EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Mr Alateeqi	**v**	**Kuwait Investment Authority**

Heard at: London Central **(by CVP)** **On**: 8, 9 July 2024
10 July 2024 (In Chambers)

Before: Employment Judge Brown

Representation

For the Claimant: **Alison Macdonald KC**
For the Respondent: **Ms C Darwin, KC**

JUDGMENT AT A PUBLIC PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. **The Respondent is a separate entity which is distinct from the executive organs of the government of the State of Kuwait and capable of suing or being sued.**

2. **The Respondent has immunity from the jurisdiction of the courts of the United Kingdom under s14(2) of the SIA 1978 because the proceedings relate to the employment of the Claimant by the Respondent which was done in the exercise of sovereign authority and the circumstances are such that the State would have been immune.**

3. **The Claimant's claim is dismissed.**

REASONS

1. This was a Public Preliminary Hearing to determine the following issues:

1. Is the Respondent immune from the jurisdiction of the courts of the United Kingdom as follows:

2. Is the Respondent a "State" or a "separate entity", within the meaning of the State Immunity Act 1978 ("SIA 1978")? Specifically, is the Respondent "distinct from the executive organs of the government of [the State of Kuwait] and capable of suing or being sued" (s.14(1) SIA 1978)?

3. If the Respondent is not a State but a separate entity, does the Respondent have immunity from the jurisdiction of the courts of the United Kingdom under s.14(2) of the SIA 1978?:

a. Do the proceedings relate to anything done by the Respondent in the exercise of sovereign authority (cf. s.14(2)(a) SIA 1978)?

b. If yes, are the circumstances such that a State would have been immune (cf. s.14(2)(b) SIA 19781)? The issues in this regard are as per 4. below.

4. If the Respondent is a State, or for the purposes of s.14(2)(b) SIA 1978:

a. Does the exception to general immunity at s.4(1) SIA 1978 (contracts of employment) apply? As to this:

i. Do the proceedings relate to a contract of employment between the Claimant and the Respondent which was made in the United Kingdom and/or which was in respect of work which was to be wholly or partly performed in the United Kingdom (cf. s.4(1) SIA 1978)?

ii. It is common ground that the Claimant is and was at all material times a national of the State of Kuwait, prima facie disapplying s.4 SIA 1978 (cf. s.4(2)(a)).

iii. Does s.4(3) SIA 1978 apply to prevent s.4(2)(a) SIA 1978 from excluding the application of s.4 SIA 1978? As to this:

(a) Was the Claimant's work "for an office, agency or establishment maintained by [the State of Kuwait] in the United Kingdom for commercial purposes", as defined in s.17(1) SIA 1978 (s.4(3) SIA 1978)?

(b) If yes, was the Claimant habitually resident in Kuwait at the time when his contract of employment was made (cf. s. 4(3) SIA 1978)?

iv. Have the parties agreed in writing that s.4 SIA 1978 does not apply (s.4(2)(c))?

b. If the exception to general immunity at s.4(1) of the SIA 1978 is prima facie applicable, is s.4 SIA 1978 disapplied or inapplicable by reason of s.16(1) SIA 1978? As to this:

i. Do the proceedings relate to a contract of employment between the Respondent and the Claimant, under which the Claimant was employed as a diplomatic agent (cf. s.16(1)(a) SIA 1978)?

ii. Or do the proceedings relate to a contract of employment between the Respondent and the Claimant, under which the Claimant was employed as a member of a diplomatic mission other than a diplomatic agent (cf. s.16(1)(aa) SIA 1978)?

(a) If yes:

a. Did the Respondent enter into the contract in the exercise of sovereign authority (cf. s.16(1)(aa)(i) SIA 1978)?

b. Or, alternatively, did the Respondent engage in the conduct complained of in the exercise of sovereign authority (cf. s.16(1)(aa)(ii) SIA 1978)?

5. Which party bears the burden of proof on each of the issues identified above?

6. For the purposes of Issues 3(a) and 4(b)(ii)(a)(b) above, it is to be assumed that the Respondent engaged in the alleged acts of detriment complained of in the particulars of claim.

2. Regarding those issues, at the start of this hearing, the Respondent said that:

a. The Tribunal should not assume that the Respondent actually engaged in the acts alleged, as stated in issue 6. It said that the proper approach was for the ET to proceed to determine the matter before it based on an examination of what the Claimant is alleging, *Grovit v De Nederlandsche Bank and others* [2006] 1 WLR 3323 at [57-58].
b. The Respondent also said that the Claimant should not be allowed to advance the argument that *s4 State Immunity Act 1978* is not in accordance with customary international law, so that *s4(3) SIA 1978* should be given a different meaning accordingly.

I have addressed both those matters in this judgment.

3. I heard evidence from the Claimant. For the Respondent, I heard evidence from, Ahmad Bastaki, former Executive Director of the Office of the Managing Director, Planning & Senior Management of the Kuwait Investment Authority, Huda Almousa Acting Executive Director of General Reserves of the Kuwait Investment Authority and James MacDonald Stuart, Chief Financial Officer at the Kuwait Investment Office.

4. I read the witness statement of Ghanem Al Ghenaiman, Managing Director of the Kuwait Investment Authority.

5. I read official sealed documents from the Kuwaiti Embassy [HB/134-135/636-637] and [HB/139/650]. I also read an official sealed document from the Kuwaiti

Ambassador dated 24 June 2024 that the KIO is part of Kuwait's Diplomatic Mission [SB1/29/p146], which was exchanged at the same time as witness statements.

6. The KIA had obtained written permission from the Minister of Finance on behalf of the State of Kuwait for Ms Almousa to provide evidence remotely from Kuwait. That permission had not been transmitted through the Taking of Evidence Unit at the FCDO. In *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC), at [19] the Upper Tribunal said that, "Whenever the issue arises in a tribunal about the taking of evidence from outside the United Kingdom, the question of whether it would be lawful to do so is a question of law for that country, whether or not that country is a signatory to the Hague Convention … In all cases, therefore, what the Tribunal needs to know is whether it may take such evidence without damaging the United Kingdom's diplomatic relationship with the other country".

7. I said that I was satisfied, on the basis of an official letter from the Kuwaiti Minister of Finance, confirming that Ms Almousa had permission to give evidence to this Tribunal, that hearing her evidence would not damage the UK's diplomatic relationship with Kuwait

8. Ms Darwin KC for the Respondent told me that Mr Al Ghenaiman, was conducting state business outside Kuwait between 9 and 11 July 2024 and, as such, was unable to provide remote witness evidence. The Respondent invited the Employment Tribunal to read his evidence and give it such weight as the Employment Tribunal saw fit. I did so.

9. The Claimant's witness statement was redacted in a number of parts.

10. Article 8 of the 1982 Law establishing the KIA includes the following [HB/37/p211]: "The members of the Board of Directors, the employees of the Authority or any of those participating in any form in its activities, may not disclose data or information about their work or the position of the invested assets, without a written permission from the Chairman of the Board of Directors, and this prohibition remains in force even after cessation of the relation of the person with the business of the Authority."

11. Article 9 of the 1982 Law provides that breach of Article 8 is punishable by up to three years' imprisonment [HB/37/p212].

12. I accepted that the Claimant was entitled to refuse to provide evidence, including answering questions in cross examination, if he considered that doing so might expose him to criminal prosecution. I would not draw adverse inferences from his failure to provide evidence, if it was done for that reason.

13. There were a number of Bundles of documents, a preliminary hearing bundle and 3 supplementary bundles of documents. Page references in this judgment use abbreviations for the various bundles "HB", "SB". Disclosure had been provided on a voluntary basis only, because the Claimant did not pursue an application for disclosure, in the circumstances that the Respondent was asserting state immunity and that issue had not been resolved. I could not be certain, therefore, that either party had provided full disclosure of all relevant documents. Ultimately, the facts

were not significantly in dispute, and I did not need to consider whether to draw any adverse inferences from any failure to provide full disclosure.

