was the state of Kuwait, not the Respondent. Whilst, of itself, that was not the Claimants' best point, had the Respondent been the owner and the premises been designated as diplomatic premises, that would have supported its case. In fact, the deed supported the position set out in the 2005 note; Wren House is designated as diplomatic premises for the state of Kuwait; partly used by the Respondent, possibly, but that did not equate with a statement that the Respondent forms part of the mission.

58. It would not have been difficult for the Respondent to have sought certification of that fact from the FCO/FCDO and that was particularly important given the need for express consent to the establishment of offices forming part of the mission in localities other than those in which the mission itself is established (per Article 12, VCDR). By contrast, with certain qualifications, a sending state may freely appoint the members of staff of the mission (Article 7, VCDR). The question is whether the available evidence suffices to establish the Respondent's membership of the mission. The two inter partes documents upon which it relied were communications between the Kuwaiti Embassy and the FCO which did not fall into the category of documentation submitted for judicial scrutiny in **Central Bank of Venezuela**. It might be that, in some cases, an inter partes communication would leave no room for doubt; this case was far from that territory, submitted Mr Laddie. If the EAT were to uphold the decision of the Tribunal, or to decide the issue afresh by reference to the augmented evidence now available, that would be an end to the grounds of appeal relating to diplomatic immunity. The submissions which followed were advanced in the alternative.

Articles 24 and 27 of the VCDR

59. Mr Laddie submitted that, if, contrary to the Claimants' primary submission, the Respondent were found to constitute part of the Kuwaiti mission:

59.1. the Claimants acknowledged that **Shearson** and **Bancoult** were not directed at the question of documents in the hands of the mission, as distinct from third parties. Nonetheless, **Bancoult** was particularly significant when considering the former. As was clear from paragraph 65 (cited above), Article 27 VCDR was of no application to this case. It was concerned with documents en route, delivered other than by diplomatic courier or bag. As paragraph 69 of **Bancoult** had made clear, *'The purpose of article 24*

in protecting a mission's archives qua archives, and not as mere items of property, is to protect the confidentiality of the mission's work, without which it is conceived that it cannot effectively represent the sending state. In particular, it is "to protect the privacy of diplomatic communications": Shearson Lehman Brothers Inc v McLaine Watson & Co Ltd (International Tin Council intervener) (No 2) [1988] 1 WLR 16, 27 (Lord Bridge). The confidentiality of such documents does not depend on their particular content or subject matter, which is not a matter which a domestic court could properly examine, but on their status as part of the archives and documents of a diplomatic mission protected by article 24 of the Convention.'

59.2. Thus, contrary to the Respondent's submission, a party's Article 24 right is founded in confidentiality. Lord Sumption's comments, at paragraph 71 of **Bancoult**, were to be read with that in mind: *'...No-one doubts that if the document has been communicated to a third party with the actual or ostensible authority of the responsible personnel of the mission, any immunity in respect of it is lost. In the form communicated, it is no longer the mission's document: Shearson Lehman Brothers Inc v McLaine Watson & Co Ltd (International Tin Council intervener) (No 2) [1988] 1 WLR 16, 27-28.'* (emphasis added) The fact that any immunity is lost, indicated that the principle equally applies to documents in the hands of the mission itself, as to which ordinary principles apply, once confidentiality is lost. It would make a mockery of the process, were the Claimants to be obliged to apply for disclosure orders against third parties. In any event, an order that the Respondent provide a list of third parties to whom the relevant documents were sent would not fall foul of Article 24; it would simply require the creation of a new document.

59.3. In oral argument, the Respondent had not pressed ground 7 of its appeal (by which it asserted that if, contrary to ground 6, the applicable test for loss of diplomatic immunity

under article 24 of the VCDR were as set out in **Shearson** [28A] and **Bancoult** [71], certain documentation sought remained in the Respondent's control, even if sent to third parties, because it had been sent in the context of a *'lender and borrower, bailor and bailee or principal and agent relationship'*. The answer to that ground was that, before the Tribunal, no more than an assertion that such circumstances applied had been made: no evidence of any such status had been provided (whether to the Tribunal or the EAT), nor explanation of what was meant. That was consistent with the Tribunal's recollection, as set out at paragraphs 10 to 12 of its comments dated 8 December 2020, in response to the Order of HHJ Auerbach, made on 28 October 2020.

Waiver of immunity and Article 6 of the ECHR

59.4. The Claimants parted company with the Tribunal over the issue of waiver. The Claimants had not asserted that the Respondent had waived diplomatic or state immunity in full; rather in connection with the discrete procedural issue of specific disclosure, such that they could not give selective disclosure.

59.5. The Article 6 issue went to equality of arms. Before the Tribunal, the Claimants had contended that, in the absence of full disclosure, the Respondent should be debarred from participating in the proceedings at all. Whilst that would afford inadequate protection to the Claimants, because it might deprive them of documents advantageous to their case, it would afford better protection than would the availability of adverse inferences drawn from the Respondent's conduct. At no stage had the EAT received a satisfactory answer to its question of Professor Sarooshi as to why consent had been given to standard disclosure, given the Respondent's case on diplomatic immunity. The Respondent had volunteered to give standard disclosure on the issue of state immunity at an early stage in

proceedings (see, for example, a letter from Allen & Overy LLP, then representing the Respondent and a second respondent who was no longer a party to proceedings, dated 14 November 2019, in which they had sought an order in the following terms: *'The parties shall exchange all documents in their possession relevant to the issue of state/diplomatic immunity by no later than…'*. At that time, the Respondent had also been represented by highly experienced leading and junior counsel, albeit not the team now appearing.) There had been no question of disclosure being resisted until 18 May 2020, when diplomatic immunity had first been raised as a separate ground for resistance, after standard disclosure had been completed. That stance was incompatible with the provision of standard disclosure.

Relevance of the disclosure sought

60. Mr Laddie submitted that it would be an extraordinary case in which a tribunal's decision as to the relevance of documentation, falling, classically, within its discretion to determine, was overturned on appeal. There was no error of law demonstrated in the Tribunal's approach. **FG Hemisphere** indicated the breadth of enquiry to be undertaken in determining whether a party has state immunity and, as previously observed, the disclosure sought went to the matters to which that case referred. **Benkharbouche** had been a case on diplomatic immunity, but related to one of the areas in which there was overlap with the position regarding state immunity. Paragraphs 53 and 54, within the judgment of Lord Sumption, were relied upon by both parties in the instant case (with emphasis added by the Claimants):

'53. As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune. It is not always easy to determine which aspect of the facts giving rise to the claim are decisive

of its correct categorisation, and the courts have understandably avoided over-precise prescription. The most satisfactory general statement is that of Lord Wilberforce in The I Congreso, at p 267:

> *"The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental activity."*

54. In the great majority of cases arising from contract, including employment cases, the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise. This will in turn depend on the functions which the employee is employed to perform.'

Mr Laddie submitted that, in the context of a question relating to diplomatic immunity, Lord Sumption had referred to a case relating to state immunity. Whilst the Claimants relied upon the emphasised text within paragraph 53, the Respondent relied upon paragraph 54. In most diplomatic immunity cases, there will be no dispute as to whether the mission occupies diplomatic premises (see, for example, **Aziz**). No doubt that is what Lord Sumption had had in mind when referring to 'the great majority of cases'. In the instant case, there is a dispute as to what the Respondent does and whether it performs acts of sovereign authority. For that reason

alone, authority and pragmatism suggest that there is no basis for interfering with the Tribunal's orders (some of which had required disclosure by list alone) on the grounds of relevance, and the Respondent had not pressed ground 3 of its appeal with any vigour. If, contrary to that proposition, the EAT were to conclude that the relevance of the specific disclosure ordered was in issue, the Claimants agreed that it should remit that matter to the Tribunal for fresh consideration.

Grounds 1 and 2

61. Regarding grounds 1 and 2 of the Respondent's appeal, Mr Laddie submitted that there was a deep irony in the Respondent's position that the Claimants were required to plead the factual basis of their challenge to state immunity in order to identify the scope of the Respondent's disclosure obligations, whilst advancing a primary position that it had no disclosure obligations. The weight to be attached to those grounds was demonstrated by the lack of time devoted to them in the Respondent's oral submissions.

62. The Tribunal's order on the Respondent's application had been rightly made, including for the reasons given by the Tribunal, submitted Mr Laddie. Furthermore, the application had been an abuse of process, as being the Respondent's third application for the same relief and ought to have been refused for that reason. The only material point of distinction between the third application and the prior two had been the penalty sought for non-compliance (debarring the Claimants from advancing a positive case on state immunity). In any event, it is standard practice for respondents in tribunal proceedings to raise new matters in response to a pleaded defence. Examples could be found in cases in which the respondent: denies that it is the claimant's employer, by reason of a TUPE transfer; asserts that it is not liable by virtue of a substantive statutory defence, such as under section 109(4) of the Equality Act 2010; raises a limitation defence; or advances a case by

reference to **Polkey v AE Dayton Services Ltd** [1987] IRLR 503, or of contributory fault. In the experience of the Claimants' counsel, replies in tribunal proceedings, if ever ordered, must be exceptionally rare, consistent with the tribunal's standard expectations; the absence of provision in the rules for such a pleading; the overriding objective; rules 16.7 and 15.9 of the Civil Procedure Rules; the caselaw upon which the Respondent relied (at best, demonstrating that the substantive claim must be confined to the matters pleaded); and the reality of this case, in which the parties had managed to achieve standard disclosure with no noteworthy dispute. Only on the working day before the Claimants' application had been due to be heard had the Respondent asserted a reply to be a necessary precursor. The Tribunal had been entitled to determine the disclosure application by reference to the factual issues raised in that application. Such an approach was standard practice. In any event, relevance could also be determined by reference to the facts on which the Respondent relied (for example concerning the management of funds) of which it could be put to proof.

63. Further, submitted Mr Laddie, there was no inconsistency between the Claimants' factual case on state immunity and the position pleaded, which had not been intended to relate to state immunity, or advanced as an exhaustive description of the Respondent's activities. The Respondent's criticism of the Tribunal's alleged failure to have recorded its submissions regarding the burden of proof in relation to state immunity went nowhere; as the Tribunal had since made clear, the Respondent had submitted that the burden of proof 'did not matter' for the purposes of its application. Whilst there were good arguments to be made that the burden of proof fell on the Respondent, that issue is to be determined at the substantive preliminary hearing. The Tribunal had been entitled to assess the relevance of the disclosure sought by reference to the issues as pleaded by the Respondent, each element of which was disputed by the Claimants, and to the reasons advanced in the Claimants' disclosure application. The Tribunal had not taken account of impermissible, or irrelevant, factors and had given due consideration to the Respondent's

submissions. It had properly exercised its case management powers in ordering the relevant disclosure.

The Respondent's submissions in reply

64. Professor Sarooshi submitted that, as very senior former members of staff, the Claimants would have known of the Respondent's state immunity. The First Claimant had been acting President, at one stage. The High Court proceedings against him had not been retaliatory and had followed from the outcome of an investigation. In his internal grievance against the Respondent, he had asserted the Respondent to be *'an arm of the State of Kuwait as its sovereign wealth fund and an entity with State immunity protections'*. Whilst not determinative, that indicated his view prior to his commencement of proceedings, which was inconsistent with the stance adopted in the latter.

The one voice doctrine

65. The difference between the parties in connection with the one voice doctrine, was as to the standard of evidence required to establish its application. From paragraph 71 of **Central Bank of Venezuela** (see above), it was clear that express recognition requires a clear announcement of the intention of recognition (and that that can be done by note addressed to the state or government which has requested it). In this case, a diplomatic note had been addressed to the state in 2005. That note had referred to the Diplomatic and Consular Premises Act 1987, which, in terms, refers to the grant of diplomatic status. The document produced by the Land Registry also showed that the Respondent is treated as part of the mission, given that the 1987 Act allows designation of diplomatic premises. The 2005 note referred to the deemed diplomatic premises in question being used for the purposes of the Respondent, which it treated as being at one with the Embassy; otherwise there could have been no reference to diplomatic premises. That note constituted the

clearest expression of an intention to recognise the Respondent as part of the mission. Certainly, it, at least, implied recognition, consistent with paragraph 72 of **Central Bank of Venezuela**. An exercise of the prerogative was an exercise of the prerogative and it mattered not whether the recognition in question was of a government, or of a mission. The evidence on which the Respondent relied established recognition, beyond a shadow of a doubt. On Professor Sarooshi's instructions, the position as set out in the FCO's note of 7 November 2005 remained the current position and the consent to which reference was made had never been withdrawn. In Professor Sarooshi's submission, once a prima facie case of immunity had been established, the burden shifted to the Claimants to disprove it, because the issue went to the tribunal's jurisdiction. He produced no authority in support of that proposition. (In his skeleton argument[5], reliance was placed upon **JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry** (1987) 3 BCC 413, at 418-419, per Staughton J, for the proposition that the burden of proof is on the claimants to demonstrate that the tribunal has jurisdiction, '*where an issue of immunity is in play'*. Whilst stated as a general proposition, I understood it, in context, to relate to the question of state immunity. I note, however, that, at paragraph 6 of its Particulars of Assertion of State and Diplomatic Immunity, the Respondent also relies upon the case in relation to diplomatic immunity.)

