Michaelmas Term
[2017] UKSC 61
On appeal from: [2015] EWCA Civ 32

JUDGMENT

Reyes (Appellant/Cross-Respondent) *v* Al-Malki and another (Respondents/Cross-Appellants)

before

Lord Neuberger
Lady Hale
Lord Clarke
Lord Wilson
Lord Sumption

JUDGMENT GIVEN ON

18 October 2017

Heard on 15, 16 and 17 May 2017

Appellant/Cross-Respondent
Timothy Otty QC
Paul Luckhurst
(Instructed by ATLEU)

Respondents/Cross-Appellants

Sir Daniel Bethlehem KCMG QC
Sudhanshu Swaroop QC
(Instructed by Reynolds Porter Chamberlain LLP)

Intervener (Kalayaan)
(Written submissions only)
Richard Hermer QC
Tom Hickman
Flora Robertson
Philippa Webb
(Instructed by Deighton Pierce Glynn)

Intervener (Secretary of State for Foreign and Commonwealth Affairs)
(Written submissions only)
Ben Jaffey QC
Jessica Wells
(Instructed by The Government Legal Department)

LORD SUMPTION: (with whom Lord Neuberger agrees)

Introduction

1. Ms Reyes, a Philippine national, was employed by Mr and Mrs Al-Malki as a domestic servant in their residence in London between 19 January and 14 March 2011. Her duties were to clean, to help in the kitchen at mealtimes and to look after the children. At the time, Mr Al-Malki was a member of the diplomatic staff of the embassy of Saudi Arabia in London. Ms Reyes alleges that she entered the United Kingdom on a Tier 5 visa which she obtained at the British embassy in Manila by producing documents supplied by Mr Al-Malki, including a contract showing that she would be paid £500 per month. She alleges that during her employment the Al-Malkis maltreated her by requiring her to work excessive hours, failing to give her proper accommodation, confiscating her passport and preventing her from leaving the house or communicating with others; and that they paid her nothing until after her employment terminated upon her escape on 14 March. The proceedings have been conducted to date on the assumption, which has been neither proved nor challenged, that these allegations are true. I shall also make that assumption. In addition, I shall assume that these allegations amount to trafficking in persons within the meaning of the International Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children (Palermo, 2000), although that is very much in dispute.

2. In June 2011, Ms Reyes began the present proceedings in the Employment Tribunal alleging direct and indirect race discrimination, unlawful deduction from wages and failure to pay her the national minimum wage. The Court of Appeal has held that the Employment Tribunal has no jurisdiction because Mr Al-Malki was entitled to diplomatic immunity under article 31 of the Vienna Convention on Diplomatic Relations, and Mrs Al-Malki was entitled to a derivative immunity under article 37(1) as a member of his family.

3. The main issues on the appeal concern the effect of article 31(1)(c) of the Convention, which contains an exception to the immunity of a diplomat from civil jurisdiction where the proceedings relate to "any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions." This raises, among other issues, the question how, if at all, that exception applies to a case of human trafficking. Since there is some evidence that human trafficking under cover of diplomatic status is a recurrent problem, this is a question of some general importance. Its broader significance explains the intervention, by leave of this court, of the Secretary of State for Foreign and Commonwealth Affairs

and of Kalayaan, a charity that supports migrant domestic workers, some of whom have been trafficked. For the same reason, I shall deal fully with the issues that were argued in the Court of Appeal and before us, although not all of them arise on the conclusions that I have reached.

4. In my opinion, the employment of a domestic servant to provide purely personal services is not a "professional or commercial activity exercised by the diplomatic agent". It is therefore not within the only relevant exception to the immunities. The fact that the employment of Ms Reyes may have come about as a result of human trafficking makes no difference to this. But the appeal should be allowed on a different and narrower ground. On 29 August 2014, Mr Al-Malki's posting in London came to an end and he left the United Kingdom. Article 31 confers immunity only while he is in post. A diplomatic agent who is no longer in post and who has left the country is entitled to immunity only on the narrower basis authorised by article 39(2). That immunity applies only so far as the relevant acts were performed while he was in post in the exercise of his diplomatic functions. The employment and maltreatment of Ms Reyes were not acts performed by Mr Al-Malki in the exercise of his diplomatic functions.

The legal framework

5. The legal immunity of diplomatic agents is one of the oldest principles of customary international law. Its history can be traced back to the practices of the ancient world and to Roman writers of the second century. "The rule has been accepted by the nations," wrote Grotius in the 17th century, "that the common custom which makes a person who lives in foreign territory subject to that country, admits of an exception in the case of ambassadors": *De Jure Belli ac Pacis*, ii.18. But, although recognition of diplomatic immunity is all but universal in principle, until relatively recently both states and writers differed on the categories of people to which the immunity applied and its precise ambit in each category. In particular, they differed on the existence and extent of any exceptions. In Britain, the matter was dealt with by the Diplomatic Privileges Act 1708, which conferred absolute immunity on ambassadors and their staff from civil jurisdiction, in accordance with what British authorities regarded as the rule of international law. In *Triquet v Bath* (1764) 3 Burrow 1478, 1480, Lord Mansfield described the Act as declaratory of the law of nations, and it remained in force until 1964. The United States adopted the British Act in 1790, and France adopted a corresponding rule by legislation in 1794. In other countries, however, exceptions of greater or lesser breadth were recognised, among others for private transactions relating to title to real property, certain employment disputes and liabilities arising out of business activities in the receiving state. There were also differences about the application of the immunity to diplomatic agents of a sending state who were nationals of the receiving state.

6. These differences gave rise to a number of attempts during the 19th and 20th centuries to codify the law of diplomatic relations with a view to achieving a common set of rules and enabling them to operate on a reciprocal basis. The Havana Convention among the states of the Pan-American Union (1928) and the influential draft convention drawn up by the Harvard Law School (1932) were notable examples. But there was no universally accepted code before 1961. The Vienna Convention on Diplomatic Relations, which was adopted in that year, has been described by Professor Denza, the leading academic authority on the law of diplomatic relations, as "a cornerstone of the modern international order": *Diplomatic Law*, 4th ed (2016), 1. It has been perhaps the most notable single achievement of the International Law Commission of the United Nations. The text was the result of an intensive process of research, consultation and deliberation extending from 1954 to 1961. Draft articles were submitted to the governments of every member state of the United Nations, and were subject to detailed review and comment. Eighty one states participated in the final conference at Vienna in March and April 1961 which preceded the adoption of the final text. Since its adoption, it has been ratified by 191 states, being every state in the world bar four (Palau, the Solomon Islands, South Sudan and Vanuatu). A number of states ratified subject to declarations or reservations, but none of these related to the articles which are primarily relevant on this appeal. 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.

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, especially for someone in Ms Reyes' position. 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."

8. Diplomatic immunity is dealt with at articles 22 and 29 to 40 of the Convention. These provisions confer different degrees of immunity on persons connected with a diplomatic mission, according to their status and function. For present purposes, the provisions primarily relevant are as follows:

"Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.

2. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

Article 29

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

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.

Article 32

1. The immunity from jurisdiction of diplomatic agents … may be waived by the sending state.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving state, enjoy the privileges and immunities specified in articles 29 to 36.

Article 38

1. Except insofar 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.

Article 39

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

…

Article 41

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state.

Article 42

A diplomatic agent shall not in the receiving state practise for personal profit any professional or commercial activity."

9. Section 2(1) of the Diplomatic Privileges Act 1964 provides that the articles of the Vienna Convention annexed in Schedule 1 "shall have the force of law in the United Kingdom." Schedule 1 contains articles 1, 22 to 40 and 45 of the Convention. They include all the articles dealing with diplomatic immunities.

Principles of interpretation

10. It is not in dispute that so far as an English statute gives effect to an international treaty, it falls to be interpreted by an English court in accordance with the principles of interpretation applicable to treaties as a matter of international law. That is especially the case where the statute gives effect not just to the substance of the treaty but to the text: *Fothergill v Monarch Airlines Ltd* [1981] AC 251, esp at pp 272E, 276-278 (Lord Wilberforce), 281-282 (Lord Diplock), 290B-D (Lord Scarman).

11. The primary rule of interpretation is laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969):

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The principle of construction according to the ordinary meaning of terms is mandatory ("shall"), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must, as the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for determining the parties' intentions.