14. The Respondent also provided a bundle of privileged documents. These were privileged documents from the Hard litigation*: Kuwait Investment Office v Hard* [2022] EAT 51, [2022] ICR 1111; *Hard v Kuwait Investment Office* 2202296/2019. The Respondent sought to maintain the confidentiality of that disclosure as against third parties and the outside world, but not as between the Claimant and it. I decided, under r50 ET Rules of Procedure 2013, that it was appropriate to permit the Respondent to maintain the confidentiality of those privileged documents. I ordered that any parts of the proceedings concerning those documents would be held in private. I gave oral reasons for that decision.

15. Both parties provided detailed written and oral submissions. I reserved my decision.

Relevant Facts

16. As I have indicated, the facts were not significantly in dispute.

The KIA and the KIO

17. The Respondent, the KIA, was the first sovereign wealth fund in the world. The KIA originated from the Kuwait Investment Board ("KIB"), which was established in London in 1953, following Kuwait's discovery of oil reserves in 1948. The KIB's mandate was to invest surplus oil revenue in a diverse range of investments, with the long-term goal of reducing Kuwait's reliance on a single finite source of income and to protect itself against the inflationary pressures associated with the trading of oil.

18. The KIB was replaced in 1965 by the Kuwait Investment Office ("KIO").

19. The KIA, originally named the Public Investment Authority, was established by Kuwaiti Law No. 47 of 1982 (the "1982 Law") [HB/37/p209-212], as a body responsible for the management of the assets of the State of Kuwait. The KIA was established to manage the State's reserve funds. The KIA's mission is "To achieve a long-term investment return on the financial reserves entrusted by the State of Kuwait to the Kuwait Investment Authority, providing an alternative to oil reserves " [H/187/p919].

20. The KIA manages assets held within the State of Kuwait's "General Reserves Fund" ("GRF") and "Future Generations Fund" ("FGF").

21. The Future Generations Fund ("FGF") was created in 1976 under Kuwaiti Law No 106/1976, as an alternative reserve of wealth and as an intergenerational saving platform for the State of Kuwait. It comprises investments from outside Kuwait, based on an approved Strategic Asset Allocation. It is not possible to withdraw funds from the FGF in the absence of a law sanctioning such a withdrawal.

22. The General Reserve Fund, or GRF, holds Government assets, liabilities and effectively operates as the Government's treasury account. Revenues generated from the sale of oil are placed directly into an account which lies within the GRF.

23. When funds are required or requested by the Minister of Finance, the KIA takes the proceeds from the sale of oil in the GRF and converts it into Kuwaiti Dinars for use by the Government.

24. The KIA also allocates money for the FGF and other funds.

25. The KIO, where the Claimant worked as CEO, is now the KIA's London office. It does not have any legal personality separate from the KIA. It is a 100% wholly owned portfolio manager, mandated to make a return on behalf of the KIA. It is not, however, involved in the management of assets held within the GRF.

26. As an element of its work managing part of the FGF, the KIO oversees various legal entities whose names include the words "Cale Street" or "Wren House", which are investment vehicles for investing in certain asst classes. These special purpose vehicles are allocated capital from the KIA to invest on its behalf. Whatever profit is generated remains part of the FGF; it cannot be used by the KIA as it does not form part of its operating budget. The KIA and KIO do not receive any independent fees or monies from the FGF or GRF assets.

27. Under Article 1 of Law No. 47 of 1982 [HB/37/p210], the KIA is classified as an independent public authority attached to the Minister of Finance,

> "Article 1
>
> An independent public authority shall be established with juridical status to be named the "Public Investment Authority" and be attached to the Minister of Finance. The seat of the authority shall be in the State of Kuwait and it may set up offices outside the State of Kuwait.
>
> Article 2
> The objective of the Authority is to undertake, in the name and for account of the Government of Kuwait, the management of the State's Reserve Fund, the monies allocated for the Future Generations Fund, as well as such other monies that the Minister of Finance may entrust the Authority with its management."

28. Article 3 of the 1982 Law sets out requirements for how the KIA is managed and structured at Board level, [HB/37/p210]:

> "Article 3
>
> The Authority shall be managed by a Board of Directors which shall be composed of the Minister of Finance, as Chairman, the Minister of Oil, the under-secretary of the Ministry of Finance and the Governor of the Central Bank, as well as five other members from among those Kuwaitis specialized in various fields of investment, to be appointed by an Amiri Decree for a four-year

term, who may be re-appointed, provided that at least three of them do not hold any public office. The Board of Directors is the body responsible for the affairs of the Authority and has all powers necessary for attaching its objectives, in particular, the following:

a... Formulation of the general policy of the Authority and supervision of its implementation, preparation and follow-up of investment programs, and issue of decisions necessary thereto

b. Adoption of financial and administrative regulations necessary for the authority and supervision of its implementation,

c. Undertaking of various transactions of assets investment whether directly or through other establishments

d. Approval of the Authority's draft budget and its annual accounts, before their submission to the competent authorities."

29. The KIA retains more than 500 external fund managers for public markets, managing its investments in equities, bonds and cash and also investments in hedge funds and infrastructure.

30. Management of the FGF is effectively split between the KIA and KIO. Whilst the portion allocated to the KIA is largely delegated to external fund managers, the portion entrusted by the KIA/Board to the KIO is managed directly by the investment professionals employed by the KIO in London. The FGF makes up the vast majority of assets entrusted to the KIO.

31. The KIO (and thus the KIA) also manages investment portfolios on behalf of at least two clients which do not form part of the State of Kuwait, namely the Kuwait Petroleum Corporation ("KPC") and the Kuwait Foundation for the Advancement of Science ("KFAS"). KPC is a state-owned natural resources company which has independent legal personality (see Law No. 6 of 1980, especially Article 1 [SB1/2/pp7-20]) and KFAS is "a private non-profit organization" - the description on KFAS's website [HB/190/p924]. These funds are known as the MOFF and the MOFF2014.

32. Otherwise, the KIO does not have commercial clients or third-party customers.

33. The Kuwaiti Ministry of Finance has confirmed in historic correspondence that, "all the investment assets, held and managed by KIA, either through KIO ever since its inception or through other offices or agents, form an integral part of the sovereign investment assets of the State of Kuwait." [HB/47/p382 and HB/48/383].

34. As Mr Stuart told the Tribunal, "The funds that are being managed by the KIA are State assets, such that its management and efforts to increase State reserves are ultimately for the benefit of the citizens of Kuwait."

35. The KIA has no equity or capital and cannot be sold to a third-party.

36. The Santiago Principles were agreed in 2008 and have been adopted by the International Forum of Sovereign Wealth Funds; they are voluntary principles which aim to encourage accountability, good governance, transparency and prudent investment practices.

37. The KIA has made the following statements in its self-assessments in relation to the Santiago Principles:

> "KIA is an independent public authority managed by its Board of Directors. The Board has complete independence in its decision making process…" (2016 self-assessment, §§6, 8 [HB/65/pp416, 418]).
>
> "KIA is an independent public authority managed by its Board of Directors. The Board has complete independence in its decision making process…" (2019 self-assessment, §§6, 8 [HB/108/pp568, 569]).
>
> "KIA is an independent public authority managed by its Board of Directors. The Board has complete independence in its decision making process…" (2022 self-assessment, §§6, 8 [HB/150/pp686, 687]).

38. The Kuwaiti State Audit Bureau, established in 1964 by Kuwaiti Law 30 of 1964 [HB/32/p161-194] is entitled to inspect the KIA, as a public authority with responsibility for exercising functions of the Government of the State of Kuwait, at any time and on an ad-hoc basis. The State Audit Bureau's powers are derived from legislation to ensure it can "realise effective control over public funds" (Article 2 of Law No. 30/1964 on the Establishment, Aims and Composition of the State Audit Bureau).

39. The State Audit Bureau has full teams of permanent members of staff onsite at the KIA and KIO and any companies that the State owns more than 50% of to monitor and audit its activities and management of public funds.

40. The KIA is mandated by law to submit semi-annual statements to the State Audit Bureau relating to assets under its management. It also submits reports and budgets to the Council of Ministers (i.e. the Kuwaiti Cabinet) and the National Assembly.

41. The remuneration of all of Kuwaiti employees employed by via the KIA to the KIO in London is set by the Civil Service Commission (the "Commission") which derives from the Civil Service Council's power to approve public bodies' salary scales (Article 8 of the 1982 Law (HB/37/p210| Articles 5 and 38 of Decree Law No 15 of 1979 [HB/35/p207 and 36/p208]).