66. Mr Laddie had taken **Bancoult** out of context, submitted Professor Sarooshi. The Court had been deciding whether documents in Washington D.C. enjoyed the protection of Article 24 of the VCDR. Only the mission had immunity, but no distinction fell to be drawn between the mission and the state. Such a statement was not applicable in a case of the instant type. **Al-Malki** made clear that the existence of a mission was to be established by reference to the VCDR. **Bancoult** had not been concerned with the issue of separate legal personality.

[5] at paragraph 79(1)

67. As to **FG Hemisphere**, at paragraph 16 Lord Mance had stated (with bold emphasis added):

> *'The distinction between a state organ and a separate or distinct entity is not concluded by determining whether the separate entity has separate legal personality. That was held in Baccus SRL v Servicio Nacional del Trigo [1956] 3 All ER 715, 1 QB 438 and assumed in the Trendtex Trading case, where the Central Bank was a separate legal entity, and it continues to be the position. The 1978 Act makes this clear by providing that a separate entity must be 'distinct from the executive organs of the government of the state' as well as 'capable of suing or being sued'. A separate entity must therefore have legal personality in this sense in order to have immunity as part of the state.* ***But an organ of the state may under certain circumstances have legal personality.*** *This is expressly contemplated both by the Explanatory Report (ETS number 074) relating to the European Convention, and by the commentary to the International Law Commission's Articles of State Responsibility.'*

That, submitted Professor Sarooshi, demonstrated that there was no reason why a diplomatic mission should not have a legal personality under domestic law, or why the Respondent's separate legal personality should be of significance, for current purposes. Under the DPA and the VCDR, in the context of HMG's recognition, the status of the Respondent was altered so as to render it part of the Kuwaiti mission. For that reason, whilst it was acknowledged that the Respondent has a separate legal personality under English law, that was of no consequence. Per Fox, under international law, the mission is not recognised as having a legal personality separate from the state and, under English law, the diplomatic mission is not a person in law. The Respondent did not disagree with either proposition, but contended that neither bore upon the critical question here, as to which entities form part of the mission, under international law. As **FG Hemisphere** indicated, a state organ can have separate personality. Thus, the Respondent, as part of the state, can benefit from the state's diplomatic immunity. The fact that the mission has no separate

personality from the state in international law does not preclude it from incorporating a body which has separate legal personality.

Article 24 of the VCDR

68. Within **Bancoult**, the wording 'in the form communicated' meant the specific form; it did not matter whether the information in the document was protected, or not. Nor could a tribunal, or the EAT, order provision of a list of third party recipients: see **Mid-East Sales Limited v United Engineering & Trading Company Limited and another** [2014] EWHC 892 (Comm), a case in which disclosure of certain bank statements had been sought relating to bank accounts in respect of which the question of state immunity was likely to arise at a later stage, because it was said that they were used wholly or partly for diplomatic expenses. Disclosure of the bank statements had been resisted, under Articles 24 and 27(2) of the VCDR. At paragraphs 9 and 10 of his judgment, Males J (as he then was) had recorded evidence to the effect that the bank statements had been addressed to the director of audit and accounts at the High Commission, who was a high-ranking diplomatic official based at the High Commission, and were stored at the mission securely, in a locked facility. In those circumstances, he had held, the documents sought fell within the terms of Article 24 and were immune from any order for disclosure on that ground. At paragraph 12, he had further held:

> '[Counsel for the applicant] *submits that there is a way round the question of inviolability because statements could be obtained directly from the bank which holds the accounts without any need to access the High Commission's archives. There is no application against the bank for disclosure of such documents as it may hold, but what* [Counsel for the applicant] *submits is that effectively the second defendant could be directed to instruct the bank to provide further copies of the statements. It seems to me that that would not be a way round the problem of inviolability*

at all because, if one assumes that that were to happen, the documents which were then produced to the High Commission by the bank would themselves fall into the scope of protection under Article 24. But in any event, the application is for documents as they currently exist and, in my judgment, those are immune from disclosure pursuant to Article 24. So that application is dismissed.'

Professor Sarooshi did not explain how the above conclusions served to demonstrate that the Respondent could not be ordered to produce a list of the third parties to whom it had disclosed the documents sought, in order that the Claimants could approach those third parties directly and, if necessary, seek an order that each disclose documents *'communicated* [to it] *with the actual or ostensible authority of the responsible personnel of the mission…in the form communicated'* [**Bancoult**, paragraph 71]. Separately, he submitted that the nature of inviolability meant that the Respondent cannot be compelled to provide a list of recipients, relying upon the extract of paragraph 69 of **Bancoult**, cited at paragraph 59, above: the purpose of Article 24 is to protect the privacy of the mission's archives. Whilst no objection could be raised to an application for disclosure sought against third parties, a list of those parties would require the mission to disclose information in its archives which was itself protected.

Article 6 of the ECHR

69. Even if a consequence of Article 24 were to be that there was a crucial missing piece of the jigsaw, an order for specific disclosure of documents by the mission was not permissible, submitted Professor Sarooshi. For that submission, he relied upon the following extracts from *Inviolability of the Archives, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (4th Edition),* Eileen Denza, which, so he contended, also supported his proposition that no order

could be made requiring the Respondent to provide a list of third party recipients of relevant documents:

'The same approach to the inviolability of diplomatic archives was taken by the US State Department in the context of a case where they were not prepared to support a claim to state immunity — Renchard v Humphreys & Harding Inc. In a letter to the court, the State Department said that in declining to recognize and allow sovereign immunity in a suit for damage to neighbouring property caused by excavations and construction on the Embassy of Brazil, they did not intend to imply that Article 24 could not be used to resist discovery of relevant documents:

> *"Thus, while it is the position of the Department of State that the Government of Brazil does not enjoy immunity from suit in the courts of the United States in the subject litigation, involving the construction of the chancery building in Washington, it is also the position of the Department of State that the documents and archives of the Embassy are inviolable under the Vienna Convention as against any order of a United States court."*

The same distinction was upheld in the case of Mission of Saudi Arabia to the United Nations v Kirkwood Ltd in which a US court confirmed that the Saudi Mission did not lose the separate inviolability of its archives (conferred under the Host State Agreement between the United States and the United Nations) by instituting legal proceedings.'

70. In **Benkharbouche** and in **Estrada**, diplomatic immunity had been upheld, in the face of an Article 6 challenge, Professor Sarooshi submitted.

Waiver of diplomatic immunity

71. Professor Sarooshi reiterated his reliance upon paragraph 56 of **Aziz** (cited at paragraph 32 above), in contending that any waiver would need to be express and exercised by the ambassador, or someone acting on his instructions in his absence. A solicitor could not give the relevant authority and his actions could not establish a waiver, nor could such a waiver be implied in any way. Conduct, in the form of earlier standard disclosure would not constitute a waiver: see, in particular, **R (Dunn) v The Secretary of State for Foreign and Commonwealth Affairs** [2020] EWHC 3185 (Admin), at paragraphs 18(8) to (12), in relation to the issue of waiver of immunity from jurisdiction under Article 32(1) of the VCDR, which provides, *'The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.'*, with Article 32(2) providing that *'Waiver must always be express'.* **Dunn** made clear that there was no room for English law concepts such as implication of terms, or constructive waiver; the rule means that the waiver be intended as such by the sending state, and unequivocally communicated as such to the court.

Relevance

72. Professor Sarooshi submitted that all that section 14(1) of the SIA requires to be considered is whether the entity in question is distinct from the executive organs of the government of the state and capable of suing, or being sued. A consideration of the function, scope or activities of the Respondent is not required in order to decide whether it qualifies as a separate entity. At paragraph 86 of its decision, the Tribunal had wrongly described **Benkharbouche** as not relating to state immunity; in fact, it had been a state immunity case, albeit concerning employees of diplomatic missions. The Tribunal had failed to explain why the instant case does not fall within

the scope of *'the great majority of cases'* to which Lord Sumption had referred at paragraph 54 of that authority.

Events post-dating the hearing

Further documentation from the Respondent

73. A week after the hearing, those acting for the Respondent wrote to the EAT in the following terms:

*'We refer to the FCO Note dated 14 November 2005… (the "**FCO Note**") a copy of which is enclosed for convenience.*

*As was discussed at the hearing, the FCO Note refers in terms to a Kuwaiti Embassy Note dated 4 October 2005 (the "**Embassy Note**"). The Appellant apologises that it was not in a position to have voluntarily provided a copy of this document previously; however, the Appellant has only recently located a copy. A copy of the Embassy Note and accompanying TX19 Exemption from General Rates form are voluntarily enclosed with this letter.*

The terms of these documents are self-explanatory. Specifically, the premises were "to be used for mission purposes. The building will be used exclusively by the Kuwait Investment Office". That is also reflected in the information that was set out in the enclosed TX19 form, in particular at entries at questions 2 and 4.a.

The Appellant does not advance any submissions in respect of these documents (though if the Tribunal would be assisted by any further submissions, it would, of course, provide them). The Appellant respectfully requests that when considering the FCO Note, the Tribunal consider these documents given:

i. the heavy emphasis during the hearing that the [Claimants] *placed on the absence of the Embassy Note when considering the FCO Note; and*

ii. the importance of the Tribunal having relevant evidence available to determine the Appellant's diplomatic immunity.

For the avoidance of doubt, the KIO's position on immunity in these proceedings remains as previously stated. The KIO does not submit to the jurisdiction of the Tribunal and nothing in this letter is to be construed as a submission to the jurisdiction on behalf of the KIO or a waiver of immunity in respect of any claim or as a waiver of diplomatic privileges, immunities or inviolabilities.'

74. The note to which that letter referred came from the Embassy of the State of Kuwait and informed the FCO that 'the Investment Office' had changed its premises to Wren House, Carter Lane, London EC4V 5EY. It continued, *'The Embassy requests the consent of the Foreign Secretary for the above-mentioned premises to be used for mission purposes. The building will be used exclusively by Kuwait Investment Office…'* At sections 2 and 4a, the Exemption from General Rates, dated 20 September 2005, respectively stated the purpose for which Wren House was to be used as being 'Kuwait Investment Office' and named the occupier as 'Kuwait Investment Office, Kuwait Investment Authority, Government of the State of Kuwait'.

Directions

75. In response to that letter, I directed as follows:

'1. By 4:00pm today, 11 February 2021, the Appellant shall notify the EAT and the Respondents, in writing, of:

a. the date on which it first looked for the original, or a copy (as the case may be) of: (1) the Embassy Note; and (2) the TX19 form;

b. the date on which it first located each such document;

c. if (either of) the date(s) at (b) above fell on or before the date of the hearing of the appeal, why it is that the relevant document(s) was/were not produced at or before that hearing; and

d. if (any of) the date(s) at (a) or (b) above fell after the hearing of the appeal, why it was that the efforts subsequently made to locate the relevant document(s) had not been made at an earlier stage, in order that they could be considered at that hearing.

2. By 4:00pm on Friday 12 February 2021, the Respondents shall notify the EAT and the Appellant, in writing, of any response to the Appellant's letter of 10 February 2021 and/or to the information provided in response to my directions at paragraph 1 above.'

76. The Respondent's solicitors' reply to those directions was as follows:

'We refer to Mrs Justice Ellenbogen's directions … and have set out the Appellant's response below which is provided on a voluntary basis and is not being done pursuant to any order. For the avoidance of doubt, the KIO's position on immunity in these proceedings remains as previously stated. The KIO does not submit to the jurisdiction of the Tribunal and nothing in this

letter is to be construed as a submission to the jurisdiction on behalf of the KIO or a waiver of immunity in respect of any claim or as a waiver of diplomatic privileges, immunities or inviolabilities or a waiver of legal privilege.

A. The date on which it first looked for the original, or a copy (as the case may be) of: (1) the Embassy Note; and (2) the TX19 form

The Appellant conducted a general search for relevant documents within the archives of the Mission of the State of Kuwait prior to the commencement of these proceedings. It also conducted searches at other points during the proceedings. During the course of these searches, it located a Note from the FCO dated 14 November 2005 (the "FCO Note").

Given that the FCO Note refers to a note by the Embassy dated 4 October 2005 (the "Embassy Note"), the Appellant conducted further specific searches in an attempt to locate a copy of the Embassy Note. This was before January 2021.

In light of the decision to seek to adduce the FCO Note in evidence before the EAT (in respect of which, for the avoidance of doubt, privilege is not waived), searches were again conducted to locate a copy of the Embassy Note to which reference is made in the FCO Note. These searches were carried out in the period following 14 January 2021. These searches were conducted electronically because Wren House was physically closed to members of the Mission with effect from 21 December 2020 until further notice, owing to the COVID 19 pandemic. Wren House has been and remains physically closed due to COVID 19 and the latest guidance. Unfortunately, no copy of the Embassy Note was located by the electronic searches conducted. At 16:23 on 15 January 2021, the Appellant wrote to the Claimants notifying them that it would seek to adduce the FCO Note as evidence in the EAT hearing.

