Neutral Citation Number: [2022] EWCA Civ 1595

Case No: CA/2022/001029

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
Mr Justice Nicklin
[2022] EWHC 668 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 December 2022

Before:

LADY JUSTICE KING
LADY JUSTICE SIMLER
LORD JUSTICE POPPLEWELL

- -

Between:

Corinna Zu Sayn-Wittgenstein-Sayn	**Claimant/ Respondent**
- and -	
His Majesty Juan Carlos Alfonso Victor María de Borbón y Borbón	**Defendant/ Appellant**

Timothy Otty KC, Paul Luckhurst and Professor Philippa Webb (instructed by **Carter-Ruck**) for the **Applicant**
James Lewis KC and Andrew Legg (instructed by **Kobre & Kim (UK) LLP**) for the **Respondent**

Hearing date: 9 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler:

Introduction

1. The appellant is the former King Juan Carlos I of Spain. He abdicated on 18 June 2014, in favour of his son, King Felipe VI, though he remains entitled to use the title King and the style "His Majesty". The respondent is a Danish national who was a resident of Monaco between 2008 and 2009. She lives in London and Shropshire.

2. The appellant and respondent were in an intimate relationship from 2004 to 2009. In the underlying proceedings issued by the respondent on 16 October 2020, the respondent alleges that, from 2012, the appellant engaged in a course of conduct amounting to harassment pursuant to the Protection from Harassment Act 1997. She seeks damages and an injunction in respect of acts both prior to and after the abdication. I emphasise at this stage, that there has, as yet, been no decision about whether any of the allegations she makes are true. The appellant emphatically denies that he engaged in, or directed, any harassment of the respondent and rejects her allegations to the contrary as untrue. In respect of the part of the claim period which is not barred by some form of immunity, he has also reserved the right to dispute jurisdiction on other grounds.

3. The harassment claim, as originally pleaded in the Particulars of Claim, contained a number of allegations about the conduct of the appellant and General Sanz Roldán, the Head of the Spanish National Intelligence Agency ("the CNI") during the period before his abdication, when the appellant was sovereign and head of state. By an application notice dated 18 June 2021 the appellant sought an order declaring that the court had no jurisdiction to try those (and later) allegations because he was entitled to immunity under the State Immunity Act 1978 ("SIA").

4. Nicklin J dismissed the application. He held, in summary, that:

   (a) the appellant was not entitled by virtue of his special constitutional position in Spain as a "*sovereign*", to the personal immunity afforded under section 20(1)(a) SIA following his abdication;

   (b) nor was he a member of the household of King Felipe VI for the purposes of immunity under section 20(1)(b) SIA;

   (c) so far as the pre-abdication acts are concerned, the claim for harassment was not (even arguably) within the sphere of governmental or sovereign activity for the purposes of section 14(1) SIA. On the contrary, harassment is an act that any private citizen can perform;

   (d) as for the individual acts relied upon as part of the course of conduct amounting to harassment, these did not give rise to functional immunity under section 14(1) SIA;

   (e) in particular, in relation to the alleged covert operation to gain entry to the respondent's home in Monaco, a case of functional immunity under section 14(1) SIA was not made out on the basis of the case as it then stood, but the judge observed

that if evidence subsequently emerged which suggested that those who arranged or undertook the search were "state-sponsored" the issue could be revisited;

(f) in relation to other acts alleged to have been carried out by General Sanz Roldán, the mere fact that the General was Director of the CNI was not enough to justify treating harassing threats, by email or telephone, as having been done in that capacity;

(g) finally, the respondent's reliance on the exception to state immunity in section 5 SIA was rejected because her claim included no claim to have sustained a recognised psychiatric injury as a result of the alleged harassment and was therefore not a claim for personal injury within the terms of section 5 SIA.

5. Nicklin J refused permission to appeal.

6. Following an oral hearing, permission to appeal to this court was granted by Underhill and Peter Jackson LJJ on three of the five grounds advanced at that stage (grounds 1, 2 and 4). Permission was limited to challenging the findings that the appellant has no claim to functional immunity under section 14(1) SIA. The appeal is, accordingly, limited to the allegations of conduct that pre-dated the abdication. These are pleaded at paragraphs 15 to 23 of the Particulars of Claim, as acts of harassment of the respondent, including the covert search of her home in Monaco, done or procured by General Sanz Roldán "under the direction or with the consent" of the appellant. The specific allegations are discussed further below. It is common ground that even if the appellant succeeds on grounds 1, 2 and 4 that will not be fatal to the respondent's claim, since she pleads post-abdication acts of harassment in respect of which state immunity cannot arise. But so long as the pre-abdication conduct remains part of her case, the appellant is entitled to pursue his objection to them.

7. In addition to the reasons shortly summarised above for rejecting the claim to functional immunity under section 14(1) SIA, at [75] of the judgment, Nicklin J indicated that parts of the original pleading were ambiguous as to the details of the pre-abdication acts and the role of General Sanz Roldán in particular, and said:

> "For the sake of clarity in the future conduct of the [respondent's] claim … the [respondent] should, as Mr Lewis QC offered, make it clear in her Particulars of Claim that the acts alleged against General Sanz Roldán are said to be acts of his in his personal capacity, not as head of the CNI or other official capacity."