42. Certain employees of the KIA, such as the Managing Director, may have a contract with particular commercial terms, but these terms must be approved by the Commission. The Commission must also approve every job title, every organisational structure and any promotion.

43. The KIO has no balance sheet, no share capital, and its operational costs are funded by the Ministry of Finance in Kuwait. This includes the salaries of all staff. It is

not regulated by the Financial Conduct Authority. It is not obliged to comply with the filing of annual returns at Companies House.

The Claimant, his Employment and his Diplomatic Status

44. Before being employed the KIA, the Claimant worked in various senior roles in the fields of management consultancy, real estate development, banking and asset management. Immediately before joining the KIA, he was a Partner in the Dubai office of McKinsey & Co, a leading management consultancy firm.

45. The Claimant was employed by the KIA under a contract of employment dated 5 April 2018. His employer was stated to be the KIA and he was appointed to the role of 'CEO of the Kuwait Investment Office in London' with effect from 4 May 2018 [HB/79/p487]. His appointment was approved by the KIA's Board of Directors. The Managing Director of the KIA issued a resolution appointing the Claimant to that position on 8 April 2018 [HB/80/p491].

46. Neither the contract, nor the resolution, appointed the Claimant as a diplomatic agent. Both those documents were silent on the subject of his diplomatic status.

47. The Claimant is and was at all material times a citizen of Kuwait. At the time the contract of employment was made in April 2018, he was working in Dubai. On 13 February 2018, McKinsey & Co wrote a letter confirming that the Claimant, was, at that date, "… a full time permanent employee of McKinsey & Company LME, Limited based in Dubai as a Partner." HB p 486.

48. It was not in dispute that the Claimant's job description included the following duties:

> "He is the first and foremost responsible person for the activities and operations of the Office, the progress of its work and the achievement of its objectives.
>
> He serves as chief representative of the KIO in the UK and abroad pursuant to the authorisation assigned to him by the KIA's Managing Director, and within the limits of the activities of the Office.
>
> He pursues his roles and actions in accordance with the regulations and principles stipulated in the law, regulations and the instructions of the Managing Director of the KIA.
>
> He acts as the formal channel of communication between the KIA and the organs of the Office to ensure coordination of the Office activities and policies with related activities and policies in the KIA.
>
> He supervises the setting and implementation of investment policies in accordance with decisions made by the Office, the Executive Committee and the KIA.
>
> He supervises the drawing-up and implementation of the Executive regulations relating to the investment operations, administrative and personnel affairs.

He supervises the preparation and endorsing of the estimated budget of the Office before its submission to the KIA.

He signs on the cheques and transfer payments from the KIA's budget within the adopted chapters and articles subject to the limits of allocated funds for the Office." HB p433.

49. Kuwaiti secondees from the KIA are given diplomatic status.

50. On 9 April 2018, the Managing Director of the KIA wrote to the Kuwaiti Deputy Minister for Foreign Affairs, asking that he arrange for the Claimant to be given a diplomatic passport [HB/82/p493]. His diplomatic passport stated, "Chief Executive Officer of the Kuwait Investment Office in London." HB p804.

51. The Ministry of Foreign Affairs will then have informed the Kuwaiti Embassy in London of the Claimant's appointment as a diplomatic agent; the Kuwaiti Ambassador's 24 June 2024 letter states that, "The Ministry of Foreign Affairs in the State of Kuwait notifies the Kuwaiti Embassy with any newly issued diplomatic passports and additions to its diplomatic mission to ensure proper oversight and coordination" [SB1/29/p145].

52. When the Claimant was dismissed, on 21 July 2022, the Chairman of the KIA issued a resolution terminating with immediate effect the Claimant's contract of employment as "Chief Executive Officer – Kuwait Investment Office – London" [HB/154/p726]. The resolution did not itself terminate the Claimant's appointment as a diplomatic agent.

53. The resolution recital included the words, "The Board of Directors' resolution issued on 19/7/2022, approving termination of the contract of the Chief Executive Officer - Kuwait Investment Office- London for the sake of the public interest and authorising the Board's chairman to take the actions necessary…" HB p726.

54. Four days later, on 25 July 2022, the Chairman of the KIA wrote to the Deputy Minister of Foreign Affairs, asking him to arrange for the Claimant's diplomatic passport to be cancelled [HB/155/p727].

55. It was not in dispute that the Claimant was only appointed as a diplomat because he had been appointed as CEO of the KIA. When he was dismissed, his diplomatic status was therefore revoked.

56. The Claimant was listed on the London Diplomatic List as a financial attaché during his employment by the KIA. A Certificate issued under the Diplomatic Privileges Act 1964, certified that he had been accepted by the UK Government as a member of the diplomatic staff of the Embassy of the State of Kuwait. The certificate described him as, "Mr Saleh Alateeqi m Financial Attache (Head of the Kuwait Investment Office)", HB p722.

57. The Claimant was issued with a Diplomatic ID card by the FCDO. The FCDO "Diplomatic Identity Card Diplomatic Staff" specified that the Claimant's "Designation" was "Head of The Kuwait Investment Office – Financial Attache". HB p802.

58. As CEO of the KIO, the Claimant met Government Ministers such as Robert Jenrick.

59. The KIO, and its senior staff members, including the CEO, have various formal and informal interactions with the Kuwaiti Embassy, foreign Embassies and the FCDO. The Claimant was invited to a US Embassy dinner [HB/146/p671-672]. The Claimant could "stand-in" for the Ambassador of Kuwait for events he was unable to attend [HB/103/p543-545]. The Claimant was also invited by the Kuwait Ambassador to attend other events such as the Book Prize Ceremony [HB/97/p533] and an event celebrating 100 years of friendship between the UK and Kuwait [HB/118/p594-596].

60. The Claimant, as a financial attaché, was exempt from income tax and national insurance contributions in the UK. As President & CEO of the KIO, he was provided with a diplomatic vehicle (car) with diplomatic plates and a chauffeur, with the chauffeur's car also having diplomatic plates.

61. In previous Employment Tribunal proceedings brought against him personally as an employee of the Kuwait Investment Office, as well as against the KIO itself, the Claimant asserted diplomatic immunity to defend the claim against him personally. In evidence at this Public Preliminary hearing, he said that he had done so because he had believed that the KIO was part of the Mission, but that he had learned otherwise by the judgments of the Employment Appeal Tribunal and ET in that case (*Kuwait Investment Office v Hard* [2022] EAT 51, [2022] ICR 1111; *Hard v Kuwait Investment Office* (2202296/2019; 16 December 2022).

62. As part of his duties as CEO, the Claimant line managed 19 other employees who were also serving diplomatic agents, HB p722.

63. In these proceedings, by a claim form dated 19 October 2022, the Claimant brought complaints of ordinary and automatically unfair dismissal, on the grounds of protected disclosures, and protected disclosure detriment, against the Respondent.

64. He alleges that, during the course of his employment, he made a series of protected disclosures of non-compliance by the KIA and others with various legal obligations to which the relevant entities/individuals were subject.