B. The date on which it first located each such document

On Tuesday 10 February 2021, an employee of the KIO attended Wren House by car in order to carry out a physical search. The Embassy Note along with the TX19 Form were first located in hard copy in the Mission's archives on 10 February 2021 by the employee who had attended Wren House to conduct a search.

The Appellant sought to provide a copy to the Tribunal and the Respondents without delay given the importance of these documents. The Appellant provided the documents by way of email sent at 22:44 on 10 February 2021, the same day on which the documents were located.

C. If (either of) the date(s) at (b) above fell on or before the date of the hearing of the appeal, why it is that the relevant document(s) was/were not produced at or before that hearing

Not applicable.

D. If (any of) the date(s) at (a) or (b) above fell after the hearing of the appeal, why it was that the efforts subsequently made to locate the relevant document(s) had not been made at an earlier stage, in order that they could be considered at that hearing.

As explained above, the Appellant conducted various searches for relevant documents within the archives of the Mission of the State of Kuwait prior to and during the proceedings, which unfortunately did not result in a copy of the Embassy Note and the TX19 form being found. After it was decided to seek to rely on the FCO Note, as explained above, further searches were conducted but, as also explained above, given that Wren House has been physically closed to

employees with effect from 21 December 2020 during the lockdown, it was considered reasonable to rely on electronic searches. However, due to the heavy emphasis during the hearing that the Respondents placed on the absence of the Embassy Note when considering the FCO Note, a decision was subsequently made that someone would attend Wren House by diplomatic vehicle in order to conduct a further physical search for the document in the Kuwaiti Mission's archives.

The Appellant hopes that the above answers the Tribunal's questions. It also takes this opportunity to apologise again to the Tribunal that this document was not before it during the hearing, and respectfully requests that it nonetheless be considered given its importance to the Tribunal's determination on appeal of the Appellant's diplomatic status, immunities and inviolabilities under the Diplomatic Privileges Act 1964…'

77. The above letter prompted supplementary written submissions and appendices from the Claimants. Their overarching position was that the documentation supplied by the Respondent supported their position in this appeal and that, whilst the reasons for its late disclosure were not acceptable, they did not oppose its admission. Elaborating on those contentions, it was said that:

77.1. the October letter showed that the State of Kuwait and the Kuwait Investment Authority were distinct legal personalities; it was the embassy which had made the request and there had been no reference to the KIA. Whilst it was apparent that the FCO had previously recognised that some diplomatic status had attached to the premises used by the KIA/the Respondent, and that some diplomatic status had attached to some people who worked for the KIA/the Respondent, there was no evidence that the FCO had expressly recognised the KIA, in its capacity as a separate legal personality, as part of the mission. Indeed, all the documentary evidence indicated that the FCO continued only to recognise the embassy as constituting the mission. The documentary evidence certainly did not '*leave*

no doubt' as to the intention of the FCO to recognise the KIA/the Respondent as part of the mission, which was said to be the implied recognition test in **Central Bank of Venezuela** when recognising states/governments: **Deutsche Bank AG London Branch v Receivers Appointed by the Court** [2021] 2 WLR 1 at [78]. Rather, the October letter reinforced the Claimants' primary submission; neither English law nor the FCO/FCDO recognises separate legal personalities as being part of a diplomatic mission;

77.2. The Respondent's disclosure underscored why the EAT could not place any reliance upon incomplete disclosure of correspondence with the FCO, particularly where the FCO was not aware that the correspondence would be relied upon for the purposes now advanced (see **Central Bank of Venezuela**, at [92]: *'What mattered was that the FCO knew that the letters were intended to be produced to the court and that they contained the carefully considered views of HMG for use in a public forum.'*). In common with all of the FCO documentation relied upon by the Respondent, the further disclosure invited further questions. From the October letter, it appeared that the FCO had previously recognised the premises used by the Respondent as having diplomatic status and the 2005 letters related only to a change of address. Thus, new questions arose, including: what the FCO had recognised previously; in what circumstances; on what conditions; and based upon what representations; and why there was no evidence post-dating 2005 casting light upon FCO's/FCDO's view of the Respondent's status as at 2020 or 2021.

77.3. The explanation provided for late disclosure was not accepted. When the Claimants had sought disclosure of the October letter, the Respondent had asserted that it would not be disclosed on grounds of 'immunity and inviolability'. It had not stated that it did not have the document and had not provided the explanation now advanced. Even if that explanation were accepted, it was poor and amounted to, '*after the hearing, we searched*

our premises for it'. The relevant pandemic-related restrictions had not materially changed since the Respondent had first sought to rely upon the FCO note of November 2005 (in late December 2019) and, apparently, neither had the Respondent's own Covid-19 policies (the Respondent having stated that its premises had remained closed throughout the relevant period). The October letter could have been searched for well in advance of the Tribunal and EAT hearings and, certainly, in response to the Claimants' repeated requests for it. In reply to the EAT's question (d), as to why searches had not been conducted at an earlier stage, the Respondent's answer has been that, at the EAT hearing, the Claimants had placed *'heavy reliance'* on its failure to have disclosed the October letter. In fact, the Claimants' reliance upon the non-disclosure of the October letter had been no more *'heavy'* than the other matters on which they relied. In any event, it could have come as no surprise given: (a) their earlier repeated requests for its disclosure; (b) the absence of any good explanation for its non-disclosure (a simple assertion of diplomatic immunity); and (c) that a core part of the Claimants' case, since the employment tribunal hearing of June 2020 and throughout their appeal, had been that the Respondent had produced incomplete documentation and candidly embraced cherry-picking. Further, the Respondent had not given disclosure of the October letter out of any duty to the Claimants, or to the EAT. Rather, it had made late disclosure only because it apparently considered that to do so improved its case. Its approach was unacceptable and raised a question as to the limit to the views expressed in **Aziz** and other authorities as to a relaxation of conventional **Ladd v. Marshall** principles in cases raising issues of state immunity. The Respondent's drip-feed of documents since the promulgation of the Tribunal's decision was striking — was it to be permitted to adduce more and more documents, one at a time, seeing whether each successive document made a difference to its position? Was it permitted to do so at successive appellate stages, thus raising the spectre of an appeal before the Supreme Court decided against a factual background

significantly different from that applicable before the Tribunal and the EAT? It was submitted that that could not be the case and that the admitted importance of diplomatic immunity could not be treated as a trump card, allowing a party claiming such immunity to eschew adherence to recognised norms of litigation. The fact that the Claimants did not oppose the admission in evidence of the October letter should not be regarded as an indication of their approach to any further evidence on which the Respondent might attempt to rely in the future;

77.4. Notwithstanding the Respondent's inexcusable conduct, the Claimants did not oppose the admission in evidence of the October letter. First, the document supported their case. Secondly, they wished to avoid the Respondent's running of meritless procedural arguments on appeal, as it would, no doubt, otherwise seek to do.

Correspondence from the Government Legal Department, on behalf of the FCDO

78. On 19 March 2021 (12:51), the EAT was contacted by the Government Legal Department ('GLD') as follows:

'My client, the Foreign, Commonwealth and Development Office (FCDO), have been informed that "FCDO Certificates" have been provided to the Employment Tribunal, confirming the recognition of the Kuwait Investment Office (KIO) as part of the Mission of the State of Kuwait to the Court of St James's. We understand these were provided by the Claimant to the court, in relation to the case EAT/0131/20/JOJ Kuwait Investment Office v 1) Mr S Hard 2) Ms A Locke.

We should be grateful if you could provide copies of the FCDO Certificates that have been received in relation to these proceedings. We understand a new request has been made for the Certificates and is due for filing with the court on 22 March 2021, though we have not had sight

of any court documents referencing this 22 March 2021 deadline.

Can you please provide all court documents in relation to the case … and please confirm if any "FCDO Certificates" as described have been filed.

We should be grateful if you could provide any clarity on this matter and existing or related proceedings.'

79. At the request of the President of the EAT, the GLD was asked to identify the specific documents sought; why they were needed; and on what basis they had been requested. The response received, dated 16 April 2021 (16:51) was as follows:

'1. What specific documents you require

- *All court documents filed by the Kuwait Investment Office in relation to the case of EAT/0131/20/JOJ Kuwait Investment Office v 1) Mr S Hard 2) Ms A Locke.*

- *Specifically any documents, which have originated from the Foreign Commonwealth and Development Office. We understand "FCDO Certificates" were filed by the Claimant in this case which state the status of the Kuwait Investment Office and the Kuwait Embassy.*

2. Why you need these documents

- *The Kuwait Embassy have contacted my client, the FCDO, to request that the FCDO urgently provide a certificate confirming the recognition of the Kuwait Investment Office (KIO) is part of the Mission of the State of Kuwait to the Court of St James's for separate*

Employment Tribunal Proceedings (possibly the appeal to this case but this has not been confirmed by the Embassy). They state that the same FCDO Certificates have already been considered in the case of EAT/0131/20/JOJ and had been provided by the Claimant. They state this certificate is needed for an urgent court deadline.

- *My client is unaware of such a certificate and therefore wishes to obtain this document and understand the context of these proceedings.*

3. On what basis are these documents requested

- *The FCDO is understood to be the author of these documents.*

- *To facilitate the Kuwait Embassy's ability to meet court deadlines.'*

80. On 29 April 2021, a copy of the Respondent's notice of appeal was disclosed to the GLD, pursuant to paragraph 6.3.1 of the EAT's 2018 Practice Direction. In its covering e-mail, the EAT stated, *'One of the requirements under paragraph 6.4 includes the need to consult with the other parties. Please clarify the reason you require the documents so that it is clear to the parties. Can you confirm that the documents are not available from the Appellant (Kuwait Investment Office) and/or the Kuwait Embassy?'*

81. On the same day (16:23), the GLD replied as set out below:

'Thank you very much for sending across this attachment, which has shed some useful light on these proceedings for my client.

Documents sought

1. *Copies of the Written Reasons issued subsequent to the 3 June 2020 Case Management hearing and ET Judge Brown's Orders of 17 June 2020.*

2. *Any documents, which have originated from the Foreign Commonwealth and Development Office, specifically regarding the status of the Kuwait Investment Office and diplomatic immunity of its employees.*

Reason for seeking these documents

3. *The Kuwait Embassy have contacted my client, the FCDO, to request that the FCDO urgently provide a certificate confirming the recognition of the Kuwait Investment Office (KIO) is part of the Mission of the State of Kuwait to the Court of St James's for separate Employment Tribunal Proceedings. They state that "FCDO Certificates" have already been considered in the case of EAT/0131/20/JOJ and had been provided by the Claimant. They state this certificate is needed for an urgent court deadline of 22 March, but further queries to the Kuwait Embassy about this court deadline have not been answered.*

4. *My client has approached the Embassy for the related ET orders/judgments without any success. I have also contacted the clerk of Professor Dan Sarooshi, counsel for the Kuwait Investment Office, also without success.'*

82. On 12 May 2021 (15:49), the GLD wrote again to the EAT, as follows:

'My client has asked me to specifically request the following documents as a matter of urgency.

- *The Written Reasons issued subsequent to the 3 June 2020 Case Management hearing;*

- *ET Judge Brown's Orders of 17 June 2020; and*

- *Details of exactly what the disclosure sought, and resisted by the Kuwaiti Embassy/KIO, goes to.*

We are continuing to request the same from the Embassy of Kuwait…'

Further directions

83. The GLD's correspondence with the EAT was passed to me on 13 May 2021. On 14 May 2021, at my direction, the Registrar wrote to the parties as follows:

'[The GLD's] *correspondence constitutes, in part, a request for documents under paragraph 6.4 of the 2018 EAT Practice Direction, as to which each party to this appeal should be consulted in accordance with that paragraph. The parties are directed to set out their respective positions in response to each request made in* [the GLD's] *e-mails, respectively dated 16 April 2021 (16:51); 29 April 2021 (16:23); and 12 May 2021 (15:49). In the course of so doing, each party should identify the documents which it contends to fall within numbered paragraph 2 of the 29 April e-mail and within the second bullet point inserted under numbered paragraph 1 in the 16 April e-mail.*

The KIO is further directed to comment on the matters set out in the two bullet points inserted underneath numbered paragraph 2 of the President's request by [the GLD], *in her e-mail of 16*

April 2021 (16:51), and on numbered paragraphs 3 and 4 of [the GLD's] *e-mail of 29 April, and to state:*

1. *whether the KIO was a, or the, source of the information relayed to the FCDO by the Kuwait Embassy;*

2. *which documents are said to constitute the 'FCDO certificates' provided by either Claimant (or any other party) in this appeal;*

3. *what the 'urgent court deadline' of 22 March 2021 was and by which court or tribunal it was imposed. (See, further in this respect,* [the GLD's] *email of 19 March 2021 (12:51).);*

4. *what the urgent court deadline was, as at 16 April 2021, and by which court or tribunal it was imposed; and*

5. *whether, to the knowledge of the KIO, there remains outstanding any court deadline in respect of this matter and, if so, by which court or tribunal it was imposed and what that order requires.'*

84. On 19 May 2021, the following responses were received (so far as material for current purposes):

84.1. a letter from the First Claimant's solicitors, said to have been written with the agreement of the Second Claimant:

'…Thank you for giving us the opportunity to comment on the requests for correspondence made by the GLD on behalf of the FCDO.