The judge proceeded on that basis in his judgment, and at paragraph 6 of the order he made, dated 29 March 2022, giving effect to his judgment, he gave the respondent permission to amend in accordance with that offer. The respondent served Amended Particulars of Claim on 12 April 2022, making the amendment directed at [75] of the judgment (together with a number of additional amendments, including deletion of references to the CNI, which are said by the appellant to have gone beyond the scope of [75]). The Amended Particulars of Claim as served now contain the following (among other) averments:

> "13. General Sanz Roldán acted in his personal capacity on behalf of the Defendant and not in any official capacity in respect of this and every other allegation involving him made in these Amended Particulars of Claim".

8. The grounds of appeal challenge the judge's substantive decision that the claim to functional immunity under section 14(1) SIA was not made out, together with his approach to the proposed amendment. The grounds are:

(a) in reaching his substantive conclusion, the judge adopted an erroneous approach to the legal test by considering only whether the cause of action (namely, harassment) was of a nature that any private citizen could perform, and by failing to conduct a closer analysis of the individual acts alleged and, in particular, to consider whether they were done "under colour of authority" whatever their motive (ground 1);

(b) the judge wrongly proceeded on the basis of an anticipated amendment, in the absence of any formal application to amend, without sight of draft proposed amendments or any examination of the merits of the proposed amendment. He compounded the error by giving permission to amend on an anticipated basis in the course of hearing the state immunity application and this constituted a serious procedural irregularity (ground 2); and

(c) wrongly and in error of law, the judge concluded that he could defer resolution of the immunity plea in relation to the alleged targeting of the respondent's home in Monaco (pleaded at paragraph 16 of the Particulars of Claim) and relied on this possibility in support of his dismissal of the immunity claim (ground 4).

9. The appeal is opposed. The respondent seeks to uphold the judgment for the reasons given by the judge. Alternatively, by way of a Respondent's Notice the respondent contends that if there would otherwise be immunity in respect of these acts, the statutory exception for personal injury claims applies pursuant to section 5 SIA. The judge concluded that, while the respondent did not need to rely on this exception, her claim was not a claim for personal injury. She submits that this was an error of law and the judge was wrong to reject her reliance on section 5 SIA (as he did at [76] of the judgment).

10. In addition, by an application dated 6 October 2022 the respondent sought to rely on an "Unagreed Bundle" of documents not before the judge. The application was opposed. The Unagreed Bundle includes a proposed draft Re-Amended Particulars of Claim, and a letter from Kobre & Kim (UK) LLP (solicitors for the respondent) dated 26 September 2022, explaining that new information has come to light since the Particulars of Claim were filed. In his skeleton argument on behalf of the respondent, Mr Lewis KC asserted that the draft Re-Amended Particulars of Claim are significant to the appeal because new information is now available about the motivation and objectives of the appellant's alleged harassment (the "Lucum gift" allegations said to have been inimical to his status and role as sovereign); together with allegations against a private company identified as the "Eulen Group" allegedly founded by the appellant's close friend, which appear to replace certain allegations previously made against the CNI; and new allegations about the relationship between the appellant and General Sanz Roldán. These allegations are now newly pleaded in the proposed draft Re-Amended Particulars of Claim. There is also an express plea of personal injury based on a medical report dated 12 June 2022 from Dr Frank

Farnham, said to document the respondent's depression of mild to moderate severity, an anxiety disorder of mild to moderate severity, and symptoms suggestive of post-traumatic stress disorder.

11. The appellant has not consented to any of the proposed re-amendments; and the respondent has not, in fact, made any application for permission to re-amend in the terms of the proposed draft. Nonetheless, in writing, Mr Lewis suggested that this court should consider the re-amended pleading as curing any defects in the original pleading. This is particularly so he submitted, since they are consistent with and supportive of the respondent's case before the judge that the context of the conduct as a whole demonstrates that the alleged acts were not sovereign activity undertaken by the appellant in his public capacity as King under colour of authority, but private acts not susceptible to a claim of functional immunity, as the judge found. To have regard to the draft pleading would be just in all the circumstances.

12. During the hearing before this court, Mr Lewis accepted that an application to re-amend could (and should) have been made. He made clear that he did not rely on documents contained in the Unagreed Bundle, or on the re-amended pleading, as evidence of the truth of its contents. Rather, he submitted that the new material simply supports the case he wishes to run at trial. Mr Lewis maintained his reliance on the letter of 26 September 2022, said to have been written without waiver of privilege. During the course of the hearing, Popplewell LJ drew Mr Lewis' attention to the risk of associated waiver of privilege in these circumstances. Mr Lewis maintained, on instructions, that this letter continued to be deployed to support the case the respondent wishes to run. In light of Mr Lewis' stance, the Unagreed Bundle was admitted *de bene esse* without determining the admissibility of each document. The appellant did not oppose that approach.

The applicable legal framework

13. Before the SIA was enacted, the ambit and extent of state immunity was governed by the common law (and customary international law). The SIA replaced and codified the domestic law on state immunity. Under the SIA foreign states and their officials are immune from proceedings in the English courts, unless a recognised exception within the SIA applies. As a matter of domestic law, because the SIA is a complete code, if the case does not fall within one of the express statutory exceptions, the state is immune: see *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777 at [39] per Lord Sumption JSC.