65. The alleged protected disclosures included (broadly):

a. The Claimant giving the KIA's Executive Board Committee information about operational matters and conflict of interest at Wren House;
b. The Claimant telling the Executive Board Committee that the KIA's reporting of investment performance returns was inaccurate;
c. The Claimant telling Mr Bastaki that the KIA was failing to make filings to the US Securities and Exchange Commission;
d. In 2021 the Claimant telling the Executive Board Committee and/or its members that the KIA had made misleading public announcements/presentations of its performance figures;

e. The Claimant raising concerns with Mr Bastaki and Mr Al-Ghenaiman about a Spanish subsidiary's failure to appoint a Chairman and to file compliant financial statements and its resulting breach of Spanish law;
f. In 2019 the Claimant sending KIA senior managers reports and memos about the misuse of public funds by individuals at the KIA and stating that public funds should be recovered and a complaint made to the Public Prosecutor under the Kuwait Public Funds Protection Act;
g. The Claimant reporting to senior managers that a Mr Legbelos had attended a conference contrary to instructions, had held himself out as a representative of the KIO, had disclosed information about the KIA's assets without permission and in breach of Kuwaiti law and had leaked confidential information to the Financial Times;
h. On 19 April 2022 setting out in a memo to Mr Al-Ghenaiman information about the KIO's operating budget; failure to submit a claim to the public prosecutor in Kuwait to safeguard public funds; poor investment performance and regulatory non-compliance by Wren House; (repeated) allegations of breach of confidentiality and misrepresentation by Mr Legbelos and others; allegations that an employee at the Spanish subsidiary was mistreating employees and exposing the KIA to risk;
i. On 30 May 2022 the Claimant submitting a complaint to the Kuwait Public Prosecutor that Mr Legbelos had divulged secrets regarding the economic interests of Kuwait to external parties; conspired with the intention of harming a major Kuwaiti facility; divulged Future Generations Fund secrets; communicated with a foreign country; and /or conspired with a foreign country;
j. On 1 June 2022 the Claimant sending a letter to the Chairman of the KIA and Minister of Finance and a letter to the Managing Director of the KIA that Mr Legbelos had, amongst other things, acted as CEO of another company in violation of his employment contract; that that company had contacts with the Israeli army; that Mr Legbelos had misled financial institutions;

66. The Claimant contends that, as a result of his protected disclosures, the Respondent dismissed him and subjected him to the following detriments:

a. Mr Legbelos making and/or pursuing the complaints in the Letter (and/or the KIA or Mr Al-Ghenaiman encouraging or inducing Mr Legbelos to make or pursue those complaints);
b. Mr Al-Ghenaiman preventing the Claimant from initiating a disciplinary process or disciplinary action relating to Mr Legbelos;
c. Mr Al-Ghenaiman and those involved in the KIA investigation refusing to provide the Claimant with details of the allegations or individuals that were intended to be investigated by the KIA investigation;
d. Refusing to investigate (or permit the KIA investigation to investigate or consider) the allegations of serious misconduct relating to Mr Legbelos;
e. The KIA changing Mr Al-Qadhi's appraisal on about 30 June 2022;

f. Showing Ms Al-Tameemi and Ms Al-Sane the Claimant's highly confidential correspondence with Mr Al-Ghenaiman and/or encouraging them to raise a complaint against the Claimant;
g. Taking the decision to dismiss the Claimant prior to conducting any (or any adequate) investigation (despite having indicated in writing that an investigation would take place);
h. Dismissing the Claimant (this claim is brought under section 47B(1B) only, on the basis that the KIA is liable for the actions of its agents or workers in dismissing the Claimant);
i. Issuing a statement and/or informing the press that the Claimant had been terminated: (i) without notice; and/or (ii) in the "public interest";
j. Mr Legbelos' describing the Claimant on LinkedIn as "the failed and now former and disgraced CEO of [the KIO]" and "intentionally fraudulent" and the Respondent's employees circulating Mr Legbelos' description on WhatsApp;
k. The Respondent's employees supplying information to the press that the Claimant was responsible for a toxic culture at the KIO and heavy losses.

67. The factual background to the Claimant's claims includes that, on 21 June 2022, the Claimant filed a complaint with the Public Prosecutor in Kuwait to bring a claim against Mr Legbelos. In this complaint he alleged that Mr Legbelos had been, "perpetrating acts that harm the national economy and the national security of the State of Kuwait", SB2/8/51 and SB2/9/52.

68. The Claimant accepted in cross-examination that the 14 alleged protected disclosures about Mr Legbelos were made by him as President & CEO of the KIO.

Discussion and Decision

69. Given the complexity of the issues and the law, I have addressed the issues in turn, and the law in relation to each issue. I did, however, take into account all the relevant law and facts when coming to my conclusions.

70. I decided that I would approach my findings on the basis of the factual allegations made by the Claimant. Clearly, I was making no determination that the Respondent did the alleged acts, or, if they did, that the acts were done for an unlawful reason.

2. Is the Respondent a "State" or a "separate entity", within the meaning of the State Immunity Act 1978 ("SIA 1978")? Specifically, is the Respondent "distinct from the executive organs of the government of [the State of Kuwait] and capable of suing or being sued" (s.14(1) SIA 1978)?

Law

71. *Section 14(1) State Immunity Act 1978* provides:

> "(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—
>
> (a) the sovereign or other head of that State in his public capacity;
>
> (b) the government of that State; and
>
> (c) any department of that government,
>
> but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued."

72. In *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27, [2013] 1 All ER 409, the Privy Council considered the meaning of "any entity … distinct from the executive organs of the government of the state and capable of suing or being sued" in the context of whether the defendant, a Congolese mining company known as Gécamines, was an organ of and to be equated with the Democratic Republic of Congo. The company was wholly owned by the Congolese government, board members were appointed and liable to be removed by the national President, and a government department (the Ministry of Mines) had a right of veto over all board or management committee decisions.

73. The Privy Council decided amongst other things:

a. The principles governing state immunity recognised the existence of separate juridical entities established by states, particularly for trading purposes. Such entities enjoyed a special functional immunity if and so far as they did exercise sovereign authority.

b. Separate juridical status was not conclusive on the State organ issue. An entity's constitution, control and functions remained relevant. But constitutional and factual control and the exercise of sovereign functions did not without more convert a separate entity into an organ of the State. Where a separate juridical entity was formed by the State for commercial or industrial purposes, with its own management and budget, the strong presumption was that its separate corporate status should be respected, and that it and the State should not have to bear each other's liabilities. The presumption would be displaced exceptionally if in fact the entity had, despite its juridical personality, no effective separate existence.

74. On my findings of fact, the KIA is an independent public authority with juridical status.

75. The KIA has a Board of Directors, which reports into the Ministry of Finance of Kuwait. The Board is chaired by the Minister of Finance and includes three Government Ministers and the Governor of the Central Bank, as well as five other Kuwaitis specialized in various fields of investment, at least three of whom do not

hold any public office. It is the Board which is in charge of setting and supervising the KIA's investment policies and its overseas offices.

76. The KIA is funded by an allocation of a budget by the state. That allocation forms part of the state budget.

77. There is no suggestion that it is a sham entity.

78. All those factors, including its juridical status, its own management and its own budget, point to the KIA being an "entity … distinct from the executive organs of the government of the state and capable of suing or being sued", applying *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC – "Where a separate juridical entity was formed by the State for commercial or industrial purposes, with its own management and budget, the strong presumption was that its separate corporate status should be respected, and that it and the State should not have to bear each other's liabilities."*

79. However, I must consider the constitution, control and functions of the KIA (reminding myself that constitutional and factual control and the exercise of sovereign functions do not, without more, convert a separate entity into an organ of the State).

80. The KIA is the body responsible for the management of the assets of the State of Kuwait. Its employees are civil servants of the Kuwait government, and their pay scales are set by and subject to the oversight of the Civil Service Commission. The KIA holds no equity or capital and cannot be sold to a third party. The KIO, which is a part of the KIA, does manage some assets of 2 bodies which are not in themselves part of the state of Kuwait. However, it does not have other third party clients.

81. Those facts indicate that the KIA's functions are almost wholly directed to the management of Kuwait's State assets. They also indicate that it is not a commercial company, or an entity which could be bought and sold. The fact that its employees are civil servants indicates that it is, at least, extremely close to the government. Those features, together, indicate at least some degree of interconnectedness with the State and a distinction between the KIA and an arms-length commercial organisation.

82. The KIO undertakes investment of State assets. However, in doing so, it engages in commercial transactions, in equities and real property. Those appear to be in the nature of private transactions, and not governmental acts. The KIA also retains more than 500 external fund managers to manage its investments. That indicates that the investment functions of the KIO and KIA are truly private and not governmental acts. Further, while the KIA handles government funds in the GRF, it then provides those funds to the government, at the government's direction, for the government to spend. It remains separate from the Treasury function of the government and does not make decisions about government spending.

83. As Mr Stuart said, the funds that are being managed by the KIA are State assets, such that its management and efforts to increase State reserves are ultimately for the benefit of the citizens of Kuwait. However, the fact that increasing

State reserves is ultimately for the benefit of the citizens of Kuwait does not mean that the KIA is part of the state. Private actors, such as external fund managers also increase State reserves, ultimately for the benefit of Kuwaiti citizens.