Before we set out those comments, we should place on record that we would have preferred to provide this response with sight of the correspondence between the KIO and/or the Kuwaiti embassy and the FCDO which apparently prompted this request for documentation. The GLD's emails to the EAT, if they accurately reflect the communications from the KIO/embassy, cause us disquiet as to what the GLD/FCDO have been told as the suggestion that the Claimants have provided any FDCO certificates is clearly untrue.

Furthermore, it is far from clear why the KIO has failed to notify either the EAT or our clients that it is seeking urgent certification (not least in circumstances where its case on the appeal was that no such certification was required).

The Claimants' position as set out below is without prejudice to the above observations.

As to the specific document requests in the GLD correspondence, we have copied the requests in italics and our responses below them:

16 April 2021

…

Specifically any documents which have originated from the Foreign Commonwealth and Development Office. We understand "FCDO Certificates" were filed by the Claimant in this case which state the status of the Kuwait Investment Office and the Kuwait Embassy.

There are a number of difficulties with this request which we appreciate arise from the confusion caused by the KIO/embassy. First, we are surprised that the FCDO is asking for copies of its own documents. Presumably, if the documents existed, the FCDO would have them. Second, if the genesis of this request is the KIO's own attempt to obtain ex post facto certification, why has the KIO/embassy not sent to the FCDO the FCDO's own documents allegedly supporting the existence of certification? Third, why has the KIO/embassy apparently told the FCDO that there are FCDO certificates "filed by the Claimant[s] in this case"? The short answer is that no such certificates have been filed by either party.

29 April 2021

…

Any documents, which have originated from the Foreign Commonwealth and Development Office, specifically regarding the status of the Kuwait Investment Office and diplomatic immunity of its employees.

This would appear to constitute a request for items … of the Supplemental Bundle, and a request for the document disclosed on 10 February 2021 by the KIO (a letter dated 4 October 2005). Please see our response under 16 April 2021, para. 2, above. Further, any diplomatic immunity of individual employees of the KIO is also not in issue in this appeal and there is no FCDO document (still less any certificate) indicating that the KIO itself has diplomatic status. That is unsurprising, since as explained during the appeal, the KIO has separate legal personality from the Kuwait Embassy and is thus necessarily not part of the diplomatic mission.

We are bound to observe that given the unsatisfactory way in which the KIO has produced documentation at various stages in the litigation, we are far from confident that this is comprehensive record of the correspondence. This was raised most recently in the Claimants' response of 15 February 2021 to the KIO's disclosure of further documentation after the conclusion of the hearing before Mrs Justice Ellenbogen.

...

Further Observations

We further note that in both the 29 April and 12 May 2021 emails, Ms Claydon refers to the GLD having sought the documents from the Kuwait Embassy and from Professor Sarooshi (leading counsel for the KIO) but had received no response. We respectfully suggest that, in addition to the supplemental questions that the EAT has asked the KIO to answer, the KIO should also provide a comprehensive explanation for why, having sought certification from the FCDO on an urgent basis, it has apparently failed to respond to FCDO communications for a number of weeks.

Finally, the Claimants contend that the FCDO should not be invited to provide certification on a unilateral basis and that [it] *is highly regrettable that the KIO/embassy has apparently approached the FCDO for some form of certificate between the close of argument and the handing down of judgment. We await a full explanation from the KIO, but absent any application by either party, consider that the appeal should be determined on the basis of the materials placed before Mrs Justice Ellenbogen at the February hearing*;

84.2. a letter from the Respondent's solicitors, as follows:

'1. We refer to Mrs Justice Ellenbogen's directions of 14 May 2021 inviting the parties' positions regarding a request for documents under paragraph 6.4 of the EAT Practice Direction and further directing our client to provide additional comments and responses to certain items numbered (1) to (5) therein.

2. We have set out the Appellant's response below which is provided on a voluntary basis and is not being done pursuant to any order or direction. For the avoidance of doubt, the KIO's position on immunity in these proceedings remains as previously stated. The KIO does not submit to the jurisdiction of the Tribunal and nothing in this letter is to be construed as a submission to the jurisdiction on behalf of the KIO or a waiver of immunity in respect of any claim or as a waiver of diplomatic privileges, immunities or inviolabilities or a waiver of legal privilege.

3. ...

*4. On the particular questions posed to the Appellant by the EAT, the Appellant means no disrespect in any way but since the KIO is only one part of Kuwait's Diplomatic Mission in the UK (the "**Mission**") it would not be appropriate for the Appellant to comment on diplomatic communications between any other part of the Mission and any government department of its host state. To the extent the FCDO has queries arising in relation to any communications said to have occurred, such queries would best be resolved through diplomatic channels in the usual way. Moreover, it is not appropriate for the Appellant to comment on internal diplomatic communications*

within or between different parts of the Mission, of which it is part.

5. *Consistent with this position and with the FCDO's longstanding dealings with the KIO as part of the Mission, the Appellant hopes the EAT will appreciate that no disrespect is intended by the Appellant in declining to comment on diplomatic communications said to have occurred between the Kuwaiti Embassy and the FCDO or within or between different parts of the Mission.'*

More documentation from the Respondent

85. On 1 June 2021, the Respondent's solicitors wrote to the EAT, as follows:

'…

2. *On Monday, 24 May 2021, the attached document dated 23 July 2020 (the "HMRC Letter") came to the attention of those involved in instructing counsel and solicitors in the above captioned case. The document speaks for itself: it is a short, two-sentence letter from Her Majesty's Revenue and Customs addressed to KPMG that confirms in categorical terms that according to Her Majesty's Government ("HMG") the "earliest available records show that Sovereign Immunity for the Kuwait Investment Office was in place in 1975" and that the KIO is "accorded Sovereign immunity from UK direct taxation".*

3. *Had the HMRC Letter been known to those involved in instructing counsel and solicitors in the above captioned case prior to the hearing, it would have been voluntarily provided at that time. The Appellant apologises unreservedly to the EAT that it is only now in a position to be able to send this to the EAT. Given the importance and relevance of the HMRC Letter, the Appellant considered that it should nonetheless provide a copy to the EAT in order that it is*

before the EAT when reaching its decision.

4. *Given the stage of proceedings, the Appellant makes no detailed submissions in relation to the HMRC letter (though would do so, if the EAT considered that that would be of assistance). The Appellant simply notes that:*

   a. It has consistently maintained it enjoys both State (Sovereign) and diplomatic immunity;

   b. These immunities have long been recognised by HMG, and pursuant to the one-voice doctrine it is established (respectfully), that recognition is a matter for the executive not the judiciary; and

   c. In respect of State (Sovereign) immunity, the HMRC Letter provides further evidence, in terms that its: "earliest available records show that Sovereign Immunity for the Kuwait Investment Office was in place in 1975".

5. *For the avoidance of doubt, the Appellant's position on immunity in these proceedings remains as previously stated. The Appellant does not submit to the jurisdiction of the EAT and nothing in this letter is to be construed as a submission to the jurisdiction on behalf of the Appellant or a waiver of immunity in respect of any claim or as a waiver of diplomatic privileges, immunities or inviolabilities.'*

86. In response to the EAT's request for comment on the above, the Claimants stated that, whilst, as a matter of principle, the Respondent should not be permitted to rely upon its latest disclosure, were the EAT minded to take account of it it reinforced the central points of the Claimants' case. The circumstances in which the latest disclosure had come into being were entirely unclear and the document could have been produced at an earlier stage, including at the hearing of the appeal. On its face, the document formed part of a wider chain of correspondence which had not been disclosed. There had been no disclosure in relation to the Respondent's tax arrangements, nor had

the EAT heard argument, or received evidence, concerning the meaning or consequences of 'Sovereign Immunity from UK direct taxation'. The letter continued:

'…

8) The Latest Disclosure says nothing about the alleged diplomatic status of the KIO or the KIA, let alone whether they are part of the Kuwaiti diplomatic mission. Rather, it refers to "Sovereign Immunity from UK direct taxation". This appeal is not about state immunity. State immunity is the substance of the main issue between the parties, which has yet to be determined.

9) The Latest Disclosure is a letter from a non-ministerial government department to accountants. It is not a letter that "leaves no doubt" as to the UK Government's position on whether the KIO/KIA is part of a diplomatic mission, let alone is it a document that was "intended to be produced to the court" or contains "the carefully considered views of HMG for use in a public forum". See authorities in the Claimants' supplementary note of 15 February 2021.

10) We note that, by the FCDO's application disclosed to us on 14 May 2021, the Respondent, or someone on its behalf, has apparently approached the FCDO for a certificate. We note that no certificate has been produced. We also note the Respondent has unacceptably refused to provide information to the EAT about, or related to, this request.

Conclusion

The Respondent's conduct underscores three particular features of this appeal.

First, the Respondent considers itself entirely unbound by rules of procedure or a fair conduct.

Second, the Respondent's selective and opaque approach to disclosure emphasises why its principal case, that it should be permitted to cherry pick what documents it discloses, should not be accepted by the EAT. It is clear that if the Respondent has documents that assist the Claimants both in this appeal and in the underlying litigation, it will choose not to disclose them. This is an affront not only to the Claimants but to the Employment Tribunal and the EAT.

Third, it is notable that the Respondent is unable to produce any clear or cogent evidence that it is part of the diplomatic mission of Kuwait. That is unsurprising because, in English law, it cannot be recognised as such. Rather, it has resorted to piecemeal and partial disclosure of documents that, if anything, only raise more questions than answers…'

Yet more documentation from the Respondent

87. On 9 July 2021, the Respondent's solicitors wrote to the EAT in the following terms:

'…

2. *On Tuesday, 6 July 2021, the attached correspondence came to the attention of those involved in instructing counsel and solicitors in the above captioned case. It was found in hard copy by an individual who had previously been asked to conduct a search for relevant documents.*

3. *The correspondence speaks for itself: it is a short note from the Foreign and Commonwealth Office (**"FCO"**) sent to the Embassy of Kuwait dated 23 February 2006 ("**2006 FCO Note**")*

which states in full:

"Note Number TXA110/06

Protocol Division of the Foreign and Commonwealth Office presents its compliments to the Embassy of Kuwait and has the honour to advise that the Division is in the process of updating all records concerning Diplomatic Missions in London.

The Division would therefore be grateful if the Embassy of Kuwait could provide a list of all staff presently working at the Kuwait Investment Office. Protocol Division also requests that in future all new members of staff appointed to the Investment Office stipulate this in their TX9 appointment forms. This should be done by stating in the 'Name of Mission' section of the TX9:

*'**Kuwait – Kuwait Investment Office**'*

Protocol Division of the Foreign and Commonwealth Office avails itself of this opportunity to express to the Embassy of Kuwait the assurances of its highest consideration.

FOREIGN AND COMMONWEALTH OFFICE LONDON SW1

23 February 2006" (Original emphasis)

4. *Had the 2006 FCO Note been known to those involved in instructing counsel and solicitors in the above captioned case prior to the hearing, it would have been voluntarily provided at that time. The Appellant **apologises unreservedly** to the EAT that it is only now in a position to be able to send this to the EAT. Given the importance and relevance of the 2006 FCO Note, the*

Appellant considered that it should nonetheless provide a copy to the EAT in order that it is before the EAT when reaching its decision.

5. *Given the stage of proceedings, the Appellant makes no detailed submissions in relation to the 2006 FCO Note (though would do so, if the EAT considered that that would be of assistance). The Appellant simply notes that:*

   a) *It has consistently maintained it enjoys diplomatic immunity;*

   b) *The evidence already adduced, including before the ET is sufficient to evidence its Diplomatic status; and*

   c) *That the 2006 FCO Note is a further piece of evidence in respect of the same.*

6. *For the avoidance of doubt, the Appellant's position on immunity in these proceedings remains as previously stated. The Appellant does not submit to the jurisdiction of the EAT and nothing in this letter is to be construed as a submission to the jurisdiction on behalf of the Appellant or a waiver of immunity in respect of any claim or as a waiver of diplomatic privileges, immunities or inviolabilities.'*

88. By letter dated 14 July 2021, the First Claimant's solicitors, with the agreement of the Second Claimant stated that (in summary): the Respondent's conduct in the litigation had crossed the threshold from unreasonable to scandalous, marking another attempt at cherry-picking, in disclosing to the EAT and to the Claimants documents which it believed (rightly or wrongly) to be helpful to its case and withholding documents which it feared to be harmful; should the Respondent wish to rely on the latest disclosure, it should make an application to do so, explaining

(in the form of a witness statement or statements, including from the supervising partner of the solicitors instructed by the Respondent) exactly and in full the steps taken to obtain and review disclosure; when, were and by whom the 2006 document had been found and why it had not been disclosed prior to the hearing before the Tribunal, or prior to 9 July 2021; the exact nature of the 2006 document, which other documents related to it and why the latter had not been disclosed; why the Respondent had not disclosed it to the Claimants, giving them an opportunity to consider it before disclosing it to the EAT; why, having regard to the timing of its disclosure and the principles in **Ladd v Marshall**, the document should be admitted and considered by the EAT. Without prejudice to the above, the Claimants went on to address its substantive content, as follows:

'First, we note this documentation (like all disclosure from the Respondent) is incomplete. It is an isolated communication that is clearly part of a broader exchange and which is very difficult to understand.