14. Sections 1 and 14(1) SIA apply to civil proceedings. There is an exception in section 5 which is also relevant to this appeal. The relevant provisions are accordingly as follows:

> "**s.1 General immunity from jurisdiction**
> (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.
> …
>
> **s.5 Personal injuries and damage to property**

> A State is not immune as respects proceedings in respect of—
> (a) death or personal injury; or
> (b) damage to or loss of tangible property,
> caused by an act or omission in the United Kingdom.
> …
>
> **s.14 States entitled to immunities and privileges**
> (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—
> (a) the sovereign or other head of that State in his public capacity;
> (b) the government of that State; and
> (c) any department of that government,
> but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.
> (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
> (b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.
> (3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.
> …
> (5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State."

15. The general approach is well-established and is as follows.

16. State immunity (*ratione personae*) attaches for acts performed by a head of state while in office. But even after a head of state (or other agent of the state) leaves office, they continue to enjoy immunity *ratione materiae* for acts performed by them as head of state (or agent of the state) while in office, under sections 1(1) and 14(1) or section 14(2) SIA. In *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 ("*Pinochet No3"*), Lord Goff identified the critical question to be addressed in deciding whether immunity *ratione materiae* applies as follows (at 210B):

> "The effect is that a head of state will, under the statute as at international law, enjoy state immunity *ratione personae* so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity *ratione materiae* 'in respect of acts performed [by him] in the exercise of his functions [as head of state], the critical question being 'whether the conduct was engaged in under colour of or in ostensible exercise of the head of state's public authority'... In this

> context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not."

17. The explanation for this was given by Lord Phillips in *Pinochet No3* at 286A:

> "There would seem to be two explanations for immunity *ratione materiae*. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damages made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have nonetheless, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine."

18. The immunity is that of the state. It can therefore only be waived by the state itself. As Lord Saville explained in *Pinochet No3* at 265:

> "These immunities belong not to the individual but to the state in question. They exist in order to protect the sovereignty of that state from interference by other states. They can, of course, be modified or removed by agreement between states or waived by the state in question."

19. Moreover, it is not open to this court to adjudicate upon the legality of the foreign state's acts. As Lord Millett said in *Pinochet No3* at p. 270:

> "The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or unconstitutional under its own domestic law."

20. Where a claim is brought against officials, servants or agents of a foreign state in respect of acts done by them, the foreign state is entitled to claim immunity for its servants or agents as it could if sued itself.

21. If state immunity is established, it is for a claimant to establish, to the civil standard, an exemption to that immunity (for example, under section 5 SIA).

22. Whenever the question arises under the SIA as to whether a state is immune by virtue of section 1 or not immune by virtue of one of the exceptions, the question must be decided as a preliminary issue in favour of the claimant, in whatever form and by whatever procedure the court may think appropriate, before the substantive action can proceed: *J.H. Rayner Ltd. v. Department of Trade* [1989] Ch 72 per Kerr LJ at 194 and Ralph Gibson LJ at 252. If there are disputed matters of fact upon which the claim for immunity would depend, then the court can direct the trial of those

matters as a preliminary issue: *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536, at 550-551, per Ward LJ. Before taking that course, the court assumes the facts pleaded in the claimant's statement of case to be true, and determines whether they would give rise to immunity if true: *Jones v Ministry of the Interior of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 per Lord Bingham at [13]; *Belhaj v Straw* [2017] AC 964 per Lord Sumption JSC at [179].

The pleaded case and the judgment below

23. The pleaded claim of harassment in the period from April 2012 to 18 June 2014 is set out in paragraphs 15 to 23 of the (original) Particulars of Claim. It is not in dispute that immunity can attach to individual acts complained of as part of a course of conduct.

24. The detailed Particulars of Claim were supported by the respondent's sworn statement of truth dated 29 December 2020. The judge redacted the name of the private company referred to in the pleading, and I have retained the same redactions. The Particulars of Claim alleged:

> "4. The [appellant] himself, or by his servants or agents, pursued a course of conduct targeted at the [respondent] which amounts to harassment. … The [appellant] used his agents and those of the Spanish State and/or their contractors to carry out some of the elements of the said course of conduct, as set out further below. …
>
> 13. As detailed below, the Claimant was later informed by General Felix Sanz Roldán, the head of the Spanish National Intelligence Agency known as the 'Centro Nacional de Inteligencia' ('CNI'), that he had been responsible for deliberately leaking the identity of the Claimant to the media. He did not offer any reasonable explanation as to why he had done so. Thereafter General Sanz Roldán, the Defendant's agents and/or agents or contractors of the CNI acting on the Defendant's instructions placed the Claimant, and others close to her, under physical surveillance which included vehicle and personal surveillance, trespassing onto her property at which she was residing and hacking into her/their telephones and computers.
>
> …
>
> 16. During April to June 2012 General Sanz Roldán, acting under the direction or with the consent of the Defendant, co-ordinated a covert operation to enter and search the Claimant's office and apartment in Monaco. General Sanz Roldán utilised armed operatives from the Monégasque security company, [X], as a cover for the operation in order to enable a CNI team dispatched from Spain to gain access to her property without her consent. Operatives from [X company] informed the Claimant that 'the Spanish sweeping team' were arriving on 4 June from Madrid and would need five days 'to sweep' her office and apartment. Business and personal documents belonging to the Claimant had been examined and/or copied and some removed during the operation, without her consent.
>
> 17. The Claimant was told by the Defendant, and by General Sanz Roldán, that [X company] had been engaged to protect her from the paparazzi and from journalists who might steal documents. However, the true objectives of the Defendant were: to find and remove any documents in her possession related to

his business and financial dealings; to ascertain any information about the Claimant which might be used to pressurise her to comply with his wishes; to prevent her from providing information in respect of anything which might incriminate him; and to install surveillance equipment.