84. In this regard, when assessing whether an act is done in the exercise of sovereign authority, the focus is exclusively on the character of the act itself, rather than the purpose for which it was done: see further below, *I Congreso del Partido* [1983] AC 244 (HL),

85. Kuwaiti government ministers constitute a large and potentially controlling part of the Board. The State Audit Bureau operates on site at both the KIA and the KIO. the KIA submits reports and budgets to the Council of Ministers and the National Assembly. All those factors indicate that the Kuwaiti State engages in very close scrutiny of the KIA and KIO's activities. However, they do not indicate that the KIA is part of the State. Close oversight by a State of State-owned assets and companies, even if they are separate from the State, is to be expected, to ensure that they are being properly managed and safeguarded.

86. In fact, the KIA is not directly controlled by the Kuwaiti government, but by the KIA's own Board. The KIA has described itself as an "independent public authority managed by its Board of Directors." It therefore enjoys operational independence – the Kuwaiti government does not dictate its operational decisions. It is distinct from the executive organs of the government of the State.

87. The Kuwaiti Ambassador's June 2024 letter states that the Embassy considers the KIA to be part of the State of Kuwait [SB1/29/p145]. The Respondent submits that those official documents ought to be given substantial weight, particularly where they come from the Ambassador.

88. The Respondent notes that *s13(5) SIA 1978* provides that in the context of whether property is used for commercial purposes, official embassy documents must be accepted as proof of certain facts unless the contrary is proved. The Respondent also relies on *Krajina v Tass Agency* [1949] 2 All ER 274, where Tucker LJ held at [281] that it was: "common ground that the certificate of their ambassador in this country is not conclusive of the matter, though, no doubt, it is evidence of very high evidential value, and, in a matter of this kind, I think it is probably the best kind of evidence that can be procured."

89. However*, s13(5) SIA 1978* is specifically directed to proceedings for enforcement of a judgment or award, where the proceedings have been issued in respect of property alleged used for commercial purposes. It is not relevant any determination under *s14 SIA.*

90. I accept that the certificate of the Kuwaiti ambassador is of high evidential value. However, I also consider that, nevertheless, it is a matter of law as to whether the KIA is a separate entity within the meaning of *s14(1) SIA.*

91. Applying the law to the facts, I consider that the strong presumption in favour of the KIA being a separate entity is not rebutted, even taking into account the Ambassador's certificate. On the facts, the KIA fulfills all 3 of the elements of the

s14(1) separate entity test. It is a separate entity and is capable of suing and being sued, in that it has juridical status. Further, the facts of its constitution, control and functions, as I have set out and analysed above, show that it is truly distinct from the executive organs of the government of the State.

92. While the Respondent contended that I should be cautious about applying the test in light of the Court of Session decision in *Morrison v Middlesea Insurance Plc*, 2022 SLT 412, I agreed with the Claimant that that case considered the application of *s14(2) SIA* and the question of "separate entity" under *s14(1) SIA* did not arise. I did not find it relevant or persuasive.

93. The Respondent also contended that *Propend Finance Pty Ltd & Ors v Sing & Anrat* (1997) Times, 2 May, per LJ Leggatt, indicated that the word 'government' in *s14(1)SIA* must be given a broad reading, in order to correspond with the requirement of comity and with a body of law from many countries on the scope of sovereign immunity as a concept which covers acta jure imperii. He said that the word "government" should be construed in the light of the concept of sovereign authority.

94. However, that case concerned a Police Commissioner and not a separate juridical entity established by a States for commercial purposes. *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* was a more directly relevant authority. In any event, even giving 'government' a broad reading in s14(1), the Respondent was still a separate entity, and was distinct from the executive organs of the government of the State. As I have indicated, it does not participate in decision making on government spending, but provides funds to the government from the GRF when the government directs it to do so. Its investment activities are private, rather than governmental acts.

95. *3. If the Respondent is not a State but a separate entity, does the Respondent have immunity from the jurisdiction of the courts of the United Kingdom under s.14(2) of the SIA 1978?:*

a. Do the proceedings relate to anything done by the Respondent in the exercise of sovereign authority (cf. s.14(2)(a) SIA 1978)?

b. If yes, are the circumstances such that a State would have been immune (cf. s.14(2)(b) SIA 1978)? The issues in this regard are as per 4. below.

96. The Respondent relies on a number of arguments in contending that the proceedings relate to things done by it in the exercise of sovereign authority. Put briefly, these are:

a. The Claimant's employment was itself an exercise of sovereign authority because he was employed by the KIA as a diplomatic agent within the meaning of the Vienna Convention; he was a diplomatic agent as President and CEO of the KIO and/or as a member of the diplomatic staff of the Kuwaiti mission;
b. The proceedings arise out of inherently governmental acts because:

i. The Claimant's alleged disclosures concerned the way the KIO was being run, the Future Generations Fund, and the investment of the assets managed by the KIO and these are all inherently governmental activities; the generation of returns on assets to benefit the State of Kuwait, to achieve long term growth, and to protect public funds, are exercises of sovereign function on behalf the State of Kuwait;
ii. In particular, one of the alleged protected disclosures is his complaint to the Public Prosecutor alleged that Mr Legbelos was perpetrating acts that harmed the national economy and the national security of the State of Kuwait
iii. The resolution terminating C's employment makes clear was a decision of the Minister of Finance made in the "public interest", HB p726

Law

97. *s14(2) SIA 1978* provides:

> "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…would have been so immune."

98. A "separate entity" is only immune from jurisdiction if the requirements of both *s14(2)(a)* and *s14(2)(b)* are satisfied. The burden of showing that the requirements are satisfied lies on the "separate entity": *Kuwait Airways Corporation v Iraqi Airways Co* [1995] 1 WLR 1147 (HL), 1161D-E; *Dynasty Co for Oil and Gas Trading Ltd v Kurdistan Regional Government of Iraq* [2021] EWHC 952 (Comm), [2022] QB 246, §55.

99. Regarding what constitutes an act done in the exercise of sovereign authority, Lord Wilberforce in *I Congreso del Partido* [1983] AC 244 (HL), identified the basis for the recognition of state immunity as follows:

> "The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of "par in parem" which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate."

100. On that basis, Lord Wilberforce endorsed the "restrictive" theory of state immunity, under which a state is not immune in respect of all its acts, but only in respect of acts done in the exercise of sovereign authority. At p262E-G, he said:

> "When therefore a claim is brought against a state…and state immunity is claimed, it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act "jure gestionis" or is

> it an act "jure imperii": is it (to adopt the translation of these catchwords used in [a letter written by an official in the US State Department in 1952]) a "private act" or is it a "sovereign or public act," a private act meaning in this context an act of a private law character such as a private citizen might have entered into?"

101. At p267A-B, he accepted the proposition that "the existence of a governmental purpose or motive will not convert what would otherwise be an act jure gestionis, or an act of private law, into one done jure imperii". At p262A he said, "… if the act in question is of a commercial nature, the fact that it was done for governmental or political reasons does not attract sovereign immunity".

102. At 269B-C, he endorsed the following formulation of the "ultimate test" for identifying a "sovereign act": "…it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform."

103. In *Kuwait Airways Corporation v Iraqi Airways Co* [1995] 1 WLR 1147 (HL), Lord Goff (with whom Lords Jauncey and Nicholls agreed) said that the words "in the exercise of sovereign authority" in SIA 1978 should be construed in accordance with the principles articulated by Lord Wilberforce in I Congreso del Partido: 1159H-1160A. The question of whether an act involves the exercise of "sovereign authority" is therefore to be answered by considering whether or not the act was one which a private actor could do. On that basis, the seizure of civilian aircraft as spoils of war was an act done in the exercise of sovereign authority, since this was not something which a private citizen could properly do; by contrast, once a legislative resolution had declared the aircraft to be the defendant's property, the defendant's use of the aircraft for commercial flights did not involve any exercise of sovereign authority (see 1163A-D).

104. The application of the concept of "sovereign authority" in the context of contracts of employment was considered by Lord Sumption (with whom the other Justices agreed) in *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777.

105. Lord Sumption said, at [53]-[54]:

> "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 aspects 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 law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as

> having been done outside that area, and within the sphere of governmental or sovereign activity.
>
> 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."