Second, the 2006 Document is clearly not purporting to state a position on the specific question of whether the KIO or the KIA, as separate legal entities, are part of the diplomatic mission of Kuwait. Rather, it is a letter apparently aimed at updating records on "staff". The Claimants have accepted that the Government has recognised some individual people who do work for the KIO as having diplomatic status. The letter, in explaining how an (undisclosed) form apparently relating to staff should be filled out is clearly not aimed at recognising the diplomatic status of the KIO or the KIA.

Third, we note the document is apparently addressed to the embassy and not to the Respondent or the KIA.

Fourth, we note the document is over 15 years old. Given the Respondent's apparently deliberately partial approach to disclosure, if its best evidence is a 15-year-old letter concerning a different issue, that speaks for itself.

Fifth, we repeat a point that we have made on a number of occasions already: this documentation comes nowhere near a certificate or letter that "leaves no doubt" as to the UK Government's position on whether the KIO/KIA is part of a diplomatic mission, let alone is it a document that was "intended to be produced to the court" or contains "the carefully considered views of HMG for use in a public forum". See the authorities in the Claimants' supplementary note of 15 February 2021.

Sixth, what is strikingly absent, despite it being 2 years since this claim was first brought, over a year since the employment tribunal proceedings and judgment, and six months after the EAT hearing, is a certificate or even a letter from the FCDO recognising the KIO or KIA as part of the diplomatic mission of Kuwait. This is apparently despite the Respondent (or someone on its behalf) directly contacting the FCDO and requesting such certification.

Seventh, this reinforces the Claimants' clear, straightforward and accurate position: in law, the Respondent is not, and cannot, form part of the mission of Kuwait. If the FCDO had issued a certificate in connection with these proceedings recognising the Respondent as part of a diplomatic mission that might represent a conflict of legal principles; but in this case, there is no such conflict…'

Central Bank of Venezuela *in the Supreme Court*

89. On 20 December 2021, the Supreme Court handed down its judgment in **Central Bank of Venezuela** [2021] UKSC 57[6]. The following day, I asked the parties to provide their brief written submissions on its relevance to the Respondent's appeal, including in connection with any submissions previously made arising from the Court of Appeal's judgment in the same case. Those submissions were received on 21 January 2022. In summary, the parties submitted as follows:

The Respondent

89.1. The judgment reiterated the importance of the 'one voice' doctrine and confirmed that statements of recognition by HMG, in the exercise of the prerogative power to conduct foreign relations, are a matter solely for the executive [63-64; 69; 78-79];

89.2. Thus, the decision as to whether the Respondent forms part of the Kuwaiti diplomatic mission in the UK is, constitutionally, solely a matter for HMG, on which it has made express and unambiguous statements to which the one voice doctrine applies and which need not take the form of a formal certificate;

89.3. If, contrary to the Respondent's primary case, the question of implied recognition arises, the Supreme Court had held [96; 98] that the Court of Appeal had been wrong to have held, at [71], that recognition could be express or implied. That conclusion did not affect the proper disposal of this appeal. The critical point was that the Supreme Court's

[6] under the name **"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela**

reasoning regarding implied recognition concerned recognition of governments, or foreign heads of state. There had been a particular, and distinct, policy backdrop regarding recognition in that field. In 1980, HMG had adopted a policy that the UK Government would no longer accord recognition to foreign governments [66]. The Supreme Court had set out the legal consequences of that new policy [81 *et seq*], noting that, '*in future, the voice of the executive would be silent on such issues*'. In that, specific, context, the court had concluded that there was no role for implied recognition. If HMG, exceptionally, had made an express statement, notwithstanding its 1980 policy, the court's role was to interpret that statement. If there had been no such express statement, it was not for the court to make findings inferring which government HMG has recognised. Where HMG has made no statement, its voice was silent [81]. *'To infer the intention of HMG in relation to recognition would be to trespass into an area which is constitutionally within the exclusive competence of the executive*' [98]. In other words, as HMG has a policy not to afford recognition to foreign governments, the courts would be acting contrary to HMG's position (and, therefore, constitutionally inappropriately) if they, nevertheless, attempted to infer whether HMG had recognised a particular foreign government. In such circumstances, recognition is not the determinative criterion. The court must instead identify who may be the government or head of the foreign state by making its own findings of fact, adopting the approach in the earlier case of **Somalia v Woodhouse Drake & Carey (Suisse) SA** [1993] QB 54 [98].

89.4. As to that:

89.4.1. It does not affect the position in this case, in which the relevant question is not whether a foreign government has been recognised but whether HMG recognises an entity as part of a foreign state's diplomatic mission in the UK. There is

nothing akin to the 1980 policy which exists in relation to diplomatic missions; HMG has not made an express statement that it will not recognise foreign diplomatic missions. The Supreme Court's conclusion that there is no scope for implied recognition in the context of recognition of governments is of no broader application;

89.4.2. That approach is supported by **Woodhouse Drake & Carey.** In that case, there had been a dispute over the identity of the government of Somalia. Hobhouse J (as he then was) had distinguished the approach to determining the government of Somalia from the approach to determining whether there was a diplomat recognised by HMG. He had held that, given the 1980 policy statement, recognition was not the appropriate test for determining who was the government of Somalia, but had stated (at page 66C, with emphasis added):

'Nor does this case involve any accredited representative of a foreign state in this country. Different considerations would arise if it did, since it would be contrary to public policy for the court not to recognise as a qualified representative of the head of state of the foreign state the diplomatic representative recognised by Her Majesty's Government.';

89.4.3. Thus, it remains open to the court to have regard to other evidence from HMG, in addition to its express statements (being the FCO's notes dated 7 November 2005 and 23 February 2006 and the London Diplomatic List), in order to ascertain, as a fact of state, whether HMG affords diplomatic status to an entity as part of a foreign state's diplomatic mission in the UK;

89.4.4. Without prejudice to that position, and having regard to the absence of any evidence to contradict the position that the Respondent is part of Kuwait's diplomatic mission (nor could any such evidence be admissible: **Central Bank of Venezuela** [93-94]); there is other cogent corroborative evidence to which the EAT has been referred which indicates that HMG considers the Respondent to be part of Kuwait's diplomatic mission, including the FCO's letters dated 31 October 2019 and 4 February 2020, and HMRC's letter dated 23 July 2020, which, individually and in combination, indicate that HMG recognises the Respondent as part of the Kuwait's diplomatic mission in the UK.

The Claimants

89.4.5. The central issue in **Central Bank of Venezuela** was the identity of the Head of State/Government of Venezuela. Within the proceedings, the FCO had produced a *'written certificate'* to the court in answer to questions as to whom the FCO recognised as such — Nicolás Maduro or Juan Guaidó [42-43]. At first instance, the Head of State issue had been resolved in favour of Mr Guaidó (or, to be precise, the Board appointed by him), in reliance upon the written certificate, which was considered to be dispositive of the issue overall [49-50]. Allowing the appeal, the Court of Appeal had considered that further questions ought to be asked of the FCO, as to whether it recognised Mr Guaidó *'for all purposes'* and as being *'entitled to exercise all the powers of the President'* [52]. On the point in question, the Supreme Court had allowed the Board's appeal. It distinguished its reasoning from that of the Court of Appeal, from [90] onwards, holding that (1) the certificate produced by the FCO had not been ambiguous, or less than unequivocal [92]; (2) the Court of Appeal had been wrong to have

looked at facts beyond the terms of the certificate (by reference to *'extrinsic evidence'*) in order to found an argument that the certificate was ambiguous — it was not appropriate to adopt an *'interpretative approach which has regard to HMG's wider conduct'* [93]; and (3) the court should not have engaged in an exercise of *'implied recognition'*, absent an express statement of recognition by the FCO [96]; it is not permissible to *'infer recognition from the conduct of HMG'* [98];

89.4.6. In passing, the Supreme Court had considered the Court of Appeal's decision in **Breish**, on which heavy reliance is placed by the Respondent in this case, but which must now be regarded as having been wrongly decided, in so far as it held that the FCO's position could be inferred [95-96];

89.4.7. The Supreme Court considered the certificate to be an *'unambiguous and unqualified statement by the executive that it recognises Mr Guaidó as interim President of Venezeula'*. It was, therefore, bound by that statement [101]. That had been put beyond doubt by the Foreign Secretary's intervention in the Supreme Court in support of that proposition [102];

89.4.8. Applied to the present case, the Supreme Court's judgment reinforces the principles on which the Claimants relied, arising from **Central Bank of Venezuela** in the Court of Appeal. In the instant case, HMG has not produced an unambiguous and unqualified statement to the Tribunal, the EAT, or anyone else. As stated by the Court of Appeal in **Central Bank of Venezuela** [92], *'what mattered was that the FCO knew that the letters were intended to be produced to the court and that they contained the carefully considered views of HMG for*

use in a public forum'. The Respondent has never produced a certificate from the FCO/FCDO to the effect that it has diplomatic immunity. It has, instead, remarkably, refused to answer the EAT's questions about its approaches to the FCDO (one obvious inference being that the Respondent has applied, unsuccessfully, for a certificate, another that it has not applied for a certificate at all, recognising that the FCDO would inevitably turn down that request) and produced a hotchpotch of selective, unimpressive, historic, contradictory and (at best) highly ambiguous documentary evidence, in dribs and drabs, to support an implied or inferential case. That is exactly the sort of argument prohibited by the Supreme Court in **Central Bank of Venezuela**. The FCO/FCDO has never spoken with any voice in the litigation in support of the Respondent's position. The dangers of an inferential case are also well demonstrated in this case, in which the Respondent has shamelessly adopted an approach whereby it can selectively disclose documents which are (mildly) favourable to it, whilst withholding those which are harmful.

90. By e-mail dated 27 January 2022, the Claimants' solicitors stated their view that, by engaging in a detailed and partial review of the selective evidence provided to the EAT, and by developing a case of implied recognition which had not been advanced as part of the appeal, the Respondent had exceeded the bounds of the EAT's request.

Withdrawal of the Second Claimant's tribunal claims

91. On 23 March 2022, the EAT was informed that the Second Claimant had withdrawn her tribunal claims against the Respondent *'and therefore shall no longer be party to these EAT proceedings'*.

Analysis and conclusions

92. In this appeal, each party prays in aid of its submissions authority and academic commentary relating to state/sovereign immunity. In reviewing such material, I bear in mind that the principle of state immunity derives from the theory of sovereign equality and the independence of states, in accordance with which one state has no right to judge another by the standards of its national law. The primary source of English law on state immunity is the SIA. The immunity can extend to a separate entity, defined to mean *'any entity… which is distinct from the executive organs of the government of the State and capable of suing or being sued*', if it is *'acting in the exercise of sovereign authority'* and the circumstances are such that a state would have been immune (per sections 14(1) and 14(2) of the SIA), but, as was held by Lord Mance in **FG Hemisphere** [29]:

'..Especially where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa…'

93. Whilst having features in common with state immunity, diplomatic immunity is materially different. Per Lord Sumption JSC, in **Reyes v Al-Malki** [7]:

'*As the International Court of Justice has pointed out (Democratic Republic of the Congo v Belgium (Arrest Warrant of 11 April 2000) [2002] ICJ Rep 3 , at paras 59-61), diplomatic immunity is not an immunity from liability. It is a procedural immunity from the jurisdiction of the courts of the receiving state. The receiving state cannot at one and the same time receive a diplomatic agent of a foreign state and subject him to the authority of its own courts in the same way as other persons within its territorial jurisdiction. But the diplomatic agent remains amenable to the jurisdiction of his own country's courts, and in important respects to the jurisdiction of the courts of the receiving state after his posting has ended. I do not under-estimate the practical problems of litigating in a foreign jurisdiction, ... Nor do I doubt that diplomatic immunity can be abused and may have been abused in this case. A judge can properly regret that it has the effect of putting severe practical obstacles in the way of a claimant's pursuit of justice, for what may be truly wicked conduct. But he cannot allow his regret to whittle away an immunity sanctioned by a fundamental principle of national and international law. As the fourth recital of the Vienna Convention points out, "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of diplomatic missions as representing states".'* So it was that, subsequently, in **Benkharbouche** [17], Lord Sumption JSC stated that the modern law treats diplomatic immunity as serving an essentially functional purpose.