18. General Sanz Roldán contacted the Claimant on a number of occasions by email and telephone using the alias 'Paul Bon'. 'Paul Bon' made it clear that he was acting under directions from the Defendant. The Defendant confirmed that this was the position in the course of telephone conversations between the Claimant and the Defendant during the period between April and June 2012.

19. In early May 2012 the Defendant told her that General Sanz Roldán would be arriving in London in order to meet with her in person, in terms that made it clear that he required her to meet with the General. The Claimant and General Sanz Roldán met in the Claimant's hotel room at the Connaught Hotel on 5 May 2012 at the Defendant's insistence. During the meeting he threatened the Claimant and her family by stating that he could 'not guarantee her physical safety or that of her children' unless she complied with what he described as 'recommendations' but which were, in fact, orders. This threat reasonably made the Claimant fear for her life and that of her children. The words themselves were clear and sinister but they were made all the more so by the fact that they were made by the head of the CNI on the Defendant's behalf in the United Kingdom, and whilst the Monaco operation was ongoing.

20. The Claimant travelled the same day to her apartment in Villars, Switzerland to visit her son. On arrival, the Claimant found that papers had been disturbed within her apartment and a copy of a book on the death of Princess Diana had been left on a coffee table (which, for the avoidance of doubt, did not belong to the Claimant and had not been there before). The book was entitled 'Princess Diana: The Hidden Evidence, How MI6 and the CIA were involved in the death of Princess Diana'. That evening she received a telephone call from an unknown person who said, in Spanish, that 'there are many tunnels between Monaco and Nice' – it is averred that the telephone call and placement of the book are obviously connected.

21. On 17 May 2012, 'Paul Bon' (i.e. General Sanz Roldán) sent the Claimant an email stating that the 'services' that had been provided to her at her Monaco home and office were no longer necessary and that he would let [X company] know that going forward the Claimant or any person she designated would be exclusively dealing with her security. Mr 'Bon' added one 'last recommendation'. He said that it was 'advisable' for the Claimant to keep a security guard at her premises 'until the moment you send the black boxes with the documents to the place of your chose [sic].' Mr 'Bon' expressly stated that the Defendant had been informed of ‘this intention’. The Claimant reasonably construed this as a threat to her person.

22. In one telephone call General Sanz Roldán threatened the Claimant that there would be consequences if she did anything against the Defendant's interests. The Claimant telephoned the Defendant in Madrid about this threat and on 18 May 2012 ‘Paul Bon’ responded by email stating that there had been a misunderstanding.

> 23. On 11 June 2012, the Claimant received a further email from 'Paul Bon' referring to a number of matters which made allegations which were inculpatory of the Claimant and her business or financial affairs. The allegations were false and were partly based on documents which had been stolen and/or information obtained from her office/apartment in Monaco in April/May. The email said: 'Any leak of this information would have a devastating effect at this moment for the Institution and Your image'. The email was reasonably construed by the Claimant as a threat that these allegations would be leaked to the media if the Claimant failed to co-operate with the Defendant and General Sanz Roldán."

There are a number of other relevant paragraphs but it is unnecessary to set these out at this stage.

25. Having summarised the submissions of the parties on the question of functional immunity, the judge set out his reasons and conclusions under the heading "Functional immunity under section 14 SIA". He made clear that he found this issue difficult. He continued:

> "67. The boundary between a private act and a sovereign/public act is not always easy to draw. On the authority of ***I Congreso*** the Court is required to focus on "*the relevant act which forms the basis of the claim*". The claim is for harassment. The acts in respect of which functional immunity is claimed by the Defendant form only part of the alleged course of conduct relied upon by the Claimant. My task is to consider "*the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s)... should, in that context be considered as fairly within an area of activity… 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*": ***I Congreso*** (see [49] above); and that I should "*identify the character of the act considered in its context*": ***Surkis -v- Poroshenko*** [53].
>
> 68. Applying that test, the outcome would be clear. The claim for functional immunity would fail. The claim for harassment, made up of several constituent elements alleged against the Defendant, is not (even arguably) within the sphere of governmental or sovereign activity. The alleged course of conduct amounting to harassment is not "*of its own character a governmental act*": ***Kuwait Airways*** (see [50] above). On the contrary, harassment is an act that any private citizen can perform.
>
> 69. Can functional immunity nevertheless be claimed in respect of individual acts relied upon as part of the course of conduct amounting to harassment? From the submissions of the parties, it appears that they are agreed that a claim for immunity can be maintained in respect of individual acts relied upon by the Claimant to support her claim for harassment. However, one of the difficulties of approaching that issue is that, in her Particulars of Claim, the claim is pleaded on several bases as to who it was that actually carried out the acts said to amount to harassment.

70. In paragraph 13 of the Particulars of Claim (see [8] above), it is alleged that: "*General Sanz Roldán, the Defendant's agents and/or agents or contractors of the CNI acting on the Defendant's instructions placed the Claimant… under physical surveillance which included vehicle and personal surveillance, trespassing onto her property… and hacking into her/their telephones and computers*". It is of some significance, for the claim to state immunity, whether the acts of surveillance and physical intrusion onto the Claimant's property were done by agents of CNI or other "*contractors*". No state immunity could be claimed in respect of the latter. Some acts of surveillance can only be carried out by state operatives, others can be carried out by well-resourced and skilled civilians.