12. In the case of the Convention on Diplomatic Relations, there are particular reasons for adhering to these principles:

> (1) Like other multilateral treaties, the text was the result of an intensely deliberative process in which the language of successive drafts was minutely reviewed and debated, and if necessary amended. The text is the only thing that all of the many states party to the Convention can be said to have agreed. The scope for inexactness of language is limited.
>
> (2) The Convention must, in order to work, be capable of applying uniformly to all states. The more loosely a multilateral treaty is interpreted, the greater the scope for damaging divergences between different states in its application. A domestic court should not therefore depart from the natural meaning of the Convention unless the departure plainly reflects the intentions of the other participating states, so that it can be assumed to be equally acceptable to them. As Lord Slynn observed in *R v Secretary of State for the*

Home Department, Ex p Adan [2001] 2 AC 477, 509, an international treaty has only one meaning. The courts

> "cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Convention."

(3) Although the purpose of stating uniform rules governing diplomatic relations was "to ensure the efficient performance of the functions of diplomatic missions as representing states", this is relevant only to explain why the rules laid down in the Convention are as they are. The ambit of each immunity is defined by reference to criteria stated in the articles, which apply generally and to all state parties. The recital does not justify looking at each application of the rules to see whether on the facts of the particular case the recognition of the defendant's immunity would or would not impede the efficient performance of the diplomatic functions of the mission. Nor can the requirements of functional efficiency be considered simply in the light of conditions in the United Kingdom. The courts of the United Kingdom are independent and their procedures fair. It is difficult to envisage that exposure to civil claims would materially interfere with the efficient performance of diplomatic missions. But as the Secretary of State for Foreign and Commonwealth Affairs pointed out, the same cannot be assumed of every legal system in every state. The threat to the efficient performance of diplomatic functions arises at least as much from the risk of trumped up or baseless allegations and unsatisfactory tribunals as from justified ones subject to objective forensic appraisal. It may fairly be said that from the United Kingdom's point of view, a significant purpose of conferring diplomatic immunity of foreign diplomatic personnel in Britain is to ensure that British diplomatic personnel enjoy corresponding immunities elsewhere.

(4) Every state party to the Convention is both a sending and receiving state. The efficacy of the Convention depends, even more than most treaties do, on its reciprocal operation. Article 47.2 of the Convention authorises any receiving state to restrict the application of a provision to the diplomatic agents of a sending state if that state gives a restrictive application of that provision as applied to the receiving state's own mission. In some jurisdictions, such as the United States, the recognition of diplomatic immunities is dependent as a matter of national law on their reciprocity. As Professor Denza observes, *op cit*, 2 -

> "For the most part, failure to accord privileges or immunities to diplomatic missions or their members is immediately

> apparent and is likely to be met by appropriate countermeasures"

In the graphic words of her introduction to the Vienna Convention on the United Nations law website, a state's "own representatives abroad are in a sense hostages who may on a basis of reciprocity suffer if it violates the rules of diplomatic immunity": http://legal.un.org/avl/ha/vcdr/vcdr.html.

Service of process

13. A preliminary question arises on this appeal as to whether the claim form was validly served on the Al-Malkis. A number of modes of service were attempted, but the only one which is now relied on is service by post to their private residence in accordance with Rule 61(1)(a) of the Employment Tribunal Rules of Procedure. It is said on the Al-Malkis' behalf that the rule cannot authorise service on a diplomatic agent because this would violate his person contrary to article 29 of the Convention and his residence contrary to article 30. I can deal shortly with this point, because it has failed at every stage below and has been dealt with by the Court of Appeal in terms with which I am in substantial agreement.

14. The starting point is that we are not at this point concerned with the question whether the diplomatic agent is immune from jurisdiction in respect of the particular proceedings. Other articles of the Convention deal with that. Those articles recognise that the jurisdictional immunity of a diplomatic agent will not apply to all proceedings: they may relate to a matter within an exception, or the immunity may have been waived. The present question is whether there is an immunity from service, or from certain modes of service, implicit in the inviolability of a diplomat's person and private residence. This immunity is distinct from and additional to his immunity from jurisdiction. If it applies, then articles 29 and 30 of the Convention, being unqualified, must prevent service by post in all proceedings whether or not there is any jurisdictional immunity in respect of them. Indeed, it would also apply to other communications by the state which have nothing to do with legal proceedings, such as demands for rates or tax assessments on a diplomat's private income, notwithstanding that these may be properly demanded under article 34 of the Convention.

15. In the case of states, the mode of service is prescribed by section 12 of the State Immunity Act 1978. Service must be effected on a state by the transmission of the document through the Foreign and Commonwealth Office. Article 22 of the United Nations Convention on the Jurisdictional Immunities of States, when it is in force, will require service of process on states to be effected on states through diplomatic channels in the absence of agreement on any other mode of service.

There is, however, no corresponding provision relating to service on diplomatic agents either in the Diplomatic Privileges Act 1964 or in the Vienna Convention on Diplomatic Relations. According to the Secretary of State, a practice has become established of serving process on diplomatic agents through diplomatic channels on the foreign state or its mission in the United Kingdom. But there is no statutory basis for this practice. Nor, now that the law on diplomatic immunity has been codified, is there any basis for it in international law, unless service violates the diplomatic agent's person or residence. Moreover, in the absence of some basis in domestic law, it is not even a legally effective mode of service, since there is no way that the foreign state can be required to accept service on behalf of the diplomatic agent, if it chooses not to do so.

16. The person of a diplomatic agent is violated if an agent of the receiving state or acting on the authority of the receiving state detains him, impedes his movement or subjects him to any personal restriction or indignity. It is arguable that personal service on a diplomatic agent would do that, although it is not an argument that needs to be considered here. Premises are violated if an agent of the state enters them without consent or impedes access to or from the premises or normal use of them: see article 22 relating to the premises of a mission, which is applied by analogy to a diplomatic agent's private residence under article 30(1). The delivery by post of a claim form does not do any of these things. It simply serves to give notice to the defendant that proceedings have been brought against him, so that he can defend his interests, for example by raising his immunity if he has any. The mere conveying of information, however unwelcome, by post to the defendant, is not a violation of the premises to which the letter is delivered. It is not a trespass. It does not affront his dignity or affect his right to enter or leave or use his home. It does of course start time running for subsequent procedural steps and may lead to a default if no action is taken. But so far as this is objectionable, it can only be because there is a relevant immunity from jurisdiction. It is not because the proceedings were brought to the diplomatic agent's attention by post. Otherwise the same objection would apply to any mode of service which starts time running, including service through diplomatic channels as proposed by the Secretary of State.

Jurisdictional immunity: article 31(1)(c)

17. Articles 31 to 40 of the Convention represent an elaborate scheme which must be examined as a whole. Fundamental to its operation is the distinction, which runs through the whole instrument, between those immunities which are limited to acts performed in the course of a protected person's functions as a member or employee of the mission, and those which are not. The distinction is fundamental because what an agent of a diplomatic mission does in the course of his official functions is done on behalf of the sending state. It is an act of the sending state, even though it may give rise to personal liability on the part of the individual agent. In such a case, the individual agent is entitled to both diplomatic and state immunity,

and the two concepts are practically indistinguishable: see *Jones v Ministry of Interior for the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270, at paras 10 (Lord Bingham), 66-78 (Lord Hoffmann). By comparison, the acts which an agent of a diplomatic mission does in a personal or non-official capacity are not acts of the state which employs him. They are acts in respect of which any immunity conferred on him can be justified only on the practical ground that his exposure to civil or criminal proceedings in the receiving state, irrespective of the justice of the underlying allegation, is liable to impede the functions of the mission to which he is attached. The degree of impediment may vary from state to state and from case to case. But the potential problem for the conduct of international relations has been recognised from the earliest days of diplomatic intercourse, and in the United Kingdom ever since the arrest of the Russian ambassador for debt as he returned from an audience with Queen Anne led to the passing of the Diplomatic Privileges Act 1708.