94. The nature of, and the similarities and distinctions between, state and diplomatic immunity are important to bear in mind when considering the application of the caselaw and academic opinion on which the parties rely in this case.

95. It is convenient to consider the grounds of appeal out of numerical order, beginning with ground 5.

Ground 5: the Respondent's status as a separate legal entity from the state of Kuwait

96. The Claimants submit that the acknowledged fact that the Respondent and the State of Kuwait are separate legal entities under national law (whereas international law does not recognise a diplomatic mission as having a legal personality separate from that of the sending State) is determinative of the issue of diplomatic immunity, in their favour.

97. I accept Mr Laddie's submission that Lord Sumption's statement of principle, at paragraph 68 of **Bancoult**, that a diplomatic mission is not a separate legal entity and its archives and documents belong to the sending state, is not context-sensitive. That is consistent with the views of the distinguished academic authors to which he directed my attention. But I also accept Professor Sarooshi's submission that that proposition, without more, does not afford an answer to the issue the subject of ground 5. Whilst, as the Respondent accepts, under international law, the mission is not recognised as having a legal personality separate from the state which it represents and, under English law, the diplomatic mission is not a person in law, it is a syllogistic fallacy to conclude from the fact that the Respondent is, under national law, an independent legal entity that it cannot form part of the Kuwaiti mission which, as a matter of international law, itself enjoys no separate legal personality from the state. None of the caselaw or materials upon which the Claimants relied provided authority for that proposition. If it is the case that the Respondent forms part of the Kuwaiti mission, which itself has no personality separate from the state, then proceedings brought against the Respondent are, in substance, proceedings brought against the state itself.

98. Both **FG Hemisphere** and **Baccus** were state immunity cases and, thus, were concerned with the relevance of separate legal personality for that purpose; specifically, whether it was determinative of separate entity status. Additionally, in **Baccus**, it was not disputed that, apart from the effect

of its incorporation, the defendant would be a department of the Sovereign State of Spain [page 465, per Jenkins LJ]. Whether or not the presumption to which reference is made at paragraph 29 of **FG Hemisphere** is displaced in this case is a fact-sensitive question which will need to be explored by the employment tribunal when considering the validity of the Respondent's plea of state immunity.

99. Mr Laddie further points to the Respondent's pleaded case, in its Particulars of Assertion of State and Diplomatic Immunity, that: (1) it is the London branch office of the KIA, having no separate legal personality from the latter (paragraph 7); (2) its legal status, under the SIA, has been the subject of prior litigation in **Sarrio** (paragraph 10); and (3) [*'for the purposes of this Assertion only, without admission as to the same'*] it is prepared to proceed on the basis that it would be regarded as a separate entity under s14(2) of the SIA (paragraph 11). He contends that, irrespective of the express limitation upon the purpose of its pleaded case, the Respondent has relied upon facts which, as a matter of law, are inconsistent with an entitlement to diplomatic immunity. In my judgment, the pleaded facts upon which Mr Laddie places emphasis cannot be divorced from their express context. The issue under consideration in the relevant paragraphs is whether the Respondent is a separate entity for the purposes of section 14(2) of the SIA. In any event, nothing in those facts itself serves to undermine the analysis set out at paragraph 97 above.

100. In any event, the Respondent's pleaded reliance upon **Sarrio** (in the Court of Appeal) does not avail the Claimants. There, under the heading 'Outline facts', Evans LJ had recorded [6]:

'...The defendants are the Kuwait Investment Authority ("KIA"), which may be described as the investment arm of the government of Kuwait, though with a separate legal identity from the government and State. Its head office is in Kuwait and it is domiciled there, but it has a long-established branch office in London where it operates under the style of Kuwait Investment

Office ("KIO")…'

At [59], he had continued:

'It is common ground that the defendants KIA/KIO have a legal identity conferred by and under the laws of Kuwait. It has been described as "the external treasury of the Kuwaiti Government" and "the investment arm of the State of Kuwait", both of which it accepts as accurate. Its offices in London are treated as part of the Kuwaiti Embassy and they enjoy diplomatic immunity. Its employees are civil servants of the Kuwaiti Government. It is a public authority established by decree in accordance with the Constitution and as such it can sue and be sued. But it holds no assets and manages no business for its own account; the assets and business are the State's. It is funded by an allocation of a budget by the State, which forms part of the State budget; and its budget and accounts are subject to the control of the National Assembly. Its "Board of Directors" includes the Minister of Finance, the Minister of Oil, the Under-Secretary at the Ministry of Finance and the Governor of the Central Bank.'

Those facts were not revisited before the House of Lords [1999] 1 AC 32.

101. It is not clear from paragraph 59 of **Sarrio** by whom or what KIA/KIO's offices in London were then treated as being part of the Kuwaiti Embassy, or on what basis diplomatic immunity was said to exist. Certainly, the Court of Appeal expressed no concern about the co-existence of the separate legal identity which it had recorded at paragraph 6 and the enjoyment of diplomatic immunity to which it referred at paragraph 59. Nevertheless, there was no exploration of the basis for diplomatic immunity, which was not a matter in issue — the questions before the Court had been whether the English court should decline jurisdiction, or stay the action before it, on the basis that the latter was related to an action previously

commenced in Spain, for the purposes of article 22 of the amended Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968), and whether there was a risk of irreconcilable judgments resulting from the two sets of proceedings. In those circumstances, I do not consider the facts as outlined in **Sarrio** to be conclusive, or determinative of the issue before me.

102. It follows that, in my judgment, the Respondent's status as an independent legal entity under national law does not itself prevent it from forming part of the Kuwaiti mission. It follows that ground 5 of the appeal is allowed and it is necessary to go on to consider whether, as the Respondent contends, HMG has recognised the Respondent as forming part of the mission and, if so, with what consequence (ground 4).

Ground 4: recognition and the one voice doctrine

103. The Respondent does not contend that a section 4 DPA certificate, serving as conclusive evidence of the facts certified, has been provided by the FCO/FCDO. Asserting that there is no prescribed form which an expression of recognition must take, it relies upon the following documentation, submitting that it is for the EAT to rule on whether it establishes the status for which the Respondent contends:

103.1. the documentation which was before the Tribunal, said to indicate that the staff sent to the Respondent were accepted as part of the Kuwaiti mission and, thereby, to establish that the Respondent itself had been recognised by HMG as part of the Kuwaiti mission. The Respondent asserts that HMG's position on the issue is determinative, as a consequence of the constitutional separation of powers; the only role of the tribunal,

and, on appeal, of the EAT, is to determine whether the receiving state has made such a decision;

103.2. the additional (including unredacted) documentation which had not been before the employment tribunal, produced at or before the hearing of its appeal, itself said to demonstrate that the Respondent has been recognised by HMG as part of the Kuwaiti mission, with the same consequence; and

103.3. the yet further documentation, variously produced after the hearing of the appeal and prior to judgment, said to indicate, respectively, that: the premises from which the Respondent operates were to be used for mission purposes, exclusively by the Respondent; the Respondent had been accorded sovereign (state) immunity from UK direct taxation; and staff working at the Respondent formed part of the Kuwaiti diplomatic mission. Once again, the same consequence is asserted.

The one voice doctrine

104. For the purposes of this appeal, Mr Laddie accepts that a principle akin to the one voice doctrine applies to HMG's recognition of diplomatic missions. In my judgment, he is right to do so. In the language of Lord Lloyd-Jones, in **Central Bank of Venezuela**, SC [79], *'In the United Kingdom it is for the executive to decide with which entities or persons it will have relations on the international plane.'* It follows that (as Mr Laddie also accepts), in the event that there is before the EAT a statement of recognition of the Respondent's membership of the Kuwait diplomatic mission (whether or not it was also before the Tribunal), I must defer to the view of the executive and accept that statement as conclusive evidence of that fact, interpreting and giving effect to it in accordance with the one voice principle.

105. That said, the Claimants assert that HMG has not expressed itself in a way which sufficed to satisfy the Tribunal, or ought to suffice to satisfy the EAT, that it has recognised the Respondent as part of the Kuwaiti mission; if and to the extent admissible, the evidence produced to the EAT is supportive of the Claimants' case, rather than the Respondent's. It is, thus, necessary for this tribunal to determine the meaning of the documentation on which reliance is placed, to which I now turn.

Express recognition

106. In contending that it has been recognised expressly as forming part of the Kuwaiti mission, the Respondent relies upon the documentation considered below:

106.1. The Respondent's inclusion in the London Diplomatic List is not conclusive of its status, or, hence, entitlement to rely upon Articles 24 and/or 27(2) of the VCDR. Were it otherwise, the FCDO would not have been asked by the court in **Estrada** to provide a certificate in relation to a representative whose name appeared in the diplomatic list (see paragraphs 16 and 17), an approach of which no criticism was made by the Court of Appeal, and which is consistent with the position advanced in *Satow's Diplomatic Practice, Seventh Edition*, at paragraphs 7.34 and 10.1. If the list is not conclusive of the status of a listed individual, the submission that it is conclusive of a listed office's membership of the Kuwaiti mission is all the weaker. Further, whether or not individuals who work at the Respondent's offices themselves have the benefit of diplomatic immunity, or engage in diplomatic activity, that says nothing about the Respondent's own status as part of the mission.

106.2. The FCO note dated 7 November 2005 (stamped as having been received on 14 November 2005) was addressed to the Embassy of the State of Kuwait, rather than to the Respondent. The letter of 4 October 2005, to which it referred, again indicated that it was the Embassy, not the Respondent, which had made the relevant request and that some diplomatic status had attached to the premises and certain staff working there. The title deed for Wren House identifies the registered owner as being the State of Kuwait, rather than the Respondent. Whether or not the premises are used by the Respondent, the document does not itself establish that the Respondent is part of the mission.

106.3. Thus, whether read in the context of the 4 October 2005 letter and title deed, or in isolation, the 2005 FCO note does not constitute a clear and unequivocal statement that the Respondent forms part of the Kuwaiti diplomatic mission. In my judgment, Professor Sarooshi's reliance upon Article 12 of the VCDR is misplaced. That Article provides that '*The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.'* It does not assist the Respondent, for three reasons. First, in the absence of full disclosure, it is not possible to be clear whether the express consent required by Article 12 has been given, or, indeed, later withdrawn. Whilst the FCO note would ostensibly constitute such consent, entitling the Kuwaiti mission to establish offices forming part of the mission in a locality other than those in which the mission itself is established, if the Respondent forms part of the mission, no such consent would have been required. Secondly, and in any event, the presence of the Respondent in Wren House does not establish that it forms part of the Kuwaiti mission; it simply establishes presence. If the Respondent is not part of the Kuwaiti mission, its presence in Wren House would not constitute a contravention

of Article 12 by the sending state. Thirdly, it is, as a matter of principle, possible for the Kuwaiti mission to establish an office in Wren House (of which the state of Kuwait is the registered owner), without the Respondent thereby being part of the mission. Similarly, for the purposes of sections 1(1) and 1(3) of the Diplomatic and Consular Premises Act 1987, any application by the Kuwaiti mission to use Wren House as diplomatic premises does not itself serve to establish that the Respondent is part of the mission, irrespective of whether it operates from those premises (exclusively or otherwise).

106.4. The FCO note, dated 23 February 2006, was also sent to the Embassy, rather than the Respondent. It requested a list of all staff then working at the Respondent's office and that, in future, all new members of staff appointed to the KIO stipulate as much in their TX9 appointment forms. At that time, form TX9 was used to notify the FCO of the arrival and final departure of those officials who were entitled to privileges and immunities, or of any changes to the circumstances of a member of a mission. The pro forma as it then stood has not been disclosed in these proceedings. As noted above, whether or not individuals who work at the Respondent's offices themselves have the benefit of diplomatic immunity says nothing about the Respondent's own status as part of the mission. The reference in the note to *'Kuwait – Kuwait Investment Office'* is, at best, ambiguous and, at least, consistent with the individual's place of work being that office. In short, the 2006 note does not represent a clear and unequivocal statement of recognition.

107. Furthermore, none of the above documents was produced by the FCO, or FCDO, in the knowledge that it was intended to be produced to the court/tribunal, and containing the carefully considered views of HMG, for use in a public forum (see **Central Bank of Venezuela**, CA

[92], undisturbed by the Supreme Court). The two FCO notes are of considerable age and there can be no certainty that disclosure is comprehensive, even now. In short, in my judgment, none of the documents on which the Respondent relies as constituting express recognition of the Respondent's membership of the mission is adequate to its purpose. Properly interpreted, it does not constitute express recognition by HMG.