71. In respect of the alleged targeting of the Claimant's home (see Paragraph 16 of the Particulars of Claim), the operation is said to have been directed by General Sanz Roldán ("*under the direction or with the consent of the Defendant*") utilising "*armed operatives from a Monégasque security company*". The precise circumstances of this alleged trespass into the Claimant's property are, at the moment, unclear. For a claim to state immunity, there is a big difference between a mission to gain access to the Claimant's property which was authorised, directed, and executed by CNI operatives, and a mission that was carried out by "*contractors*", with which the Spanish state had no involvement. Both could have been "*directed*" by the Defendant, but only in respect of the former could there be any conceivable claim to functional immunity.

72. I do not have enough information – or evidence – about the alleged operation which targeted the Claimant's Monaco home to resolve the question of functional immunity in respect of this alleged incident. I am not satisfied, on the pleaded case, that it raises an obvious claim to state immunity. Whether such a claim could be maintained, and on what basis, would require further investigation of the factual circumstances and who, precisely, carried out the operation and in what capacity. If, for example, credible evidence emerges that the operation to gain entry to the Claimant's home was a state-sanctioned mission conducted by CNI operatives (or under their supervision), then the point can be revisited later in the proceedings. As matters stand, I am very far from convinced that there could be any claim to functional immunity on the grounds advanced by the Defendant. If the Spanish state wishes to step forward and to maintain that the trespass onto her property in Monaco (or other acts of covert surveillance) are protected by state immunity, then it will have an opportunity to do so. In reaching this conclusion, I have taken into account that the claim will be continuing in any event. The point in dispute here relates to one incident relied upon by the Claimant as an alleged act of harassment. Even if upheld, the immunity claim cannot dispose of the Claimant's claim.

73. Mr Lewis QC's further point that the trespass into the Claimant's Monaco home was an act that took place outside Spain (see [54] above) is not one that I need to resolve, but had it been material, this objection appears to be well-founded.

> 74. In my judgment, the remaining pre-abdication acts of alleged harassment (Paragraphs 19-23 of the Particulars of Claim) cannot attract any functional immunity. Apart from the suspicious circumstances in which the Claimant discovered the book about Princess Diana left in her apartment in Switzerland, and the telephone call she received later that evening (neither of which is directly attributed to state actors), the only connection to the Spanish state in relation to the remaining acts is that they are alleged to have been carried out by General Sanz Roldán. But the making of allegedly harassing threats, by email or by telephone, by a high-ranking state official does not, without more, make them state acts. ***Mallén -v- United States*** (cited by Calver J in ***Surkis -v- Poroshenko***) usefully demonstrates the difference. The assault of the Mexican consul by a US deputy constable in the street on a Sunday night, while on a private outing was held to be "*a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official*". A later incident, when the constable was on duty, in which he boarded a vehicle in which the consul was travelling and assaulted him was, by contrast, properly to be regarded as a "*public act*". The recent case of ***Fernando -v- Sathananthan*** **[2021] EWHC 652 (Admin)** [37]-[40] also helpfully analyses the difference "*between acts performed qua diplomat and acts performed in a personal capacity*".
>
> 75. For the sake of clarity in the future conduct of the Claimant's claim, I consider that the Claimant should, as Mr Lewis QC offered, make it clear in her Particulars of Claim that the acts alleged against General Sanz Roldán are said to be acts of his in his personal capacity, not as head of the CNI or other official capacity."

26. The Respondent served Amended Particulars of Claim on 12 April 2022, in accordance with the offer recorded at [75] of the judgment. Again, the pleading is supported by a statement of truth signed and dated by the respondent. Paragraph 4 was amended as follows:

> "4. The Defendant used his agents [*with the original words*, and those of the Spanish state *red-lined through*] and/or their contractors to carry out some of the elements of the said course of conduct, as set out further below."

Paragraph 13 as amended read:

> "13. … General Sanz Roldán acted in his personal capacity on behalf of the Defendant and not in any official capacity in respect of this and every other allegation involving him made in these Amended Particulars of Claim. Thereafter General Sanz Roldán, and/or other of the Defendant's agents [*with the original words*, and/or agents or contractors of the CNI *red-lined through*] acting on the Defendant's instructions placed the Claimant, and others close to her, under physical surveillance …"

A similar amendment was made to paragraph 19 asserting that General Sanz Roldán acted in his personal capacity. Amendments deleting all references to the CNI were made at paragraphs 16, 42.4, 42.5, 43, 46.1, 46.5, 46.7, 47, 50, 52 and 56.2.

27. As Mr Lewis accepted, the respondent has not provided any explanation for the deletion of material allegations from a pleading she had previously supported with a

signed statement of truth. Despite the letter of 26 September 2022, he acknowledged that there is no statement from her that she no longer believes her original allegations to be true, or explaining the basis for her newly changed belief about the matters originally pleaded (including the positive allegations of the involvement of the CNI in her harassment) but now deleted in her amended pleading.