18. The Vienna Convention distinguishes between diplomatic agents (ie ambassadors and members of their diplomatic staff), the administrative and technical staff of the mission, their respective families, and service staff of the mission. The highest degree of protection is conferred on diplomatic agents. In their case, the Convention substantially reproduces the previous rules of customary international law, by which a diplomatic agent was immune from the jurisdiction of the receiving state (i) in respect of things done in the course of his official functions for an unlimited period, and (ii) in respect of things done outside his official functions for the duration of his mission only: see *Zoernsch v Waldock* [1964] 1 WLR 675, 684 (Willmer LJ), 688 (Danckwerts LJ), 691-692 (Diplock LJ). Thus article 31(1) confers immunity on diplomatic agents currently in post in respect of both private and official acts, subject to specific exceptions for the three designated categories of private act. Under article 39(2), once a diplomatic agent's functions have come to an end, his immunities under article 31 will normally cease from the moment when he leaves the territory of the receiving state. Thereafter, he remains immune in the receiving state only with respect to "acts performed … in the exercise of his functions as a member of the mission". This is commonly known as the "residual" immunity. It is one of four cases in which, in contrast to the immunity under article 31, a protected person's immunity is limited to official acts, the others being (i) the immunity conferred on a diplomatic agent who is a national of or permanently resident in the receiving state, which is limited to "official acts performed in the exercise of his functions" (article 38(1)); (ii) the immunity conferred on administrative and technical staff of a mission, which "shall not extend to acts performed outside the course of their duties" (article 37(2)); and (iii) domestic staff of the mission, whose immunity is confined to "acts performed in the course of their duties" (article 37(3)). The same distinction applies to consular officers and employees under article 43 of the parallel Vienna Convention on Consular Relations (1963). Their immunity is limited to "acts performed in the exercise of consular functions".

19. Article 31(1)(c) is one of three carefully framed exceptions to the general immunity from civil jurisdiction conferred on diplomatic agents in post. The exception applies if both of two conditions are satisfied: (i) that the action relates to a "professional or commercial activity exercised by the diplomatic agent", and (ii) that the exercise of that activity was "outside his official functions". These are distinct requirements. If the relevant acts were within the scope of the diplomat's official functions, the enquiry ends there. He is immune. Moreover, he will retain the residual immunity in respect of them even after his posting comes to an end. But if he is still in post and the relevant activity is outside his official functions, the operation of the exception will depend on whether it amounts to a professional or commercial activity exercised by him.

20. Accordingly, the first question is what are a diplomatic agent's official functions. The starting point is the functions of the mission to which he is attached. They are defined in article 3 of the Convention, and comprise all the classic representational and reporting functions of a diplomatic mission. It is, however, clear that the official functions of an individual diplomatic agent are not necessarily limited to participating in the activities defined by article 3. They must in the nature of things extend to a wide variety of incidental functions which are necessary for the performance of the general functions of the mission. But whether incidental or direct, a diplomatic agent's official functions are those which he performs for or on behalf of the sending state. The test is whether the relevant activity was part of those functions. That is the basis on which the courts in both England and the United States have approached the residual immunity in article 39(2): see, as to England, *Wokuri v Kassam* [2012] ICR 1283, at paras 23-26 (Newey J) and *Abusabib v Taddese* [2013] ICR 603, at paras 29-34 (Employment Appeal Tribunal); and as to the United States, *Baoanan v Baja* 627 F Supp 2d 155 (2009) at paras 3-5; *Swarna v Al-Awadi* 622 F 3d 123 (2010) (2nd Circuit Court of Appeals) at paras 4-10. I think that it is correct, and equally applicable to the corresponding expression in article 31(1).

21. If the relevant activity was outside the diplomatic agent's official functions, the next question is whether it amounts to a professional or commercial activity exercised by him. The following points should be made about this:

> (1) An activity is not the same as an act. Article 31(1)(c) is concerned with the carrying on of a professional or commercial activity having some continuity and duration, ie with a course of business.
>
> (2) But it is not only a question of continuity or duration. It is also a question of status. In the ordinary meaning of the words, the "exercise" of a "professional or commercial activity" means practising the profession or carrying on the business. The diplomatic agent must be a person practising the profession or carrying on (or participating in carrying on) the business.

He must, so to speak, set up shop. The position is even clearer in the equally authentic French text, where the word "exercer" means "to practise, follow, pursue, carry on (profession, business)": J E Mansion, *Harrap's Standard French and English Dictionary*, ed Ledésert, (rev 1980).

(3) This is confirmed by article 42, which provides that a diplomatic agent "shall not in the receiving state practise for personal profit any professional or commercial activity." Article 42 uses the same phrase, "professional or commercial activity", as article 31(1)(c). The difference between the language of the exception in article 31(1)(c) and that of the prohibition in article 42 is simply the use in the latter of the expression "for personal profit" in place of "outside his official functions". The essential point, however, is that in both articles, the reference is to the diplomat carrying on or participating in a professional or commercial business. This is what Laws J decided in the only English case on article 31(1) until this one: *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611, 635-636 (the point did not arise in the Court of Appeal). I think that he was right.

(4) As I shall demonstrate below, this is precisely what the draftsmen of the Convention and the states who agreed it intended to achieve.

(5) There are obvious reasons why an exception such as that in article 31(1)(c) should have been limited to someone participating in a professional or commercial business. It is inherent in the concept of jurisdictional immunity that it will shelter a serving diplomat (and in some circumstances a former diplomat) against legal proceedings in the receiving state. It is not inherent in that concept that the immunity will enable him to exercise a distinct business activity in competition with others while sheltering him from the modes of enforcing the corresponding liabilities which are an ordinary incident of such an activity.

(6) A wider scope for exception (c) would expose diplomatic agents in post in the United Kingdom (and potentially British diplomatic agents abroad) to local proceedings not only in respect of their employment of domestic servants but in respect of any transaction in the receiving state for money or money's worth, save perhaps for those which were isolated or uncharacteristic. The substantial effect would be to limit the immunity to acts done in the exercise of the diplomat's official functions, even in the case of a diplomat in post. The immunity in respect of non-official acts would mean very little, for every purchase that a diplomat might make in the course of his daily life from a business carried on by someone else would be a commercial activity exercised by the diplomat for the purposes of article 31(1)(c). This

would be contrary to the carefully constructed scheme of the Convention for different categories of protected person.

The authorities

22. Apart from the decision of Laws J in *Propend Finance Pty Ltd v Sing*, to which I have just referred, the authorities most directly in point are decisions of the federal courts of the United States. These are a valuable source of law in this area, because of the long-standing engagement of the US courts with international law and the existence of a highly developed body of domestic foreign relations law belonging to the same tradition as our own. The statutory background is substantially the same as it is in the United Kingdom. Section 5 of the US Diplomatic Relations Act 1978 provides that any action or proceeding brought against an individual entitled to immunity from such action or proceeding under the Vienna Convention on Diplomatic Relations shall be dismissed. During the passage of the Act, the State Department advised Congress that the exception in article 31(1)(c) merely exposed diplomats to litigation based upon activity expressly prohibited in article 42: *Diplomatic Immunity: Hearings on S 476, S 477, S 478, S 1256 S 1257 and HR 7819 (Senate Committee on the Judiciary, Subcommittee on Citizens' and Shareholders Rights and Remedies*, 95th Cong, 2d Sess 32 (1978). This advice, as I have pointed out above, was in accordance with both the language and purpose of the Convention. It is also endorsed by the American Law Institute's authoritative *Restatement (3rd) of the Foreign Relations Law of the United States* (1986), para 464, where it is observed (Note 9) that

> "The denial of immunity in cases arising out of private commercial or professional activities has little significance for the United States since the United States forbids its diplomatic officers to engage in commercial or professional activities unrelated to their official functions, and in general does not permit such activities by foreign diplomats in the United States."

23. The leading case is *Tabion v Mufti* (1996) 107 ILR 452, a decision of the Fourth Circuit Court of Appeals. The plaintiff was employed for two years as a domestic servant in the private residence of a Jordanian diplomat. Her allegations were broadly similar to those of Ms Reyes. They included deception, false imprisonment and persistent underpayment. In response to a claim for diplomatic immunity, her argument was that "because 'commerce' is simply the exchange of goods and services, … 'commercial activity' necessarily encompasses contracts for goods and services, including employment contracts." The court examined the terms of the Convention and its background and negotiating history, and upheld the claim for immunity on the principal ground that the expression "commercial activity"

"relates only to trade or business activity engaged in for personal profit" (p 454). In reaching this conclusion, they took account of a statement of interest submitted by the State Department, which asserted that the exception "focuses on the pursuit of trade or business activity; it does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and family in the receiving State" (p 455). But they appear to have gone rather further than the State Department in suggesting (pp 455-456) that

> "day to day living services … incidental to daily life were also within a diplomatic agent's official functions."

Since a diplomat's acts in obtaining day to day living services are remote from the performance of his official functions and are not done on behalf of the sending state, for my part, I do not find it possible to accept this last point. Even in the United States it appears to have been rejected in cases on the residual immunities conferred by article 39(2) of the Convention, to which I have already referred (para 20). But on their principal ground, I think that the Court was correct.