108. In the particular circumstances set out earlier in this judgment, I am fortified in those conclusions by the absence of a DPA section 4 certificate and consider that Mr Laddie is right to invite one or other of the inferences to be drawn from the Kuwait Embassy's approach to the FCDO, following the hearing of this appeal. If each of the documents upon which the Respondent relies as constituting express recognition of its membership of the mission indeed constituted such recognition (and any recognition had not subsequently been withdrawn), the provision of such a certificate ought to have been straightforward, notwithstanding the troublingly inaccurate basis upon which it appears to have been sought. The matters to which the correspondence from the GLD, on behalf of the FCDO, refers (recited earlier in this judgment) are both telling and concerning, as is the Respondent's unwillingness to respond substantively to my directions, relayed to the parties on 14 May 2021, none of which (contrary to its assertion) required it to '*comment on internal diplomatic communications within or between different parts of the Mission, of which it is part'*; rather to answer certain questions of fact. I consider that it is appropriate to have regard to the absence of any formal certificate, both generally and in the context of the correspondence between the Kuwait Embassy and the FCDO. I do not consider that this tribunal is bound to seek such a certificate, or other clarification, for itself (see **Central Bank of Venezuela**, CA, at paragraph 109, undisturbed by the Supreme Court's judgment in that case), or that such a course is necessary or appropriate, given the history of this matter.

Implied recognition

109. In **Central Bank of Venezuela**, SC [96 and 98], Lord Lloyd-Jones stated:

> *'96. On its face, the resort by the Court of Appeal in Breish to such extraneous materials is inconsistent with the one voice principle. The Guaidó Board submits, however, that this is not the case because the Court of Appeal in Breish was not concerned with the meaning of a certificate but with the logically prior question as to the status of the letters ie whether HMG had made a statement of recognition which engaged the one voice principle or merely a statement of political support. But, even if that is accepted, it leaves a further difficulty. The Court of Appeal seems to have engaged in a process of inferring recognition from the dealings between HMG and the relevant Libyan entities. For reasons developed below I consider it inappropriate for courts in this jurisdiction to rely on notions of implied recognition. If the FCDO has departed from its usual practice by issuing an express statement of recognition, any ambiguity in the statement should be resolved by a further request to the FCDO for clarification. In the absence of such an express statement of recognition by HMG, the issue of recognition does not arise and the courts are left to conduct an inquiry as to whether the entity in fact carries out the functions of a government in accordance with Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA.*
>
> *97. ...*
>
> *98. Implied recognition is a concept of international law and its function on the international plane is widely acknowledged. However, there is no scope for the application of any notion of implied recognition by courts in this jurisdiction. In the present case,*

exceptionally, Her Majesty's Government departed from its 1980 policy and made an express statement in relation to the status of a person claiming to be head of state of Venezuela. That statement must be interpreted and applied by the courts and is determinative. No question of implied recognition arises. Where there is no such express statement, Hobhouse J in Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and Mance J in Kuwait Airways Corpn v Iraqi Airways Co (No 5) have demonstrated that it is not open to the courts to infer recognition from the conduct of HMG. Quite apart from the practical difficulties of doing so, to infer the intention of HMG in relation to recognition would be to trespass into an area which is constitutionally within the exclusive competence of the executive. In such circumstances recognition ceases to be the determinative criterion and the court must identify who may be the government or head of state by making its own findings of fact as indicated in Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA.'

110. I reject the Respondent's submission that those, unqualified statements are restricted in their effect to implied recognition of governments or heads of state, albeit that the issue had arisen in that context and against the background of the 1980 policy statements. There is no principled basis for the drawing of such a distinction. In the absence of an express statement, it is not open to the court to infer recognition from HMG's conduct, which would be to trespass into an area which is constitutionally within the exclusive competence of the executive.

111. For the sake of completeness, however, had it been appropriate, as a matter of principle, to consider whether I ought to infer recognition from the additional documentation on which the Respondent relies, I would have held that the latter gave rise to no such inference:

111.1. As is clear from the Respondent's letter to the FCDO, dated 4 November 2011 (in unredacted form), not all of the staff who work from the Respondent's office themselves have diplomatic status;

111.2. The formerly redacted part of the FCO's letter to the President and CEO of the Respondent, dated 31 October 2019, referred separately to the Kuwait Embassy and the KIO. I note the careful wording of Professor Sarooshi's submission that the letter evidences the fact that the FCO was treating the Respondent's officials as members of the Kuwaiti mission. Even if true, that is not synonymous with the Respondent's membership of the mission, or with HMG's recognition of the latter. The reference made, in the opening paragraph, to Article 38 of the VCDR is not conclusive, or compelling; it says nothing of the source of the privileges and immunities enjoyed by the relevant staff, nor does it establish the entity by which they are employed/engaged. There is no reference made anywhere in the letter to Article 11 of the VCDR. The FCO's letter of 4 February 2020 (on which Professor Sarooshi did not rely in his oral submissions, but to which he referred in the written submissions served following the Supreme Court's judgment in **Central Bank of Venezuela**) does not advance matters, for current purposes, and no further letter from the FCO in that particular chain of correspondence has been produced (albeit invited by the Respondent's letter to the FCO dated 13 February 2020). It is not appropriate to draw the conclusions invited by the Respondent on the basis of incomplete correspondence, or of Professor Sarooshi's submissions alone, or of the position as agreed between the parties in **Sarrio**, in connection with different issues;

111.3. The letter from HMRC, dated 23 July 2020, relates to 'sovereign immunity from UK direct taxation'; the relevance of which, in connection with the subject matter of this

appeal, has not been explained. It emanates from a non-ministerial government department and was sent to a firm of accountants. It forms part of a chain of correspondence the balance of which has not been disclosed. It says nothing of HMG's position on whether the Respondent forms part of the Kuwaiti mission;

111.4. The document emanating from the Embassy of Kuwait, dated 23 September 2020, is not a statement by HMG. In any event, without more, the Court is not bound to accept assertions made by the state through its representatives (see **Al Attiya**, [71]), particularly those made at a time when this litigation was already on foot and on the date on which the Respondent applied to amend its Particulars.

112. In short, it cannot be said that any of the above documentation leaves no doubt as to HMG's intention to grant recognition of the Respondent as part of the Kuwaiti mission. If and to the extent that:

112.1. reliance is placed upon the documentation said to constitute express statements of recognition as, alternatively, indicating implied recognition, that submission also fails, for the reasons previously stated;

112.2. the letters of 31 October 2019; 4 February 2020; and/or 23 July 2020 are asserted to constitute express statements of HMG's recognition of the Respondent as part of the Kuwait mission, I reject that assertion, too. In addition to the points already made in relation to each such letter, none was clear and unequivocal, nor was it produced by the FCO in the knowledge that it was intended to be produced to the court/tribunal, and containing the carefully considered views of HMG, for use in a public forum.

113. In summary, in my judgment none of the documents on which the Respondent relies is adequate to its purpose, whether considered individually or in combination with any of the others. It does not constitute express recognition of the Respondent's membership of the Kuwaiti mission by HMG. As a matter of law, there is no scope for implied recognition, but, in any event, no such inference would have been warranted in all the circumstances.

114. As it is the EAT's duty to interpret the documentation which is asserted to constitute recognition by HMG (which augments, and removes certain former redactions from, the documentation which was before the Tribunal), the Tribunal's conclusion that a rebuttable presumption had been created by the London Diplomatic List and the FCO's letter dated 31 October 2019 (then redacted) is of no consequence and need not be the subject of challenge by the Claimants. In any event, an appeal lies from a tribunal's orders (which the Claimants do not seek to challenge), not its reasoning. Moreover, the Tribunal had not been asked to address the matter on the basis of the one voice doctrine (as it made clear at paragraph 5 of its reasons for the orders made on 22 July 2020, in response to the Respondent's application for reconsideration); rather, it had been invited to conclude for itself that the documentation produced by the Respondent established that the Respondent formed part of the Kuwaiti mission.

115. Before me, the Respondent's case on this ground of appeal stood or fell on recognition and on the documentation which it had provided in that connection. In the absence of recognition by HMG (as I have found to be the case), I have not been asked to conduct an inquiry as to whether the Respondent in fact forms part of the Kuwaiti mission, nor would an appellate tribunal be the appropriate forum in which to do so. As has been amply illustrated by the Respondent's approach to disclosure and the EAT's directions in this case, the Tribunal lacked the material from which reliably to conclude that the Respondent forms part of the mission; a position which continues to obtain before the EAT. The Claimants' characterisation of the material produced

by the Respondent, as constituting *'a hotchpotch of selective, unimpressive, historic, contradictory and (at best) highly ambiguous documentary evidence'*, is well-founded. As that documentation constitutes the totality of the evidence upon which the Respondent relies for its position, on the facts of this case debate over which party bears the burden of proof, where diplomatic immunity is in issue, is sterile.

116. Nevertheless, I do not accept that **JH Rayner** is authority for the Respondent's pleaded proposition that that burden falls on the Claimants. In that case, it had been acknowledged that the defendant benefited from sovereign immunity, unless the exception for which section 3 of the SIA provides applied. Staughton J (as he then was) held that, where the SIA applied, the burden fell on the plaintiff, for three reasons: (1) it was relying on an exception to the rule which would otherwise apply; (2) section 1(2) of the SIA obliged the court to give effect to the immunity conferred by section 1, even if the state did not appear in the proceedings in question, which, it was said, was difficult to reconcile with the burden of proof being on the defendant; and (3) in most cases, service would, by section 12 of the SIA, need to be effected through the FCO. That would require the plaintiff to show a good arguable case under what was then Order 11 of the Rules of the Supreme Court. None of those considerations applies in the instant case, in which there is no presumption (a) that the Respondent forms part of the mission, or, hence, (b) of diplomatic immunity, to which an exception is being advanced; thus, there was no obligation on the part of the Tribunal, nor is the EAT under an obligation, to give effect to the immunity asserted by the Respondent; and there is no equivalent service gateway through which the claimants needed to pass.

117. Furthermore, the absence of a section 4 DPA certificate from HMG, in the face of a direct request from the Embassy of Kuwait, itself supports the Claimants' position that the material on which the Respondent relies does not suffice to indicate its asserted status, even on a prima

facie basis; otherwise, as I have previously observed, the obtaining of a certificate ought to have been straightforward.

Grounds 6, 7 and 8: archives, documents and official correspondence inviolable under Articles 24 and 27(2) of the VCDR

118. It follows from the above conclusions that there is no basis upon which Articles 24 and/or 27(2) of the VCDR apply, respectively, to the Respondent's archives and documents, or official correspondence. Thus, grounds 6, 7 and 8, fall away. Nevertheless, I address, in brief, the submissions made in connection with them, should this matter go further and should I be wrong in my conclusions on ground 4:

Article 27(2) of the VCDR

118.1. I accept Mr Laddie's submission that Article 27 of the VCDR relates to documents which would not necessarily be part of the mission's archives or documents at the time of interception (**Bancoult** [65], and see, also, *Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations*, Fourth Edition, edited by Eileen Denza, at page 1454). Thus, irrespective of my findings in relation to ground 4, it would not have been engaged on the facts of this case. In so far as the documentation in question forms part of the archives and documents of the mission, it would have the protection accorded by Article 24 of the VCDR. In those circumstances, it is, perhaps, unsurprising that the Tribunal did not engage with the point.

Article 24 of the VCDR

118.2. Albeit that the purpose of Article 24 of the VCDR is to protect the confidentiality of the mission's work (**Bancoult** [69]), in my judgment in the absence of communication to a third party, with the actual or ostensible authority of the responsible personnel of the mission, immunity is not lost ((**Bancoult** [71]).

118.3. Nevertheless, as the Respondent accepts, in the form communicated to a third party any document is no longer that of the mission and the Respondent could have no legitimate objection under the DPA/VCDR to an order for disclosure by that third party. Such an order could be made pursuant to rule 31 of the 2013 Rules. I note that, in his oral submissions, Professor Sarooshi did not assert that documents sent to third parties in the context of a lender and borrower, bailor and bailee, or principal and agent relationship fell to be analysed differently, nor was any principled basis for such a contention advanced or apparent. Within ground 7 of its notice of appeal, the Respondent referred to page 27 of **Shearson**, the relevant part of which (at F-G) made clear that a host state would not countenance violation of the privacy of diplomatic communications, by permitting a violator (i.e. someone who had obtained documentation by improper means), or someone who had received documentation from that violator, to make use of it in judicial proceedings. That is unsurprising, but is of no application to the particular proposition advanced by the Respondent, which contemplates intentional transmission of documentation by the Respondent to a third party, which is, thereby, in lawful receipt of that documentation. In any event, there was no evidence before the EAT (or, seemingly, the Tribunal) as to which, if any, of the documents sought were said to fall within any of the relationship categories identified by the Respondent.

118.4. Accepting (as do the Claimants) that **Shearson** and **Bancoult** were not concerned with documents in the hands of the mission itself, I reject Professor Sarooshi's submission that an order that the Respondent create and provide an exhaustive list of third parties to whom disclosable documents had been communicated by the Claimant would be objectionable, as itself running contrary to Articles 24 and 27(2) of the VCDR. Addressing the various arguments which he advanced in that connection:

118.4.1. As a matter of principle, upon application, such an order could be made under rule 30 of the 2013 Rules. Nothing in either Article precludes the making of an order compliance with which requires the mission to access its own documents, archive or official correspondence. Paragraph 69 of **Bancoult** does not assist the Respondent on this point; as is clear from paragraph 71 of that authority, if the document has been communicated to a third party with the actual or ostensible authority of the responsible personnel of the mission, any immunity in respect of it is lost. In the form communicated, it is no longer the mission's document (see above).