The submissions of the parties on the question of functional immunity

28. Mr Otty KC, who appeared on behalf of the appellant before us but not below, submitted that there was no ambiguity in the respondent's pleaded case: she expressly alleged that the appellant used his agents and agents of the Spanish state to pursue a course of harassment against her. The conduct was alleged to have occurred when he was a serving head of state and the sovereign of Spain. The pleading also expressly alleged that General Sanz Roldán acted "under the direction or with the consent" of the appellant. These were specific allegations not said to be based on inference. Whatever their alleged private or improper motivation, a proper application of the principles of state immunity, including the "colour of authority" test, should have led inevitably to the conclusion that the pre-abdication conduct fell within the scope of section 14(1) SIA. In reaching the contrary conclusion, Mr Otty submitted in summary, that the judge made the following errors. First, he wrongly focussed on the generic label or cause of action of harassment, rather than analysing the detail of the individual acts alleged, and having done so, he wrongly reasoned that the conduct was not "of its own character a governmental act" but of a nature that any citizen could perform and failed to apply the "colour of authority" test. Secondly, his finding at [70] to [71] that no immunity could apply to the conduct of private contractors acting on the appellant's instructions was wrong as a matter of international law: the acts of contractors acting as agents of the CNI or a serving sovereign, would be attributable to the Spanish state in the same way as conduct of the CNI. Moreover, the pleaded case expressly alleged the involvement of "a CNI team despatched from Spain" and that General Sanz Roldán, as Director of the CNI, was centrally involved. Thirdly, it was not open to the judge to rely on the possibility of deferring determination of the immunity claim. Immunity is a bar to jurisdiction. The immunity claim had to be adjudicated on as a preliminary issue and could not be deferred until trial of the substantive claim. Fourthly, the judge was wrong to hold that the acts of General Sanz Roldán were not themselves state acts (see [72] and [74]). Finally, and although the judge did not formally determine the point, the indication at [73] that the respondent would have succeeded because the conduct alleged involved criminal acts occurring outside Spain, was wrong: state immunity in civil proceedings applies to extra-territorial conduct attributable to States on the international plane, even where the conduct is unlawful.

29. Functional immunity was not at any stage conceded and nor did the appellant somehow disavow reliance on section 14(1) SIA.

30. Furthermore, it was wrong in principle (and procedurally unfair) for the judge to proceed on the basis of a hypothetical statement of case that was not before the court and for which there was no formal (or indeed any) application. The immunity claim should have been decided on the basis of the case as originally pleaded. The absence of procedural rigour in the present context was particularly irregular: it meant there was no examination of whether the offer to amend was a contrived, and therefore impermissible, attempt to avoid an immunity barrier to jurisdiction, particularly

having regard to the fact that the Particulars of Claim were backed by a statement of truth by the respondent herself and the withdrawal of clear allegations made against the Director of the CNI acting as such, required a clear explanation.

31. Mr Lewis resisted those submissions and contended that there is no basis to interfere with the judge's rejection of the appellant's claim to state immunity pursuant to section 14(1) SIA to bar the pre-abdication allegations. Although at one stage Mr Lewis appeared to put forward a different test for functional immunity to the one he had advanced in writing as common ground, he reverted to the position that section 14(1) is not engaged unless the actions of the former head of state (while head of state) were acts in his public capacity, accepting that the test does not require the official to have the power to do the impugned acts, provided that he or she purports to exercise public authority, the critical question being "*whether the conduct was engaged in under the colour of or in ostensible exercise of the head of state's public authority*" (see Lord Goff in *Pinochet No 3*, considered further below).

32. Mr Lewis submitted, in summary, that the judge had this test well in mind, alongside the distinction between governmental and private acts which is the correct starting point. The judge referred extensively to the relevant authorities (particularly *Surkis v Poroshenko* [2021] EWHC 2512 (Comm)) where the test is discussed, and the reference to *Francisco Mallén v United States, Docket No. 2935,* Opinion dated 27 April 1927, 21 American Journal of International Law 777 (1927) at [74], is a clear indication that the judge had the relevant distinction in mind. An analysis of the "character of the act considered in its context" is required. Mr Lewis emphasised that where the acts complained of are private in nature, there is a strong inference that they are not done in a public capacity: harassment of a domestic partner is a quintessentially private act. The second stage is to consider whether the juridical character of the act is affected by motivation – here he relied on the purely private motivation of the appellant as originally pleaded, and by reference to the Lucum gift allegations in the draft amended pleadings. The new information now pleaded demonstrates that the allegations concern conduct of the appellant, following the breakdown of an intimate romantic relationship, that was wholly inimical to the interests of the Spanish state, and was certainly not in his public capacity. This is not a question of the use of public power for private motivations so as to give rise nevertheless to immunity, but the actions of the appellant in his private capacity for his own hidden agenda.

33. Moreover, the acts were not done under the colour of authority and the judge was right to find, at [69]-[74], that individual elements of the allegations did not give rise to functional immunity. He was right to consider the broader course of conduct (particularly given the harassment context) and that it was concerted action to pressure the respondent into complying with the appellant's personal wishes. He was also right to regard the Particulars of Claim as ambiguous in relation to the role of General Sanz Roldán and the pleaded contractors, and was entitled to accept the respondent's explanation that no case was advanced against General Sanz Roldán as head of the CNI, and by extension against the CNI itself. That position was reflected in the Amended Particulars of Claim.