24. The decision in *Tabion v Mufti* has consistently been followed in other circuits on materially similar facts: *Gonzales Paredes v Vila and Nielsen*, 479 F Supp 2d 187 (2007), *Sabbithi v Al Saleh*, 605 F Supp 2d 122 (2009), vacated in part on other grounds, no 07 Civ 115 (DDC Mar S 2011); *Montuya v Chedid*, 779 F Supp 2d 60 (2011); *Fun v Pulgar*, 993 F Supp 2d 470 (2014). It is also endorsed by Professor Denza: *Diplomatic Law*, 4th ed (2016), at pp 251-253.

25. It is true that the Appeals Court's conclusion on the principal point was influenced by the State Department's statement of interest and that the constitutional division of powers in the United States requires the courts to show "substantial deference" to the executive's views on such matters. But, like Lord Dyson MR in the Court of Appeal, I do not regard this as undermining the authority of the decision. In the first place it is clearly established doctrine in the United States that the views of the executive, although commanding respect, are not determinative: see *Sumitomo Shoji America Inc v Avagliano* 457 US 176, 184-185 (1982), *United States v Stuart* 489 US 353, 369 (1989). Secondly, the US Court of Appeals plainly formed its own view on the questions at issue. Thirdly, the Department's statement of interest, a copy of which has been put before us, is concerned mainly to put the negotiating history before the court. Otherwise it simply analyses the relevant legal principles, very much as the submissions of the Secretary of State as intervener have done on this appeal.

Diplomatic and state immunity

26. Mr Otty QC, who appeared for Ms Reyes, sought to reinforce his case on article 31(1)(c) by pointing out that under the restrictive theory of state immunity, the immunity of states is limited to acts which they perform as states. He argues that the functional analogies between state immunity and diplomatic immunity mean that a corresponding rule should apply to the latter, ie that any act done in a purely private capacity must be regarded as "commercial", or at any rate as lying outside the permissible scope of the immunity. This argument in effect treats the words "outside his official functions" in article 31(1)(c) of the Convention on Diplomatic Relations as explanatory of the expression "professional or commercial activities" and deprives the latter of any independent effect.

27. Manifestly, diplomatic and state immunity have a number of points in common. Both are immunities of the state, which can be waived only by the state. Both may extend to individual agents of the state, acting as such. Both are creatures of international law. And, although only diplomatic immunity has been codified by treaty, the embryonic United Nations Convention on Jurisdictional Immunities of States is generally regarded as an authoritative statement of customary international law on the major points which it covers. These factors led Laws J, in *Propend Finance Pty Ltd v Sing* (1997) 1 ILR 611, 633-634 to suggest that "the law relating to diplomatic immunity is not free-standing from the law of sovereign or state immunity, but is an aspect of it", and to cite with apparent approval a dictum of Jenkins LJ in *Baccus SRL v Servicio National Del Trigo* [1957] 1 QB 438, 470 to the effect that the protection accorded to a diplomat under the Diplomatic Privileges Act 1708 (then in force) could not be greater than that accorded to a foreign sovereign.

28. However, the analogy should not be pressed too far. In some significant respects, the immunities of diplomatic agents are wider than those of the state. This is because their purpose is to remove from the jurisdiction of the receiving state persons who are within its territory and under its physical power. Human agents have a corporeal vulnerability not shared by the incorporeal state which sent them. Section 16 of the State Immunity Act 1978, which defines the ambit of state immunity in the United Kingdom, and article 3 of the UN Convention on the Jurisdictional Immunities of States, both provide that the rules relating to state immunity are not to affect diplomatic immunity. These provisions are necessary because, as Professor Denza points out in *Diplomatic Law*, 4th ed (2016), 1.

> "As international rules on state immunity have developed on more restrictive lines, there has always been a saving for the rules of diplomatic and consular law and an increasing

> understanding that although these sets of rules overlap they serve different purposes and cannot in any sense be unified."

29. For present purposes, the most significant difference in the ambit of the two categories of immunity concerns the treatment of acts of a private law character. Section 3(1)(a) of the State Immunity Act 1978, which defines the ambit of state immunity in the United Kingdom, provides that a state is not immune in respect of proceedings relating to a "commercial transaction entered into by the state". For this purpose, a commercial transaction is a "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": section 3(3)(c). The corresponding provisions of the United Nations Convention on Jurisdictional Immunities of States are in almost identical terms: see articles 2(1)(c) and 10. In *Playa Larga (Owners of Cargo lately laden on board) v I Congreso del Partido (Owners)* [1983] AC 244, 267, Lord Wilberforce, after reviewing the national and international authorities, held that the section gave statutory effect to the distinction in international law between acts *jure imperii* and acts *jure gestionis*. Its application depended on

> "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."

30. The difficulty about the appellant's proposed analogy between state and diplomatic immunity is that the immunity of a diplomat in post, unlike that of a state, unquestionably extends to some transactions which are outside his official functions, and therefore almost inevitably of a private law character. I have drawn attention above (paras 17-18) to the distinction which runs through the Convention on Diplomatic Relations and the parallel Convention on Consular Relations, between those immunities which are limited to acts performed in the course of a protected person's official functions and those enjoyed by diplomatic agents in post, which are not so limited. It is plain from this scheme that the exception for "commercial activities" exercised by a diplomatic agent is not simply another way of excepting acts in the performance of the diplomat's official functions. Moreover, the immunities of a diplomatic agent in post are extended by article 37(1) of the Convention to his family, who will generally have no official functions.

31. It is right to add that contracts of employment are not treated as a commercial transaction for the purposes of the State Immunity Act 1978: see section 3(c). They

are subject to a distinct code under section 4, which provides that subject to specified exceptions a state is not immune as respects proceedings relating to a contract of employment made in or to be performed in the United Kingdom. There are broadly corresponding provisions in article 11 of the United Nations Convention. However, although the status of private servants is the subject of a number of provisions of the Convention on Diplomatic Relations, there is no provision in it corresponding to section 4 of the United Kingdom State Immunity Act or article 11 of the United Nations Convention.

32. These differences explain why the authorities on which Mr Otty principally relied for this point are not of much assistance. With one exception (to which I shall return), they were cases about state immunity, in which the court applied the classic distinction between acts *jure gestionis* and *jure imperii* to the employment of non-diplomatic staff. Thus in *In re Canada Labour Code* [1992] 2 SCR 50 the question at issue was whether the United States was entitled to state immunity under the Canadian State Immunity Act in proceedings relating to the terms on which it employed Canadian citizens at a US naval base in Canada. In particular, objection was taken to the inclusion of a "no strike" term. The case had nothing to do with diplomatic immunity. The issue had a superficial resemblance to the present one only because the Canadian State Immunity Act excepted any "commercial activity" from the scope of the immunity. It is, however, clear from the reasoning of the majority of the Supreme Court of Canada that in the context of a statute designed to give effect to the restrictive doctrine of state immunity in customary international law, a "commercial activity" meant an act done otherwise than in the exercise by the state of sovereign authority: see pp 71-73 (La Forest J). The Court ultimately held that while some obligations of an employer (for example, to pay wages) were enforceable in the Canadian courts as being of a private law character, a state employer's imposition of terms judged appropriate to the military function of the base was an exercise of sovereign authority and as such immune. In the United States, where the Foreign State Immunity Act has an exception in the same terms as the Canadian Act, the same approach has been adopted: see *El-Hadad v United Arab Emirates and the Embassy of the United Arab Emirates* 216 F 3d 29; *Park v Shin* 313 F 3d 1138 (9th Cir 2002), at paras 27-36.

33. The exception is *Fonseca v Larren* (30 January 1991), a decision of the Supreme Court of Portugal, reported in *State Practice regarding State Immunities* (Council of Europe, 2006). This was a true case of diplomatic immunity, in which the Court held that article 31 of the Convention on Diplomatic Relations did not apply to the employment of a domestic servant in the private residence of a French diplomatic agent. The Court did not claim to be applying the exception in article 31(1)(c). Instead they applied to the Convention a principle sanctioned by the Portuguese Civil Code in the case of domestic legislation, which called for what the court regarded as an "extensive interpretation of this precept [jurisdictional immunity] in keeping with its spirit, going beyond its letter and the 'ratio legis' that

determined it." On that basis, they appear to have recognised an implied additional exception to the immunity for matters within the jurisdiction of the Portuguese Labour Courts, on the ground that such acts would not constitute exercises of sovereign authority under the restrictive doctrine of state immunity. It is apparent that the Portuguese court proceeded on domestic law principles of construction which would not be applied to a treaty in England (or internationally), and on the basis of an analogy with state immunity which is difficult to support on any generally accepted principles of international law.