106. At [55]- [57], Lord Sumption discussed the employment of staff by diplomatic missions.

107. At [55] Lord Sumption distinguished between three categories of embassy staff: diplomatic agents; technical and administrative staff; and domestic staff: "The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, ie the head of mission and the diplomatic staff; (ii) administrative and technical staff; and (iii) staff in the domestic service of the mission. Diplomatic agents participate in the functions of a diplomatic mission defined in article 3, principally representing the sending state, protecting the interests of the sending state and its nationals, negotiating with the government of the receiving state, ascertaining and reporting on developments in the receiving state and promoting friendly relations with the receiving state. These functions are inherently governmental. They are exercises of sovereign authority. Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority. The role of technical and administrative staff is by comparison essentially ancillary and supportive. … ".

108. At [57] - [58] Benkharbouche, Lord Sumption cautioned against the suggestion that, because the employment of an employee is of a private law character, state immunity does not attach to any act of the state in relation to that employment. He gave examples of where state immunity could attach to particular acts of a state in relation to an employee.

109. He said,

> "[57] I would, however, wish to guard against the suggestion that the character of the employment is always and necessarily decisive. Two points should be made…
>
> [58] The first is that a state's immunity under the restrictive doctrine may extend to some aspects of its treatment of its employees or potential employees which engage the state's sovereign interests, even if the contract of employment itself was not entered into in the exercise of sovereign authority. Examples include claims arising out of an employee's dismissal for reasons of state security. They may also include claims arising out of a state's recruitment policy for civil servants or diplomatic or military employees, or claims for specific reinstatement after a dismissal, which in the nature of things impinge on the state's recruitment policy. These particular examples are all reflected in the United Nations Convention and were extensively discussed in the preparatory sessions of the Inter-national Law Commission. They are certainly not exhaustive. United States v Public Service Alliance of Canada, Re Canada

> Labour Code [1993] 2 LRC 78, [1992] 2 SCR 50 concerned the employment of civilian tradesmen at a US military base in Canada. The Supreme Court of Canada held that while a contract of employment for work not involving participation in the sovereign functions of the state was in principle a contract of a private law nature, particular aspects of the employment relationship might be immune as arising from inherently governmental considerations, for example the introduction of a no-strike clause deemed to be essential to the military efficiency of the base. In these cases, it can be difficult to distinguish between the purpose and the legal character of the relevant acts of the foreign state. But as La Forest J pointed out ([1993] 2 LRC 78 at 89, [1992] 2 SCR 50 at 70), in this context the state's purpose in doing the act may be relevant, not in itself, but as an indication of the act's juridical character."

a. Do the proceedings relate to anything done by the Respondent in the exercise of sovereign authority (cf. s.14(2)(a) SIA 1978)? : <u>The nature of the Claimant's Employment</u>

110. The Respondent contends that the Claimant was employed as a diplomatic agent and, as such, his employment was an inherently governmental act. The Claimant acknowledges that he was appointed by the Kuwaiti government as a diplomat because of his employment by the KIA, but contends that he was not, in fact, employed as a diplomat by the KIA. He contends that his employment functions were those of a CEO and that his employment was of a private law character. He points out that he was not employed by an Embassy, but by the KIA.

111. On the facts, I agreed that the Claimant was not employed by the KIA as a diplomatic agent, but as CEO. Nevertheless, his appointment as a diplomat was because of his employment as CEO. He was not employed as a diplomat for other purposes. There was no separate letter of appointment to his role as an attaché. He has not suggested, in evidence, that he performed any diplomatic functions separately from his employment as CEO of the KIA.

112. The UK Diplomatic Privileges Act 1964 Certificate describes the Claimant as "Mr Saleh Alateeqi m Financial Attache (Head of the Kuwait Investment Office)" p722.

113. In essence, the Claimant's diplomatic role and his role as President & CEO of the KIO were one and the same.

114. It was the KIA and the KIO who asked the Ministry of Foreign Affairs to arrange for his diplomatic passport.

115. His diplomatic passport and FCDO Identity card both indicated that they were issued to him in his capacity as President & CEO of the KIO, p802, p804. The FCDO identity card stated, "Designation Head of The Kuwait Investment Office – Financial Attache." HB p802.

116. The Preamble to the Vienna Convention on Diplomatic Relations 1961 states, "Realizing that the purpose of such privileges and immunities is not to benefit

individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States…".

117. The Claimant had no other functions other that his role as CEO of the KIO. The diplomatic immunities and privileges given to him were to ensure his functions as CEO of the KIO.

118. Given that the Kuwaiti government appointed the Claimant as a diplomat because he was CEO of the KIO and that the UK Government recognised him as a diplomat also because he was CEO of the KIO, I considered that he was recognised, as between the UK and Kuwait as a diplomat in relation to his employment as CEO by the KIO. As between the UK and Kuwait, therefore, his status as a diplomat, as CEO of the KIO, is properly characterised as a sovereign or governmental act of Kuwait, which is not a matter upon which the UK courts will adjudicate, applying Lord Wilberforce's statement of the principle of state immunity in *I Congreso del Partido* [1983] AC 244 (HL).

119. For the purposes of *s14(2)(a) SIA 1978* the separate entity (as opposed to some other person or entity) must have done the act "in the exercise of sovereign authority". There could be a distinction between the Claimant's employment "done by the Respondent" and Kuwait's exercise of sovereign authority in his appointment as a diplomat. However, I consider that his position as CEO and his status as a diplomat were functionally indistinguishable. While there were small differences of timing in his appointment as CEO and as a diplomat, those roles were effectively coextensive.

120. In reality, when the KIO appointed the Claimant as CEO, it did so to a position to which diplomatic status attached, as recognised by both Kuwaiti and the UK governments.

121. Appointing someone to a role to which diplomatic status attaches is a sovereign act, which a private actor could not do, in accordance with *I Congreso del Partido* [1983] AC 244 (HL).

122. The Claimant's employment as CEO, to which diplomatic status attached, was therefore done by the Respondent in the exercise of sovereign authority. The proceedings directly relate to that employment and the test in *s14(2)(a) SIA* is satisfied.

123. As a result, the Respondent is immune from the proceedings the Claimant brings against it, if the State would have been so immune.

a. Do the proceedings relate to anything done by the Respondent in the exercise of sovereign authority (cf. s.14(2)(a) SIA 1978)? : <u>The nature of the claim itself</u>

124. Given my findings with regard to the Claimant's employment, it is not strictly necessary for me to address this issue. Nevertheless, for completeness, I will do so.

125. The Claimant accepted in cross-examination that his 14 alleged protected disclosures about Mr Legbelos were made by him as President & CEO of the KIO.

126. However, setting aside the Claimant's status as a diplomat, I was not persuaded that any of the protected disclosures, or the alleged detriments, were things which a private actor could not do, in accordance with *I Congreso del Partido* [1983] AC 244 (HL). In fact, they could have been done by any private employee. It is notable that, even when the Claimant made a complaint to the Public Prosecutor, it was for the Prosecutor to decide whether to institute proceedings. The Claimant was not exercising any governmental authority regarding prosecution when he made that alleged protected disclosure.

127. I agreed with the Respondent that the proceedings would also require examination of the cause, or motive for the detriments. However, I did not consider that the decision making in the detriments involved an exercise of sovereign authority. Again, the claim and issues arising appeared similar to any protected disclosure detriment claim made by a private employee against a financial institution, Even though the resolution dismissing the Claimant was signed by the Kuwaiti Minister of Finance, it was signed in his capacity as Chairman of the KIA Board, not in his capacity as Minister of Finance.

128. I also decided that, even if the proceedings more broadly "relate to" the KIA's management of assets on behalf of the State of Kuwait, such management would not be something done by the KIA "in the exercise of sovereign authority".

129. The management of assets on behalf of clients – including clients which happen to be States – is an activity which private actors, such as investment banks, can and do undertake.