34. Mr Lewis invited the court to proceed on the basis of the Amended Particulars of Claim, because, even if contrary to his submissions, the amendment went further than was permitted, or the judge was wrong to allow the amendment when he did,

an application to amend will be pursued to ensure that the respondent's true case is advanced at trial. The same arguments would then be pursued, and that would be futile. He supported the judge's conclusion that the pleadings were ambiguous and submitted that a discretionary case management decision permitting an amendment to clarify that ambiguity should not be interfered with on appeal. In any event, he contended that functional immunity was not made out on the face of the original pleading. The context is clear; the mere fact that General Sanz Roldán was involved was insufficient to establish that acts other than the Monaco raid were state acts; given that neither the appellant nor Spain dispute the nature of the appellant's close friendship with General Sanz Roldán, one can confidently conclude that there is no immunity on the basis that the appellant could only have influenced General Sanz Roldán as King.

35. Mr Lewis also submitted that the judge's observations about whether immunity could apply to private contractors has been misconstrued: the judge did not say that use of private contractors could never be subject to immunity, but rather, that "a mission that was carried out by 'contractors' with which the Spanish state had no involvement". This is correct as a matter of law. Likewise, he submitted that the judge was correct to conclude that, even if acts might otherwise be regarded as done in the appellant's public capacity, the argument that there can be no functional immunity in respect of criminal or tortious activities undertaken on behalf of the appellant outside Spain, was well founded and provided a further basis for rejecting the appellant's reliance on section 14(1)(a) SIA.

Discussion and conclusions in relation to the claim of functional immunity

36. The test under section 14(1) SIA requires consideration of whether the appellant, at a time when he remained the sovereign, was acting in a private or public capacity.

37. Clear guidance on the correct approach to questions of functional immunity was given in *Jones v Ministry of Interior of Saudi Arabia*, where the claimants alleged that they were tortured by members of the Saudi Arabian police. They brought civil proceedings against both the responsible officers and the Kingdom of Saudi Arabia itself. This court held that the Kingdom was protected by state immunity but because torture cannot constitute an official act, the officers' conduct fell outside the scope of their official activity, and they were not therefore protected by the immunity. The House of Lords (in speeches of Lord Bingham of Cornhill and Lord Hoffmann with whom the other members of the committee agreed) held that both were protected.

38. At [12] Lord Bingham explained:

> "12. International law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible save where an established exception applies. …"

He referred to the commentary on article 4 of the International Law Commission ("ILC") Draft Articles on the Responsibility of States for Internationally Wrongful Acts issued in 2001, which states:

> "A particular problem is to determine whether a person who is a state organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or maybe abusing public power. *Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the state*." (emphasis added)

He observed that article 7 took the matter further in relation to acts in excess of authority, by making clear that the conduct of an organ, entity or person

> "empowered to exercise elements of the governmental authority shall be considered an act of the state under international law *if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions*." (emphasis added)

Lord Bingham referred to the commentary on article 7, which referred to the emphasised expression "if the organ, person or entity acts in that capacity", continuing:

> "This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the state. In short the question is whether they were acting with apparent authority."

39. He said that state immunity is a procedural rule going to the jurisdiction of the national court – where it applies, the national court has no jurisdiction to exercise. It is an absolute preliminary bar, precluding any examination of the merits: "*A state is either immune from the jurisdiction of the foreign court or it is not. There is no half-way house and no scope for the exercise of discretion.*": [33].

40. Lord Hoffmann started with the proposition that, as a matter of international law, the same immunity that protects the state against suit in a foreign domestic court, also protects the individuals for whom the state is responsible: [66]. The acts for which the state is responsible are "*acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law*.": [74]. Ulterior or improper motives of the person concerned, or where the person may be abusing public power, are all irrelevant: [76]. At [78] Lord Hoffmann held:

> "78. It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity."

41. This was the approach correctly applied to uphold the immunity of the former President of Ukraine under section 14 SIA in *Surkis* where Calver J rejected the argument that the alleged conduct was undertaken for private purposes, holding that it arose out of the President's position and his ability through that position to exert influence over other public officials. The fact that the President was said to be abusing his power for reasons of his own was held to be irrelevant. Similarly

in *Fawaz Al Attiya v Hamad Bin-Jassim Bin-Jaber Al Thani* [2016] EWHC 212 (QB), a claim against a former senior public official of Qatar who allegedly had a private grievance against and induced other public officials to take detrimental action against the claimant, Blake J (at [25]) found it difficult to see how the "*two hats can be severed and how the alleged private motive in inducing the torts can be separated from the public office that gave the defendant the status and the ability to direct others and issue instructions*."

42. Having identified the approach, and notwithstanding the amended pleadings in this case, it is appropriate to start my consideration of the claim to functional immunity by reference to the case as originally pleaded in the Particulars of Claim, which is assumed for these purposes to be true.

43. The pleaded case alleged at paragraph 4 that the appellant "*himself, or by his servants or agents, pursued a course of conduct targeted at the [respondent] which amounts to harassment ... The [appellant] used his agents and those of the Spanish State and/or their contractors to carry out some of the elements of the said course of conduct, set out further below*." The only people thereafter identified who could be within the description of agents of the Spanish state are General Sanz Roldán and the CNI. The inference is that where they are mentioned thereafter in the pleading, that is the capacity in which they are acting. In other words, General Sanz Roldán and the CNI were state actors.