The travaux

34. These conclusions are confirmed by an examination of the *travaux préparatoires*.

35. Of the three exceptions in article 31(1), only (a), relating to private dealings with immovable property in the receiving state, had been recognised by customary international law before the Convention. Exceptions (b) and (c) were matters on which states had not previously been agreed, and exception (c) was particularly controversial. It had not been included in the draft articles submitted by the Special Rapporteur (Mr Sandström) at the outset of the process. It was introduced by amendment by the Austrian Commissioner on 22 May 1957 in the course of the Ninth Session: see *Yearbook of the International Law Commission 1957*, i, 97, at paras 70-81. As originally introduced, it was confined to professional activities. This was said to be akin to article 24 of the Harvard draft articles of 1932, which referred to a person who "engages in a business or who practises a profession". The proposer considered that cases to which the amendment would apply would be "comparatively rare", and even those who opposed it agreed with this. They opposed it on the ground that diplomatic agents "practically never" engaged in such activities, which would be inconsistent with the dignity of their diplomatic status. The Egyptian Commissioner supported the amendment and proposed to add the reference to a "commercial activity":

> "If a diplomatic agent engaged in a professional or commercial activity - the word 'commercial' should undoubtedly be inserted in the amendment - he should enjoy no immunity, but be treated on precisely the same footing as other persons who practised the same profession or engaged in the same commercial activities … The dignity itself of a diplomatic agent required that he should not engage in activities outside his official duties."

He then proposed the text of what became article 31(1)(c), which was adopted.

36. In May 1958, the Special Rapporteur reported to the Commission on observations received from governments. He reported that the United States had opposed the inclusion of exception (c). But the Special Rapporteur proposed that it should be retained, observing:

> "It would be quite improper if a diplomatic agent, ignoring the restraints which his status ought to have imposed upon him, could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court."

Commenting on the suggestion of the Australian government that "commercial activity "appears to require some definition", he observed:

> "the use of the words 'commercial activity' as part of the phrase 'a professional or commercial activity' indicates that it is not a single act of commerce which is meant [but] a continuous activity."

The Special Rapporteur's comment was reviewed in the course of the Tenth Session in 1958: *Yearbook of the International Law Commission*, 1958, i, 244 (paras 26-34). It was suggested by the Czechoslovakian commissioner in response to the commentary on exception (c) that the text might in fact cover an isolated commercial transaction. Sir Gerald Fitzmaurice (Rapporteur for the Session) questioned this:

> "Paragraph 1(c) of the article applied to cases where a diplomatic agent conducted a regular course of business 'on the side'. Such isolated transactions as, for instance, buying or selling a picture, were precisely typical of the transactions not subject to the civil jurisdiction of the receiving State. Annoying as it might be for the other parties to such transactions in the event of a dispute, it was essential not to except such transactions from the general rule for, once any breach was made in the principle, the door would be open to a gradual whittling away of the diplomatic agent's immunities from jurisdiction."

In the result, the observation in the commentary was deleted, the consensus being that the text was clear and the observation unnecessary. The report on the session to the General Assembly (ibid, ii, 98) commented on exception (c) in the following terms:

> "The third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. It was urged that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata.* Nevertheless, such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies."

37. Article 42 was inserted at a very late stage, by an amendment proposed by the Colombian delegation at the international conference of March and April 1961 which immediately preceded the adoption of the final text: *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, i, 172 (paras 24-27), 211-213 (paras 1-37). The reason advanced by the proposer of the amendment was that otherwise what became article 31(1)(c) might be read as implicitly authorising the exercise of professional or commercial activities, albeit on the basis that it was not immune. Everyone agreed that that would be incompatible with diplomatic status. It was therefore proposed that the Convention should affirm in a separate article the existing understanding that the carrying on of a business or profession by a diplomatic agent in the territory of the receiving state was incompatible with diplomatic status. The proposer considered that it was desirable to limit the occasions on which exception (c) would arise by avoiding a situation in which

> "the diplomatic agent would be acting simultaneously in two different capacities, only one of which was covered by diplomatic privileges and immunities."

The discussion which followed showed that the principle was generally accepted, on the footing that the prohibited activities covered what the Ecuadorian delegate called "the exercise of an outside gainful activity", and the delegate of Ceylon "a regular professional activity from which a permanent income was derived, and not an occasional activity, particularly of a cultural character." There was general agreement that it would not extend to occasional activities such as lecturing, even if paid. All the participants took it for granted that the activity which gave rise to the exception in article 31(1)(c) was the same as the activity which was treated as incompatible with the status of a diplomatic agent in article 42.

38. From this history, three points can be extracted:

(1) The activities covered by articles 31(1)(c) and 42 were intended to be the same.

(2) They were activities involving the assumption by a diplomatic agent of a dual status, by which incompatible occupations were being pursued by the same person.

(3) Occasions for the operation of either provision were expected to be very rare.

The trafficking dimension

39. The Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children (Palermo, 2000) supplements the United Nations Convention against Transnational Organised Crime. Article 3 defines "trafficking in persons" as

> "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

Article 5 requires state parties to establish trafficking as a criminal offence and to ensure that their legal systems afford victims the possibility of obtaining compensation. The Protocol has been ratified by 168 states, including the United Kingdom and Saudi Arabia, and by the European Union.

40. It is in principle possible for a rule of customary international law to be displaced by another rule of a higher order, or for a treaty obligation to be displaced by a peremptory norm (*jus cogens*) of international law, ie by a conflicting rule of international law permitting no derogation: see, as to treaty obligations, article 53 of the Vienna Convention on the Law of Treaties. But Mr Otty QC expressly disclaimed reliance on any such principle. He was in my view right to do so, for reasons which should be mentioned since they have a bearing on his other

arguments. Diplomatic immunity, like state immunity, is an immunity from jurisdiction and not from liability. Its practical effect is to require the diplomatic agent to be sued in his own country, or in respect of non-official acts in the receiving state, once his posting has ended. There is therefore no conflict between a rule categorising specified conduct as wrongful, and a rule controlling the jurisdictions in which or the time at which it may properly be enforced. It was for this reason that in *Jones v Saudi Arabia* [2007] 1 AC 270, Lord Bingham (para 24) and Lord Hoffmann (para 44) both adopted the observation of Hazel Fox in the then current edition of *The Law of State Immunity* (2002), at p 525, that state immunity "does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement." In *Germany v Italy: Greece Intervening (Jurisdictional Immunities of the State)* [2012] ICJ Rep 99, the International Court of Justice endorsed the Appellate Committee's reasoning on this point, and gave it what is perhaps its clearest expression at paras 92-97. Rejecting an argument based on the peremptory character of the prohibition of war crimes and crimes against humanity, the court put the matter in this way:

> "This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on state immunity. The two sets of rules address different matters. The rules of state immunity are procedural in character and are confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful … The application of rules of state immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated."

The Court went on to point out that the existence of an international law obligation to provide for the recovery of compensation made no difference to this analysis:

> "Nor is the argument strengthened by focusing upon the duty of the wrongdoing state to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule

> which exists independently of those rules which concern the means by which it is to be effected. The law of state immunity concerns only the latter; a decision that a foreign state is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act … To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of *a jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. *A jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application."

41. In these circumstances, Mr Otty wisely confined his case on this aspect of the appeal to the proposition that the international obligation to recognise a crime and a tort of human trafficking affected the scope of the exception for professional or commercial activities in article 31(1)(c) of the Convention on Diplomatic Relations. The argument is (i) that trafficking is treated by the Palermo Protocol as an inherently commercial activity, in which an employer participates by employing the victim; and (ii) that the profit element, if it is required, is established by the financial benefit which the employer generally obtains by paying less than the going rate or the legal minimum or nothing at all.