118.4.2. **Mid-East Sales Limited** is not authority to the contrary and was directed to a different issue; I do not suggest that the Respondent could be ordered to direct the relevant third parties to send copies of the documentation in question to the Respondent, or that any purpose would be served by their so doing.

118.4.3. Nor do I suggest that the Respondent could itself be ordered to disclose documents which it had sent to third parties from its own archive (see

Inviolability of the Archives, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (4th Edition), Denza).

Article 6 of the ECHR

118.5. For the avoidance of doubt, I am satisfied that, as a matter of principle, Article 6 of the ECHR is engaged in relation to disclosure in connection with proceedings to which that article relates. Whilst Professor Sarooshi did not accept that to be the case, he produced no authority supportive of his position and examples of its application to disclosure are readily to be found (see **McGinley v United Kingdom** (21825/93) (1999) 27 EHRR 1 and related caselaw).

118.6. Nevertheless, if it is the case that the Respondent benefits from diplomatic immunity, Article 6 of the ECHR will not itself operate to override or qualify that immunity and does not exist in a vacuum. The real question is whether any diplomatic immunity has been waived – a question which I address below. Subject to that, restrictions on the right of access to court which reflect generally recognised rules of public international law cannot, in principle, be regarded as disproportionate (**Estrada** [44]).

118.7. With considerable regret, I conclude that that position is not altered by any decision by the Respondent to give selective disclosure, and to withhold unfavourable material on the basis of diplomatic immunity. Assuming, for these purposes only, that Articles 24 and 27 of the VCDR apply, the Respondent could not have been criticised for withholding all documentation which they protect. In such circumstances, as a matter of principle and absent any waiver by the state of Kuwait, it is difficult to see how it could be criticised for withholding part of that documentation. As the Tribunal rightly

observed (and as Professor Sarooshi acknowledged), it may be that appropriate inferences as to the substantive merit in the Respondent's position could and should be drawn in such circumstances, but the imperfect nature of that option does not enable a tribunal to override the immunities conferred by the VCDR, however unpalatable the result. Lord Sumption JSC's observation, in **Al-Malki v Reyes** [7] (set out at paragraph 93, above) is apt here.

Waiver

118.8. It is common ground between the parties that diplomatic immunity from jurisdiction can be waived only by the sending state. It must be intended as such and unequivocally communicated to the court (**Propend**, page 643). In relation to the immunity from jurisdiction of diplomatic agents, Article 32 of the VCDR (not engaged in the instant circumstances) requires that waiver be express, again emphasising the clarity required. Albeit in the context of state immunity, it has been held that the doctrine of ostensible authority does not apply to solicitors instructed by the state, and that jurisdiction cannot be created by an estoppel; the state has protection against unauthorised action taken by a solicitor, or member of the mission (**Aziz** [58]).

118.9. Professor Sarooshi did not submit that, in proposing directions for standard disclosure going to the preliminary issue, Allen and Overy LLP had been acting without the authority of the state, suitably conferred. There is no evidence to that effect before the EAT. Consistent with the direction proposed and made, some disclosure has been given by the Respondent.

118.10. Nevertheless, and unattractive as I consider the Respondent's position to be in those circumstances, on the evidence available to me I am not satisfied that either the

proposing of standard disclosure by the Respondent's solicitors, or the giving of some disclosure by the Respondent, reflected the state of Kuwait's intention to waive diplomatic immunity (whether or not limited to the giving of comprehensive disclosure on the issue of state immunity), or that it represented the requisite unequivocal communication to the Tribunal. Had my conclusion as to diplomatic immunity been different, I would not have ruled out the prospect that such an argument could now be advanced before the employment tribunal, as fact finder, on the basis of any evidence relevant to that issue which has not been available to the EAT.

Grounds 1 and 2: the scope of the Claimants' pleaded case

119. In my judgment, these grounds of appeal lack merit, for the following reasons:

119.1. State immunity was pleaded by the Respondent as a defence to the Claimants' substantive claims. There is no suggestion that the Claimants' response to that defence ought to have been anticipated in the claim forms, as originally pleaded;

119.2. It is routine in employment tribunal litigation for a claimant to advance a positive case in response to a pleaded defence without the prior need to amend his/her claim form, or to serve subsequent pleadings or particulars. The Claimants have noted certain commonplace examples;

119.3. Consistent with that fact, there is no express provision in the 2013 Rules for the service of pleadings subsequent to the response form;

119.4. This is not a case in which amendment of the claim form would have been appropriate; there was no change to the claims being advanced by the Claimants, or the bases upon which they were being advanced. **Chandhok v Tirkey** was a case relating to the bases upon which a claim of discrimination had been advanced. Unsurprisingly, the EAT observed that the function of the form ET1 is to set out a claimant's essential case, to which the Respondent must respond in its form ET3, and which would be of significance, in particular, to the applicable limitation period. That is not this case. In relation to an application made for disclosure in civil proceedings, the Court of Appeal in **Harrods Ltd v Times Newspapers** [12] stated that it was essential that a court, first, identify the factual issues which would arise for decision at trial and that disclosure must be limited to documents relevant to those issues. As a proposition, that is uncontroversial, but it does not advance the Respondent's position in this case, in which it is clear that the plea of state immunity is contested and the Respondent is put to proof of each matter on which it relies for its plea, including the facts which were said to be common ground in **Sarrio**. That was made clear by the First Claimant's solicitors' letter, dated 23 October 2019, and the Second Claimant's solicitors' letter, dated 19 December 2019. In so far as the specific disclosure sought related to particular factual matters in issue, those matters were identified in the Claimant's respective application letters and in the inter partes correspondence which preceded them.

119.5. The pleaded averment appearing in the First (though not the former Second) Claimant's case which is said to be inconsistent with the position adopted by the Claimants in relation to disclosure, is at paragraph 11 of his grounds of complaint: *'The* [Respondent] *manages funds which are beneficially and wholly owned by the State of Kuwait'*. That is hardly determinative of the position, nor, on its face, advanced as an exhaustive or exclusive description of the Respondent's activities.

119.6. The Respondent can derive no assistance, for current purposes, from the asserted burden of proof in relation to state immunity, which is contested, and, thus, an issue for determination by the tribunal at the substantive preliminary hearing. In such circumstances, the Respondent's position on that issue in connection with its application to debar (as recorded in shorthand by the Tribunal at paragraph 15 of its decision, and clarified at paragraph 3 of the reasons for its orders dated 22 July 2020, in response to the Respondent's application for reconsideration) was correct.

119.7. As no amendment to the Claimants' pleaded case, or service of a further pleading, was required, the Tribunal made no error of law in proceeding to consider the Claimants' application for specific disclosure in their absence. Furthermore, the Tribunal went on to give perfectly sensible case management directions which will ensure that, so far as its objection extends beyond the forensic, the Respondent will not be prejudiced in the manner said to underpin that objection. Put simply, the **Noorani** test is not satisfied.

120. Finally, I turn to the Claimants' assertion of the further (indeed, primary) reason why the Tribunal was right to have dismissed the Respondent's application, dated 18 May 2020, to debar them from relying upon any factual matters outside the scope of their existing case, unless any positive factual case on the issue of state immunity were first set out in a pleading, to which the Respondent could respond, if so advised. As was noted by the First Claimant's solicitors, in their reply to that application, dated 19 May 2020, it marked the third occasion on which an order for a pleaded reply on the issue of state immunity had been sought, albeit, this time, together with a sanction in the event of default. Applications had been made in relation to the Second Claimant, on 30 October 2019, and in relation to the First Claimant, on 14 November 2019. The latter had been rejected by order of Employment Judge Brown, dated 5 December

2019. The former had been rejected by Employment Judge Nicolle, on 20 December 2019, who had also refused to vary the order made on 5 December 2019, noting that he did not see any reason to depart from it. No appeal was brought from either order.

121. On the face of it, there appears to have been no material change of circumstances since the two earlier orders had been made, and no assertion by the Respondent that the earlier orders had been based on material omission or mistreatment, or some other substantive reason necessitating interference with them (see **Serco Ltd v Wells** [2016] ICR 768, EAT and related authority). If so, there was no judicial basis upon which the Tribunal could interfere with those earlier orders. I note, however, that, in addressing the Claimants' application for costs at paragraph 8 of the reasons for its orders dated 22 July 2020, the Tribunal recorded, *'In refusing the application, EJ Brown did not find that the application was a repetition of previous applications.'* In those circumstances, and as Employment Judge Brown had also heard one of the earlier applications (for which no written reasons had been requested), it is not possible for the EAT to be certain that the **Serco** principles were engaged, or, if engaged, infringed. In those circumstances, the Claimants' contention of abuse of process is not established.

Ground 3: the relevance of the disclosure ordered

122. Professor Sarooshi did not advance ground 3 with any force. Mr Laddie is right to observe that the EAT should not lightly overturn an employment tribunal's assessment of the relevance of disclosure sought and ordered, assuming that it has directed itself in accordance with the applicable legal principles.

123. The Tribunal began its analysis of the relevance of the specific disclosure sought by reminding itself of the provisions of section 14(2) of the SIA — at that time being the only sub-section

upon which the Respondent had pleaded reliance. That section would confer state immunity on a separate entity:

'if, and only if—

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

(b) the circumstances are such that a State…would have been so immune.'

124. The Tribunal went on to refer to **Trendtex**, observing that it was not directly relevant to section 14(2) but noting that similar features were likely to arise for consideration under the latter.

125. Standing back, I accept Mr Laddie's submission that the Tribunal made no error of law in its approach to the matter. Both **FG Hemisphere** and **Benkharbouche** indicate the breadth of the context which a tribunal will be obliged to consider when determining whether the Respondent has state immunity. In particular, paragraph 29 of the former case (recited earlier in this judgment) makes clear that separate juridical status is not conclusive and paragraph 53 of the latter case affirms the earlier statement of Lord Wilberforce, in **The I Congreso**, that the court must consider the whole context in which the claim against the state is made. That is consistent with the revised and updated third edition of *The Law of State Immunity*, by Hazel Fox CMG QC and Philippa Webb, in which, under the heading 'Statehood', they state (pages 342-343): *'An agency or State trading organisation may be sued in its own name, and this will not necessarily prevent it from raising a plea of immunity, provided it can show itself to be sufficiently closely connected to the central government or to be acting on the State's behalf 'in the exercise of sovereign authority''.*

126. Distilled to its essence, Professor Sarooshi's submission is that this case falls within 'the great majority of cases' to which Lord Sumption referred at paragraph 54 of **Benkharbouche**, but Mr Laddie is right to emphasise the text in the previous paragraph of that case, in the context of which it cannot be said that the Tribunal erred in law. Paragraph 74 of **Benkharbouche** has been taken out of context by the Respondent and advances matters no further.

127. There is also the following pragmatic consideration. The Respondent has applied to the employment tribunal to amend its Particulars of Assertion of State and Diplomatic Immunity so as to plead reliance upon section 14(1) of the SIA, as its primary case. Properly, Professor Sarooshi did not suggest that the specific disclosure previously ordered would not go to the issues engaged by that section. It is unattractive to appeal against an order for disclosure, on the basis that the disclosure in question is irrelevant, whilst simultaneously seeking to amend particulars of immunity to plead a case to which that same material would be relevant.

128. Had the Tribunal erred in its approach, I would have remitted the matter for it to consider afresh the relevance of the material sought, in accordance with the correct legal principles — the course which both parties indicated would be appropriate, in that event.

Overarching conclusion and disposal

129. It follows from the above conclusions that:

    129.1. ground 5 is allowed, but results in no change to the orders made by the Tribunal, in light of my conclusions as to grounds 1 to 4;

    129.2. grounds 1 to 4 are dismissed; and

129.3. grounds 6 to 8 fall away, in light of my conclusions as to ground 4.

130. I add the following, by way of postscript. Whether or not it considered itself to benefit from diplomatic immunity as part of the Kuwaiti mission (an issue which it was entitled to raise), the Respondent's approach to litigating that issue is to be deprecated. It is difficult to conclude that its (1) attitude to the making and subsequent removal of redactions; (2) production of documents on a drip-feed basis (including after the hearing of its appeal), which could have been made available at an earlier stage; and (3) response to the directions which I gave in February and May 2021, for all of which no compelling reasons have been given, is other than cynical. Certainly, it is inappropriate. It is one thing for a party to adopt a stance on diplomatic immunity by reference to which it is said that certain documentation will not be provided. It is another for it to choose to produce such documentation as it deems it appropriate to provide in the manner which I have described and to give no substantive response to the EAT's directions in connection with the issues under consideration. In such circumstances, the First and former Second Claimant are to be commended for having engaged constructively with all material produced.