130. The fact that the KIA's purpose in managing assets entrusted to it by the State of Kuwait is to benefit that State is not relevant. When assessing whether an act is done in the exercise of sovereign authority, the focus is on the character of the act itself, and not the purpose for which the act was done: *I Congreso del Partido*

131. The Respondent relied on judgment of Aikens J in *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 WLR in contending that the management of State assets involved the exercise of sovereign authority. I agreed with the Claimant that the judgment in *AIG Capital Partners* was not relevant to the proper characterisation of the Respondent's activities in the context of *s14(2) SIA.* This was for the following reasons:

a. *AIG Capital Partners* related to an application to enforce an arbitral award which had been granted against the State of Kazakhstan. The claimants sought to enforce the award against cash and securities which were held in two accounts at a London bank, in the name of central bank of Kazakhstan. Those assets were managed by the central bank as part of a fund for the benefit of Kazakhstan.

b. The case was decided on the basis that the assets were the "property" of the central bank, and thus immune from the enforcement jurisdiction of the English courts by virtue of the specific provision in *s14(4) SIA 1978* , read with *s13(4),* [89]-[90] of that judgment. That is

unrelated to the issue in the present case, which is not to do with enforcement jurisdiction or special provisions about central banks.

c. Aikens J then said, obiter, that even if the assets were not the property of the central bank, they were not property which was "for the time being in use or intended for use for commercial purposes", and so were immune from enforcement under *s13(4) SIA 1978*, see [92] of the judgment.

d. However, the test in *s.13(4) SIA 1978* is concerned with the "purposes" for which an asset is used, or intended for use. This is a diametrically different test to the test in *s14(2)(a),* which is concerned with the legal character of an act, and not the purpose for which it is done.

b. If yes, are the circumstances such that a State would have been immune (cf. s.14(2)(b) SIA 19781)? The issues in this regard are as per 4. below.

4. If the Respondent is a State, or for the purposes of s.14(2)(b) SIA 1978:

a. Does the exception to general immunity at s.4(1) SIA 1978 (contracts of employment) apply? As to this:

i. Do the proceedings relate to a contract of employment between the Claimant and the Respondent which was made in the United Kingdom and/or which was in respect of work which was to be wholly or partly performed in the United Kingdom (cf. s.4(1) SIA 1978)?

ii. It is common ground that the Claimant is and was at all material times a national of the State of Kuwait, prima facie disapplying s.4 SIA 1978 (cf. s.4(2)(a)).

iii. Does s.4(3) SIA 1978 apply to prevent s.4(2)(a) SIA 1978 from excluding the application of s.4 SIA 1978? As to this:

(a) Was the Claimant's work "for an office, agency or establishment maintained by [the State of Kuwait] in the United Kingdom for commercial purposes", as defined in s.17(1) SIA 1978 (s.4(3) SIA 1978)?

(b) If yes, was the Claimant habitually resident in Kuwait at the time when his contract of employment was made (cf. s. 4(3) SIA 1978)?

iv. Have the parties agreed in writing that s.4 SIA 1978 does not apply (s.4(2)(c))?

b. If the exception to general immunity at s.4(1) of the SIA 1978 is prima facie applicable, is s.4 SIA 1978 disapplied or inapplicable by reason of s.16(1) SIA 1978? As to this:

i. Do the proceedings relate to a contract of employment between the Respondent and the Claimant, under which the Claimant was employed as a diplomatic agent (cf. s.16(1)(a) SIA 1978)?

ii. Or do the proceedings relate to a contract of employment between the Respondent and the Claimant, under which the Claimant was employed as a member of a diplomatic mission other than a diplomatic agent (cf. s.16(1)(aa) SIA 1978)?

(a) If yes:

a. Did the Respondent enter into the contract in the exercise of sovereign authority (cf. s.16(1)(aa)(i) SIA 1978)?

b. Or, alternatively, did the Respondent engage in the conduct complained of in the exercise of sovereign authority (cf. s.16(1)(aa)(ii) SIA 1978)?

132. The question of whether "the circumstances are such that a State…would have been so immune" under *s14(2)(b) SIA 1978* requires consideration of *ss4 & 16 SIA 1978.*

The Interpretation of S4 SIA 1978

133. *S4 SIA 1978* provides, insofar as relevant:

> "(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.
>
> (2) Subject to subsection (3) below, this section does not apply if – (a) at the time when the proceedings are brought the individual is a national of the State concerned…
>
> (3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection 2(a)…above do[es] not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State."

134. *S17(1) SIA 1978* provides: "In this Part of this Act "commercial purposes" means purposes of such transactions or activities as are mentioned in section 3(3) above".

135. *S3(3) SIA 1978* provides: "In this section "commercial transaction" means— (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual."

136. The correct interpretation of "Maintained …. for commercial purposes" was in dispute between the parties.

137. The Respondent says that *s4(3) SIA 1978* is worded similarly to *s10(4)(a) & (b) SIA 1978* ("both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes") and s13(4) SIA 1967 ("property which is for the time being in use or intended for use for commercial purposes"). In those sections, the question is whether property is in use or intended for use for 'commercial purposes.'

138. In *Argentum Exploration Ltd v Republic of South Africa [2024] UKSC 16*, per Lords Lloyd-Jones and Hamblen at [71], the Supreme Court held that the words in both sections were intended to bear the same meaning and that that decided cases on *s13(4)* may cast light on the meaning of the same words in *s10(4)(a).* The same must also be true for s4(3) of the 1978 Act.

139. In *Alcom v Republic of Colombia* [1984] A.C. 580 HL, the House of Lords held at p604 D – E that for *s13(4) SIA 1978* to apply to the bank account of a Mission, it would have to be shown that "the bank account was earmarked by the foreign state solely (save for de minimis exceptions) for being drawn upon to settle liabilities incurred in commercial transactions, as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot, in my view, be sensibly brought within the crucial words of the exception for which section 13(4) provides." [Emphasis added].

140. In *Ser Vaas Incorporated v Rafidian Bank and others* [2013] 1 A.C. 595 SC the Supreme Court held that the expression "in use . . . for commercial purposes" in s13(4) SIA 1978 should be given its ordinary and natural meaning, having regard to its context; that, therefore, whether property was in use for commercial purposes, so as to fall within the statutory exception to state immunity from execution of a judgment, depended not on the property's origin but on the use to which the state had chosen to put it. In *Ser Vaas* Lord Clarke quoted that passage from *Alcom* and said, at [19], "the judgment creditor must show that the bank account was earmarked by the state solely for being drawn down upon to settle liabilities incurred in commercial transactions." He said, "The essential distinction is between the origin of the funds on the one hand and the use of them on the other."

141. The Claimant has conceded that *s4(2)(a)* and *s4(3) SIA 1978* include provisions which – at least if read literally – may cause immunity to apply, on account of an employee's nationality and/or place of habitual residence. He argued, however, that *ss4(2)(a) & 4(3) SIA* should, so far as possible, be given an interpretation which is consistent with the Claimant's rights under Art 6 ECHR.

142. In *Benkharbouche,* the Supreme Court decided that ss *4(2)(b) and 16(1)(a) SIA* (as then drafted) were not justified by any binding principle of international law. As a result, so far as ss *4(2)(b) and 16(1)(a) SIA* (as then drafted) conferred immunity on the State in respect of employment law claims, they were incompatible with art 6 of the Human Rights Convention.

143. The Supreme Court held that Article 6 ECHR confers on individuals a right to a fair hearing of their civil claims. This provision "implicitly confers a right of access to a court to determine a dispute and not just a right to have it tried fairly" ([14]). Any measures which interfere with the right of access to a court will be compatible with Article 6 only if they "pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right" ([14]).

144. Regarding Article 6, "[w]hat justifies the denial of access to a court is the international law obligation of the forum state to give effect to a justified assertion of immunity" ([34]). Conversely, a conferral of immunity will be incompatible with Article 6 to the extent that it represents "a discretionary choice on the part of the forum state" ([34]).

145. Lord Sumption said at [34], "[I]f the legitimate purpose said to justify denying access to a court is compliance with international law, anything that goes further in that direction than international law requires is necessarily disproportionate…".

146. *Benkharbouche* did not concern *ss4(2)(a) or 4(3). Ss4(2)(a)* and *4(3)* similarly restrict the Claimant's right to a fair trial of his employment law complaints. In order for them not to be incompatible with art 6, they must be consistent with a rule of customary international law.