42. The fundamental difficulty about this argument is that it involves modifying the concept of a "professional or commercial activity" in the light of the growing concern of international law with human trafficking subsequent to the Convention on Diplomatic Immunity. There are limited circumstances in which this is a legitimate technique of interpretation, but it is subject to principled limits. Article 31(2) and (3)(a) and (b) of the Vienna Convention on the Law of Treaties envisage that a treaty may in appropriate cases be interpreted in the light of a linked treaty, whether made at the same time or subsequently. Linked treaties are generally interpretative or explanatory of the principal treaty. It is not suggested that the principle applies here. But a broader principle is applied by article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires account to be taken of "any relevant rules of international law applicable in the relations between the parties." The effect is to make limited provision for the interpretation of treaties in the light of subsequent developments of international law. The circumstances in which it applies are that the relevant provision of the principal treaty was ambulatory, in the sense that it envisaged that future changes occurring after it was made would affect its application. The example commonly cited is the International

Court of Justice's advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] ICJ Rep 16. Article 22(1) of the Covenant of the League of Nations provided for the grant of mandates for the administration of former colonies and territories "which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world". The mandate territory was to be administered on the "principle that the wellbeing and development of such peoples form a sacred trust of civilisation." The Court interpreted article 22 in the light of the subsequent development in international law of the concept of self-determination:

> "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the court is bound to take into account the fact that the concepts embodied in article 22 of the Covenant - 'the strenuous conditions of the modern world' and 'the wellbeing and development' of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such." (para 53)

The intention that the principal treaty should accommodate future change must therefore be found within the treaty itself. This is fundamental, for article 31(3)(c) of the Vienna Convention on the Law of Treaties is a principle of interpretation. It is not a principle of revision. With respect, I cannot accept that *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ 161, which Lord Wilson cites as illustrative of a wider principle, has any bearing on the point. The International Court of Justice did not in that case interpret the 1955 Treaty of Amity between Iran and the United States in the light of a subsequent and unrelated treaty or any other subsequent developments in international law. It interpreted an exception in the treaty for "measures … necessary to protect [the] essential security interests of the parties" in the light of customary international law relating to the use of force and the right of self-defence: see paras 41, 44, 73. The two concepts were clearly closely related and the relevant principles of customary international law were of very long standing.

43. The first objection to the argument in this case is that no such intention can be discerned in article 31(1)(c) of the Convention on Diplomatic Relations. The concept of a "professional or commercial activity" exercised by a diplomatic agent is not ambulatory. The expression does not express a general value whose content may vary over time. It is a fixed criterion for categorising the facts, whose meaning and effect was extensively discussed during the drafting and negotiation of the text. There is no reason to suppose that it refers today to anything other than what it referred to in 1961.

44. Secondly, the international obligations of states in relation to human trafficking are embodied in treaties, primarily in the Palermo Protocol, which is the only relevant treaty to which both the United Kingdom and Saudi Arabia are parties. The Protocol is not in any way concerned with jurisdictional immunity. Its sole relevance is as a source of international policy against human trafficking. But it does not follow from that policy that diplomatic immunity cannot be available in cases of trafficking. The intention of the parties to the Protocol that trafficking should be unlawful is entirely consistent with the subsistence of rules determining where and when civil claims or criminal charges may properly be determined. For the same reason, international law immunities have been held to be available in cases involving torture (*Jones v Saudi Arabia*), breach of the laws of armed conflict (*Jurisdictional Immunities of the State*) or crimes against humanity (*Democratic Republic of the Congo v Belgium (Arrest Warrant of 11 April 2000)*).

45. Third, nothing in the Palermo Protocol requires that human trafficking must be classified as a "commercial activity" when it would not otherwise be, whether for the purpose of diplomatic immunity or for any other purpose. The commerciality or otherwise of the activities defined as trafficking are irrelevant to the definition. As defined in article 3 of the Protocol, trafficking may consist in a number of different operations, including the recruitment, transportation, transfer, harbouring and receipt of persons. It may also consist in fraud, deception or the abuse of power or vulnerability. Commonly, a chain of intermediaries will be involved, each participant doing some of these things but not necessarily all of them. It is not inherent in any of these acts that they will necessarily be done in the exercise of a commercial activity. That will depend on the precise circumstances. In particular, it will depend on the nature of each participant's involvement. Thus one would expect an intermediary who recruits or transports a trafficked person for money to be exercising a commercial activity. The same is likely to be true of someone who receives a trafficked person for, say, prostitution. These are business operations. But the mere employment of a domestic servant on exploitative terms is not a commercial activity, and the fact that it is unlawful, contrary to international policy and morally repugnant cannot make it into one. One can readily imagine circumstances in which someone who employed a trafficked person as a domestic servant had obtained her through a chain of intermediaries engaged in human trafficking as a business, although that does not appear to have happened in Ms Reyes' case. In such a case, the employer may incur criminal or civil liability along with the other participants who brought the victim to his door. But his liability would be for the trafficking. It would not without more make him a joint participant in the intermediaries' business. Doubtless, without customers professional traffickers would have no business, but that does not make the customers into practitioners of a commercial activity. By way of analogy, if I knowingly buy stolen property from a professional fence for my personal use, both of us will incur criminal liability for receiving stolen goods and civil liability to the true owner for conversion. The fence will also be engaging in a commercial activity. But it does not follow that the same is true of me.

46. For the same reason, it cannot matter that the trafficking may enable the ultimate employer to pay the victim less than the proper rate or nothing at all. To pursue the analogy, I will no doubt pay the fence less for the stolen goods than I would have had to pay for the same goods to an honest shopkeeper. But that does not alter the characterisation of my purchase, which is no more the exercise by me of a commercial activity in the one case than it is in the other. Likewise, the employment of a domestic servant to provide purely personal services cannot rationally be characterised as the exercise of a commercial activity if she is paid less than the going rate or the national minimum wage, but not if she is paid more. One might perhaps loosely say that the victim is being treated as a commodity. But a figure of speech should not be confused with a legal concept.

47. Finally, the implications of human trafficking for the scope of diplomatic immunity have been considered on a number of occasions by the federal courts of the United States. On its facts, *Tabion v Mufti* may well have been a case of trafficking, and *Gonzales Paredes v Vila and Nielsen*, 479 F Supp 2d 187 (2007) almost certainly was. But the point appears to have been raised overtly for the first time in *Sabithi v Al Saleh* 605 F Supp 2d 122, a decision of the District Court for the District of Columbia. The court rejected the argument that the employer's participation in trafficking constituted a commercial activity within article 31(1)(c), essentially because it made no difference to the characterisation of the act of employing or maltreating a domestic servant, even on exploitative terms and at "marginal wages". The same view was taken in *Montuya v Chedid*, 779 F Supp 2d 60 (2011) and *Fun v Pulgar*, 993 F Supp 2d 470 (2014) where the facts were similar. The rare cases from European jurisdictions point to the same answer. In *Pfarr v Anonymous* 17 SA 1468/11 (ILDC 1903) (2011), which concerned the exploitation of a domestic servant in circumstances very like those of the present case, the Berlin-Brandenburg Court of Appeal declined to recognise an exception for grave violations of human rights. (The appeal was allowed by the Federal Employment Court, NZA 2013, 343, only because by the time that the appeal was heard, the diplomat was no longer in post). The possibility that the commercial activities exception might apply does not seem to have occurred to the court. In *Mohamed X v Fettouma Z* (17 October 2012), 11/01255 Legifrance, it was considered by the Court of Appeal of Montpellier in a case where the employer had made considerable financial savings by his exploitation of a Moroccan housemaid. The argument was rejected on the ground that the arrangements for the management of a diplomat's private residence and family life "could not be regarded as a professional or commercial activity outside his official functions."

Application to Ms Reyes' case

48. The first question is whether the employment or treatment of Ms Reyes by the Al-Malkis were acts performed in the course of Mr Al-Malki's "official functions." In my judgment, it is clear that they were not. Difficult questions of fact

may arise when a private servant is employed in a diplomat's residence for purposes connected with the work of the mission. But on any view Mr Al-Malki's official functions cannot have extended to the employment of domestic staff to do the cleaning, help in the kitchen and look after his children. These things were not done for or on behalf of Saudi Arabia. The Court of Appeal (para 19) thought that such activities were "conducive" to the performance of his official functions. No doubt they were. But that could be said of almost anything that made the personal life of a diplomatic agent easier. It does not make the employment of Ms Reyes part of Mr Al-Malki's official functions as a diplomatic agent. Since Mr Al-Malki's functions as a diplomatic agent have now come to an end, he is no longer entitled to any immunity under article 31. The only immunity available to him is the residual immunity under article 39(2). It follows from the fact that the relevant acts were not done in the course of his official functions that that immunity cannot apply. Likewise, Mrs Al-Malki is no longer entitled to any immunity at all.

49. Does it matter that Mr and Mrs Al-Malki were entitled to immunity under article 31(1) and 37(1) respectively at the time when the present proceedings were commenced? In my opinion it does not. An action brought against persons entitled to diplomatic immunity is not a nullity. It is merely liable to be dismissed. There are therefore valid proceedings currently on foot. Diplomatic immunity is a procedural immunity. The procedural incidents of litigation normally fall to be determined by a court as at the time of the hearing. Thus a waiver of immunity after the commencement of proceedings would dispose of any diplomatic immunity which previously existed. The result of a change in the defendant's status is not materially different. A striking illustration is supplied by the decision of the Court of Appeal in *Empson v Smith* [1966] 1 QB 426. Proceedings were begun against Mr Smith, a member of the administrative staff of the Canadian High Commission in London, claiming damages under a private tenancy agreement. At the time when the proceedings were commenced he enjoyed the same immunity under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952 as the diplomatic staff of an ambassador. Under the Act of 1708, that immunity was absolute. By the time of the hearing, however, the Acts of 1708 and 1952 had been replaced by the Diplomatic Privileges Act 1964, which conferred immunity on administrative and technical staff only in respect of acts done in the course of their duties. Mr Smith was held to be entitled only to the limited immunity under the Act of 1964. As Diplock LJ point out by way of analogy, at p 439, "if the defendant had ceased to be en poste while the plaint was still outstanding the action could then have proceeded against him." Indeed, that was the position in *Shaw v Shaw* [1979] F 62. The wife filed a petition for a dissolution of her marriage to a diplomat-attached to the United States embassy. At the time, he was immune, but the petition was allowed to proceed once the husband's posting came to an end and he left the United Kingdom. The same view has been taken in other jurisdictions where similar issues have arisen: see Denza, *op cit*, 257-258.

50. The respondents' main answer to these points is that Mr Al-Malki's official functions extended to the employment of his domestic staff. I have rejected that submission. But they also submit that even on the footing that his official functions did not extend to the acts relied on by Ms Reyes, she did not take the point in the Court of Appeal and should not be allowed to take it here. I reject that submission also. If I thought that any injustice would be done by allowing the point to be taken in this court, I would be in favour of remitting the matter to the courts below. But I do not think so. The point was reserved shortly after judgment in the Court of Appeal and was fairly taken in the appellant's printed case in this court. The relationship between articles 31 and 39(2) always was relevant, since it is a fundamental part of the scheme of the Convention. It is not suggested that the answer can turn on any disputed point of fact. There may in due course be implications for costs, but that is another matter.

51. In those circumstances, the question whether the exception in article 31(1)(c) would have applied to Mr Al-Malki had he still been in post does not strictly speaking arise. If he had still been in post, I would have held that he was immune, because the employment and treatment of Ms Reyes did not amount to carrying on or participating in carrying on a professional or commercial activity. Her employment, although it continued for about two months, was plainly not an alternative occupation of Mr Al-Malki's. Nothing that was done by him or his wife was done by way of business. A person who supplies goods or services by way of business might be said to exercise a commercial activity. But Mr and Mrs Al-Malki are not said to have done that. They are merely said to have used Ms Reyes' services in a harsh and in some respects unlawful way. There is no sense which can reasonably be given to article 31(1)(c) which would make the consumption of goods and services the exercise a commercial activity.

The European Convention on Human Rights

52. It follows from the view that I take of the immunity claim that it is unnecessary to deal with Ms Reyes' alternative argument based on the European Convention on Human Rights.

Disposal

53. I would allow the appeal.

54. It remains to deal with the consequential orders. The present appeal has been decided on the assumption that the facts stated in Ms Reyes' evidence are true. There has been no evidence from Mr and Mrs Al-Malki, and no statement of their case on

the facts. In those circumstances, the relief sought by Mr Otty is an order remitting the matter to the Employment Tribunal to determine whether on the facts Mr Al-Malki's employment and treatment of Ms Reyes were acts done in the exercise of his functions as a member of the mission. However, before inflicting on the parties a further round of argument on the claim to immunity, I would wish to be satisfied that there is a real issue on that point in the light of this Court's judgment. As at present advised, it appears to me that there could be such an issue only if there were a dispute about the nature of the functions which Ms Reyes was employed to perform or, possibly, about the circumstances in which her employment came to an end. Accordingly, unless within 21 days written submissions are received from the parties justifying some other course, I would declare that Mr and Mrs Al-Malki are not entitled to diplomatic immunity in respect of the claims made by Ms Reyes in these proceedings and remit the case to the Employment Tribunal to determine those claims on their merits. In the case of Mr and Mrs Al-Malki, those submissions would have to identify any subsisting issue of fact going to their claim for immunity.

LORD WILSON: (who agrees with Lord Sumption, save that he expresses doubts on one point, and with whom Lady Hale and Lord Clarke agree)

55. I agree that the appeal should be allowed by reference to the apparent loss of immunity on the part of Mr Al-Malki (and therefore of Mrs Al-Malki) when in August 2014 he ceased to be a member of the Saudi mission in London and when therefore they left the UK. The loss of immunity is no more than apparent because the appeal proceeds only on assumed facts. By reference to the facts alleged by Ms Reyes, one can conclude that none of the actions taken by Mr Al-Malki in relation to Ms Reyes were "acts performed by [him] in the exercise of his functions as a member of the mission" within the meaning of article 39(2) of the 1961 Convention. But, although the court has done no more than to assume these alleged facts to be correct, it may be that Mr and Mrs Al-Malki take no real issue with this part of her allegations; and in those circumstances I subscribe to the disposal proposed by Lord Sumption in para 54 above.

56. It follows that this court will not answer in any binding form the central question presented to it in such detail and with such conspicuous ability: does an action instituted in the tribunal against a foreign diplomat in the UK by his former domestic servant brought to the UK to work in his home in (assumed) conditions of modern slavery relate "to any … commercial activity exercised by [him here] outside his official functions" within the meaning of article 31(1)(c) of the 1961 Convention?

57. I am pleased that the court will not answer that question in any binding form. Lord Sumption's emphatic answer to the question is "no". His answer is (if he will forgive my saying so) the obvious answer. It may be correct. But my personal

experience has been that, the more one thinks about the question, the less obviously correct does his answer become.

58. By reference to five aspects of the background, let me explain myself.

59. First, the UK confronts a significant problem in relation to the exploitation of migrant domestic workers by foreign diplomats. Kalayaan, the Intervener, which is the principal UK charity devoted to advising and supporting migrant domestic workers, gives the following evidence:

> (1) Between about 200 and 250 domestic workers enter the UK each year under a diplomatic overseas domestic worker's visa.
>
> (2) The proportion of domestic workers who are the victims of trafficking is considerably higher in diplomatic households than in other households.
>
> (3) Thus in one representative period 17 out of 55 referrals to the government agency set up to identify the trafficking of domestic workers related to diplomatic households whereas, had such referrals been in proportion to the number of workers in other households, there would have just been one.
>
> (4) The explanation for the high ratio of trafficked workers in diplomatic households is largely because perceived immunity from claims for compensation leads diplomats to consider that they can exploit them with impunity.
>
> (5) The perceived immunity makes trafficking with a view to domestic servitude a low risk, high reward activity for diplomats.

It was these concerns which led Mr Ewins QC, in his Independent Review of the Overseas Domestic Workers Visa dated 16 December 2015, to recommend at para 165(1) that overseas domestic workers in diplomatic households should be employed by the foreign state, which (see para 63 below) he reasonably understood to have no civil immunity, rather than by the individual diplomats; but the government appears to have rejected the recommendation.

60. Second is the universality of the international community's determination to combat human trafficking. In para 39 above Lord Sumption refers to the Palermo

Protocol 2000 which was the product of a resolution of the UN General Assembly to promote the evolution of an international instrument which addressed the trafficking of women and children. The protocol, ratified both by Saudi Arabia and the UK, contains elaborate commitments by each state party to criminalise trafficking; to make material provision for victims in aid of their physical, psychological and social recovery; by article 6(6), to "ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered"; to strengthen border controls; and so on. Then came the Council of Europe Convention on Action against Trafficking in Human Beings, adopted in Warsaw on 16 May 2005. As was noted in the explanatory report which accompanied it, trafficking in human beings was a world-wide phenomenon and had become a major scourge in Europe. The preamble to this 2005 Convention described its purpose as being to improve the protections afforded by the Palermo Protocol. Its detailed provisions for strong national mechanisms to identify trafficking and for international cooperation are irrelevant. But it is noteworthy that, by way of expansion of the requirement in article 6(6) of the Palermo Protocol that victims should obtain compensation, the 2005 Convention made clear, in article 15(3) and (4), that the obligation was to provide for victims to obtain compensation "from the perpetrators" as well as from the state; and also noteworthy that the UK claims to have discharged this obligation by, among other things, providing the facility for application to the tribunal. In my view it is irrelevant that, for obvious reasons, Saudi Arabia was unable to accede (as did the UK) to the 2005 Convention. It is equally irrelevant that, for obvious reasons, the UK was unable to ratify (as did Saudi Arabia) the Arab Charter on Human Rights adopted by the League of Arab States on 22 May 2004, which, by article 10(1) and (2), declared that no one should be held in servitude under any circumstances and that trafficking in human beings for the purposes of any form of exploitation was prohibited. The relevance of these instruments is that they underscore the equal level of determination of the UK, of Saudi Arabia and in effect of every state in the world to stamp out trafficking.