147. In *Benkharbouche*, at [31] Lord Sumption said that there was a need for "substantial uniformity" of international practice, to give rise to a rule of customary international law.

148. At [66] he said, however, that there was no substantial uniformity, even in respect of the territorial responsibilities of the sending and the host state, ".The considerable body of comparative law material before us suggests that unless constrained by a statutory rule the general practice of states is to apply the classic distinction between acts jure imperii and jure gestionis, irrespective of the nationality or residence of the claimant."

149. In *The Kingdom of Spain v Lorenzo* [2023] EAT 153, the EAT confirmed at [45]-[48] that *s4(2)(a) SIA 1978* does not reflect any rule of customary international law.

150. The Claimant therefore contends that, if the KIA were accorded immunity on the basis of the Claimant's nationality and/or place of habitual residence, this would go beyond the requirements of any international law obligation to which the UK is subject; and therefore violate *Article 6 ECHR,* similarly to the ruling in *Benkharbouche* concerning the provisions of *ss4(2)(b) and s16(1)(a)* as then drafted.

151. By virtue of *s3(1) HRA 1998*, the Tribunal must read and give effect to *s4 SIA 1978* in a way that avoids such a result, "so far as it is possible to do so".

152. The Claimant accepts that, realistically, it is not possible to 'read down' *s4(2)(a) SIA 1978* in such a way as to avoid the result that his Kuwaiti nationality renders *s4* inapplicable, subject to *s4(3).*

153. He argues, however, that the Tribunal must, "so far as it is possible to do so", interpret *s4(3)* in such a way as to minimise the circumstances in which *s4(2)(a)* will give rise to a violation of Article 6. He contends that:

a. An expansive interpretation should be given to the phrase "office, agency or establishment maintained by the State in the United Kingdom for commercial purposes". In particular, he contended that an office, agency or establishment should be treated as being maintained "for commercial purposes" if any part of its work is for the purposes of such transactions or activities as are mentioned in *s3(3),* even if the office, agency or establishment also serves other purposes.

b. The words "habitually resident" should be construed in such a way that any person who spends significant periods of time in one state will not be considered to be "habitually resident" in another state.

c. It is readily possible to read *s4(3)* in this way, given that "for commercial purposes" and "habitually resident" are relatively loose expressions, and construing them as set out above does not go against the "underlying thrust" of *SIA 1978*.

154. While the Respondent contended that it was not open to the Claimant to argue for this interpretation of *s4 SIA* because it had not been raised in the List of Issues, I considered that it was appropriate for me to construe *s4 SIA* consistently with the relevant law of the UK and that included *s3 Human Rights Act 1998.*

Application of s4(2)(a) & (3) SIA to the Claimant

155. The Claimant is and has been, at all material times, a national of Kuwait. The 'exception to the exception' in *s4(2)(a),* therefore, prima facie applies to exclude him from bringing a claim.

156. Regarding *s4(3),* the Claimant's work was for the KIO in London.

157. I have found that it was not part of the State, but a separate entity.

158. I agree that, by virtue of *s3(1) HRA 1998*, the Tribunal must read and give effect to *s4 SIA 1978* in a way that avoids breaching the Claimant's Art 6 rights, "so far as it is possible to do so".

159. I refer to my factual findings in relation to the KIO as a separate entity. The KIO engages in the investment of State assets. In doing so, it engages in commercial investments or transactions, in equities and real property. Those are in the nature of private transactions, and not governmental acts. The KIA also retains more than 500 external fund managers to manage its investments.

160. I agree with the Claimant that it is possible to read *s4(3)* as applying to an entity maintained "for commercial purposes" if any part of its work is for the purposes of such transactions or activities as are mentioned in *s3(3),* even if the office, agency or

establishment also serves other purposes. That interpretation is not inconsistent with the plain wording of the Act.

161. Further, I note that in *Ser Vaas Incorporated v Rafidian Bank and others* [2013] 1 A.C. 595 SC the Supreme Court held that the expression "in use . . . for commercial purposes" in *s13(4) SIA 1978* should be given its ordinary and natural meaning, having regard to its context; that, therefore, whether property was in use for commercial purposes, so as to fall within the statutory exception to state immunity, depended not on the property's origin but on the use to which the state had chosen to put it.

162. On my findings of fact, the work of the KIO was investment and growth of the FGF. The KIO did not manage the GRF.

163. Applying *Ser Vaas*, whether the KIO is maintained for commercial purposes involves looking at the use to which the state had chosen to put it, giving its ordinary and natural meaning. In this case, the KIO's purpose is to engage in the investment and growth of state assets. The investment and growth of assets is a commercial purpose. I do not consider that the stricter interpretation of the words, applicable to money held in bank accounts, that the office should be "solely (save for de minimis exceptions)" for commercial purposes, is consistent with *Art 6* . If *s4(3) SIA* were given such an interpretation, it would considerably narrow its scope, and so exclude employment claims of a much wider group of employees, even where they were not resident in the sending state.

164. I conclude that the KIO is "an office, agency or establishment maintained…in the United Kingdom for commercial purposes". The KIO was and is an office maintained in the UK, for the purposes, or at least in part for the purposes, of managing assets and engaging in transactions otherwise than in the exercise of sovereign authority, applying the definition of "commercial transaction" in *s3(3) SIA 1978.*

165. Furthermore, on my findings of fact, at the time his employment contract was made in April 2018, the Claimant was based in, and working in, Dubai, p486. I concluded that, at that time, he was not habitually resident in Kuwait.

166. Given that he was not habitually resident in Kuwait at the relevant time and that his work was for an office maintained in the UK for commercial purposes, 'the exception to the exception to the exception' in *s4(3) SIA* applies. Accordingly, the KIA would not be entitled to immunity in respect of the Claimant's employment claims, subject to *s16 SIA 1978*.

Section 16 SIA 1978

167. *S16 SIA 1978* provides, insofar as relevant:

> "(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and—

(a) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a diplomatic agent…;

(aa) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a member of a diplomatic mission (other than a diplomatic agent)… and either—

(i) the State entered into the contract in the exercise of sovereign authority; or

(ii) the State engaged in the conduct complained of in the exercise of sovereign authority; …

(1A) In subsection (1)— …

"diplomatic agent" is to be construed in accordance with Article 1(e) of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961; …

"member of a diplomatic mission" is to be construed in accordance with Article 1(b) of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961."

168. Section *16(1A) SIA 1978* refers to Articles 1(b) and 1(e) of the VCDR, and those Articles use expressions which are defined in other sub-paragraphs of Article 1 VCDR. Article 1(a)-(g) provides:

"For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) The "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) The "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) The "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) The "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;

(e) A "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;

(f) The "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;

(g) The "members of the service staff" are the members of the staff of the mission in the domestic service of the mission…"

169. *Section 16(1)(a)-(aa)* provides that *s4* does not apply to proceedings relating to a contract of employment between a State and an individual where the individual was employed as a diplomatic agent or (in certain circumstances) another member of a diplomatic mission "under the contract", i.e. under the contract to which the proceedings relate.

Application of s16 SIA to the Claimant

170. I have decided, above, that the Claimant's his position as CEO of the KIO and his status as a diplomat were functionally indistinguishable. In reality, when the KIO appointed the Claimant as CEO, it did so to a position to which diplomatic status attached, as recognised by both Kuwaiti and the UK governments. His appointment to the role, to which diplomatic status attached, was a sovereign act, which a private actor could not do, in accordance with *I Congreso del Partido* [1983] AC 244 (HL).

171. As I have decided above, his status as a diplomat, as CEO of the KIO, as a sovereign or governmental act of Kuwait, is not a matter upon which the UK courts will adjudicate, applying Lord Wilberforce's statement of the principle of state immunity in *I Congreso del Partido* [1983] AC 244 (HL).

172. In the premises, *ss16(1)(a) and 16(1)(aa) SIA* would operate to exclude the application of *s4* to the Claimant, had he been employed by the State. The circumstances are also such that a State would have been immune.

173. Accordingly, the requirements of *s14(2)(b) SIA 1978* are satisfied, and the KIA is entitled to immunity in the Claimant's claims against it.

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Employment Judge Brown

Dated: …16 July 2024……..

SENT TO THE PARTIES ON

19 July 2024
…….....

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For the Tribunal Office