61. Third: what is trafficking and, in particular, who is guilty of it? In para 39 above Lord Sumption quotes the definition of it in article 3 of the Palermo Protocol, repeated in article 4 of the 2005 Convention. It is the definition in accepted use. For present purposes most of the definition can be omitted and what remains is:

> "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of … the abuse of power or of a position of vulnerability … for the purposes of exploitation."

As was said in para 78 of the explanatory report which accompanied the 2005 Convention, "the definition endeavours to encompass the whole sequence of actions that leads to the exploitation of the victim". As was observed by the European Court of Human Rights in *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 at para 281,

the vice of trafficking is that it "treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment …"

62. How apt (one therefore asks) is the analogy offered by Lord Sumption in paras 45 and 46 above between a purchaser of stolen goods at a cheap price and an employer, such as Mr Al-Malki, of a trafficked migrant? Neither, suggests Lord Sumption, engages in the "commercial activity" of the thief or handler of the goods and of the recruiter or transporter of the migrant. But another rational view is that the relevant "activity" is not just the so-called employment but the trafficking; that the employer of the migrant is an integral part of the chain, who knowingly effects the "receipt" of the migrant and supplies the specified purpose, namely that of exploiting her, which drives the entire exercise from her recruitment onwards; that the employer's exploitation of the migrant has no parallel in the purchaser's treatment of the stolen goods; and that, in addition to the physical and emotional cruelty inherent in it, the employer's conduct contains a substantial commercial element of obtaining domestic assistance without paying for it properly or at all.

63. Fourth is the fact that, in the words of Laws J at p 633 in the *Propend* case, cited above at para 27, diplomatic immunity is an aspect of state immunity. The parties to the 1961 Convention therefore recorded in their second recital to it that, in agreeing its terms, they had in mind the sovereign equality of states. So it must be at least relevant to notice that, in accordance with the movement in the doctrine of sovereign immunity in customary international law from being absolute to being restrictive, Parliament enacted sections 3 and 4 of the State Immunity Act 1978. Section 3(1) excludes immunity in respect of a state's entry into a commercial transaction, defined in subsection (3) as, among other things, any contract for the supply of goods or services. At the end of that subsection Parliament provided that the section did not apply to a contract of employment between a state and an individual. In the absence of that provision the section clearly would have applied to such a contract. The purpose of excluding a contract of employment from the ambit of section 3 was, so I infer, only that it required fuller treatment in a section of its own. This is section 4, which, by subsection (1), excludes immunity in respect of such a contract where made in the UK or where the work is to be performed here, albeit subject to exceptions provided in later subsections. It is true that subsection (1)(a) of section 16 of the 1978 Act purports to exclude the application of section 4 to proceedings concerning the employment of the members of a mission, including staff in its domestic service. But for present purposes the subsection can be put to one side because today, in *Secretary of State for Foreign and Commonwealth Affairs v Benkharbouche, Libya v Janah*, UKSC 0062 of 2017, this court dismisses appeals against declarations that, insofar as it bars employment-related claims against a foreign state derived from EU law, the subsection should be disapplied and that, insofar as it bars other such claims, it is incompatible with article 6 of the European Convention on Human Rights.

64. Section 5 of the Canadian State Immunity Act analogously excludes immunity from proceedings relating to a foreign state's commercial activity; and in the *Canada Labour Code* case, cited at para 33 above, the Canadian Supreme Court accepted at p 79 that a contract of employment was generally a commercial activity, while holding that the proceedings for recognition of a union's right to represent Canadian employees at the US naval base had a sovereign element sufficient to preserve the immunity.

65. I cannot readily explain why proceedings relating to a contract of employment entered into by a foreign state, for performance in the UK, will not in principle attract immunity in circumstances in which, if the contract is entered into by a diplomat, it will in principle attract immunity.

66. Fifth is the purpose of diplomatic immunity, helpfully defined in the fourth recital to the 1961 Convention as being "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". If a person's duties under a contract of employment made between her and a foreign diplomat relate to the latter's official functions, the immunity is appropriately provided, in accordance with its purpose, by the last four words of article 31(1)(c). But in the present case, for reasons explained by Lord Sumption, there is no apparent link between the duties of Ms Reyes and the official functions of Mr Al-Malki. And so if, even in that situation, diplomatic immunity were to arise, the question would become: how does that accord with its purpose?

67. The major perceived problem lies, of course, in the words of article 31(1)(c), in particular of three words "… commercial activity exercised …". The interpretation of the article is required by article 31(1) of the Vienna Convention on the Law of Treaties 1969 Cmnd 4140 ("the Vienna Convention") to be undertaken "in accordance with the ordinary meaning to be given to [its] terms … in their context and in the light of its object and purpose". So the focus is on the ordinary meaning of the words; and the purpose of the 1961 Convention is relevant only to the extent that it throws light upon their ordinary meaning. I am persuaded that, when agreeing to the terms of the 1961 Convention, the parties would have rejected any suggestion that the proceedings brought by Ms Reyes related to any commercial activity exercised by Mr Al-Malki. I am, with respect to Lord Sumption's contrary opinion expressed in para 42 above, less persuaded that, even if (which is debatable) article 31 of the 1961 Convention does not by its terms contemplate any future development of its meaning, the latter would have been unable to develop over 56 years. Article 31(3)(c) of the Vienna Convention requires the interpretation of an article to take account of any relevant rules of international law applicable in the relations between the parties; and the requirement is not further qualified. The fact that in the *Namibia* case, which Lord Sumption there cites, the international court discerned the contemplation of development within the terms of the article under scrutiny does not exclude in other circumstances the natural development of the

meaning of an article in accordance with the development of international law, in particular the emergence of an international prohibition against trafficking; nor does the absence of an ability to discern it within a term mean that the parties who agreed it intended otherwise. In *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ 161 the International Court of Justice was required to determine whether, in destroying oil platforms belonging to Iran, the US had breached an article of the Treaty of Amity which it had made with Iran in 1955. In interpreting the article the court, at para 41, turned to current rules of international law on the use of force without considering whether the article had expressly contemplated future development of its meaning. It was enough that the parties could not have intended that the article be interpreted without reference to them.

68. The other perceived problem is that an international treaty calls for international interpretation "by reference to broad principles of general acceptation" (*Stag Line, Ltd v Foscolo, Mango and Co, Ltd* [1932] AC 328 at 350); and never more obviously than when every state despatches its diplomats abroad in expectation of their protection under it. So it would be a strong thing for this court to diverge from the US jurisprudence set out in the *Tabion* case, cited in para 23 above, and to adopt the robust interpretation of article 31(1) for which Ms Reyes contends. On the other hand it is difficult for this court to forsake what it perceives to be a legally respectable solution and instead to favour a conclusion that its system cannot provide redress for an apparently serious case of domestic servitude here in our capital city. In the event my colleagues and I are not put to that test today. Far preferable would it be for the International Law Commission, mid-wife to the 1961 Convention, to be invited, through the mechanism of article 17 of the statute which created it, to consider, and to consult and to report upon, the international acceptability of an amendment of article 31 which would put beyond doubt the exclusion of immunity in a case such as that of Ms Reyes.

LADY HALE AND LORD CLARKE: (who agree with Lord Wilson)

69. We agree, for the reasons given by Lord Sumption in that connection, that if article 39 applies, then Mr and Mrs Al-Malki are not entitled to immunity. We also agree with his proposed disposal of the case. It follows that the proper construction of article 31(1)(c) does not arise. However, had it arisen, we would associate ourselves with the doubts expressed by Lord Wilson as to whether the construction adopted by Lord Sumption in this particular context is correct especially in the light of what we would regard as desirable developments in this area of the law.