44. General Sanz Roldán is first identified at paragraph 13, as Director of the CNI. This is the only pleaded case advanced by the respondent as to the capacity in which he acted. From about April 2012 the pleading alleges that General Sanz Roldán, the appellant's agents and/or agents or contractors of the CNI (all acting on instructions from the appellant) placed the respondent under surveillance, and in doing so, were acting as state actors.

45. The first principal allegation concerns an alleged covert operation by the CNI to raid the respondent's apartment in Monaco. Paragraphs 16 (and 46.1) allege that the Monaco operation was carried out by a CNI team coordinated by General Sanz Roldán, who acted under the direction or with consent of the appellant. There is nothing in the pleaded case on this allegation to suggest that the allegation that the operation was carried out by the CNI was merely an inference the respondent had drawn in the absence of actual or better knowledge about what had happened. Where inferences are relied on in the pleading, that is done expressly (for example, at paragraphs 50 and 52). This is a clear and specific allegation that the CNI were involved.

46. The second principal allegation concerns alleged threats by General Sanz Roldán at the Connaught Hotel meeting on 5 May 2012 (paragraph 19). These are alleged to have been made more sinister "*by the fact that they were made by the head of the CNI on the [appellant's] behalf in the United Kingdom and whilst the Monaco operation was ongoing*". Again, the clear inference is that at the same time as the surveillance operation was happening in Monaco by a CNI team coordinated by the General, General Sanz Roldán, acting in his capacity as Director of the CNI, made threats on the appellant's behalf. The threats were thus made through a state actor. Likewise, the third allegation concerns the Villars apartment raid (paragraph 20),

which is expressly alleged (at paragraph 46.1) to have been perpetrated by General Sanz Roldán using agents of the CNI.

47. The remaining allegations concern other threats said to have been made by General Sanz Roldán himself, by email or phone: the threat to the respondent's person by General Sanz Roldán in an email of 17 May 2012 and phone call prior to 18 May 2012 (paragraphs 21 and 22); and the threat to the respondent's person by General Sanz Roldán in an email of 11 June 2012 (paragraph 23). In the light of the earlier allegations, the clear inference is that he carried these out in his capacity as Director of the CNI, in a public capacity.

48. Paragraph 39 and following made allegations of defamatory publications from March 2013, to be further particularised. In relation to these, some identify the CNI as the source, with the approval of General Sanz Roldán (for example, paragraphs 42.3 and 42.4); and paragraphs 40.3, 42.5 and 46.2 make the allegation that the respondent was under constant surveillance by the CNI Technical Operations Group. Paragraph 46.5 relies on later oral reports made on the respondent's behalf, to the British Security Intelligence Service, regarding hostile surveillance by agents or contractors of the CNI, and confirmation that on the second occasion such a report was made, the CNI desk in London was told by its British counterparts to desist. The allegations of state intelligence service involvement could not have been clearer.

49. It is true that at paragraph 54.2.3, the pleading referred to General Sanz Roldán being the appellant's great protector and close ally. However, this reference is simply part of the narrative of alleged harassment in 2019 and is not expressed to relate back to an earlier period. It is plainly not a reference to his role as head of the CNI which is identified at paragraph 13 and was relevant to the period when the appellant was King and head of state.

50. A state can only act through individuals, whether they are employees or agents of the state. As *Jones v Ministry of Interior of Saudi Arabia* makes clear, where a state organ (like the CNI) acts through individuals (as it inevitably must) it is irrelevant that the person concerned may have had ulterior or improper motives or may be abusing public power. Nor is there any requirement of international or domestic law that such persons were acting in accordance with their instructions or authority as a condition for entitlement to state immunity. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the state. The state's immunity in respect of such persons is fundamental to the principle of state immunity.

51. Accordingly, although the question, strictly speaking, is whether the appellant rather than General Sanz Roldán and/or his agents were acting in a public or private capacity, in reality, the role of General Sanz Roldán and the other CNI operatives is determinative. If they were acting in a public capacity, the appellant must have been acting, at least apparently, in a public capacity as head of state in engaging them to act in that public capacity.

52. The Particulars of Claim are clear and unambiguous. Taking the pleading at face value, the only pleaded case in the Particulars of Claim as to the capacity in which the General acted, alleged that General Sanz Roldán was acting in his capacity as Director of the CNI throughout. Accordingly, he and the CNI operatives with whom

he acted, were at all material times acting or purporting to act as servants or agents of the Spanish state. Since the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law, their acts would accordingly be attributable to the Spanish state. On a straightforward application of the SIA, it would follow that the claim to immunity for the appellant, General Sanz Roldán, and the servants or agents of the CNI, in respect of the relevant allegations in the Particulars of Claim, should have succeeded.

53. The authorities referred to by the judge do not support a different conclusion: the analogy he drew between the alleged acts of harassment led by General Sanz Roldán and the incident in *Francisco Mallén v United States* (referred to at [74]) where the Mexican consul was initially assaulted in the street (an assault to which immunity did not apply) was the wrong analogy to draw. The more appropriate analogy was with the assault by the deputy constable whilst on duty (and having shown his badge) to which immunity did apply. The plain meaning of the pleaded case is that General Sanz Roldán and the CNI operatives acting under his direction, were on duty, and not on a frolic of their own while off duty. Nor does *Fernando v Sathananthan* [2021] EWHC 652 (Admin) (also relied on by the judge) lead to a different conclusion: it is irrelevant to the immunity question whether the acts alleged fall within the job description of the relevant official. Moreover, it is no answer for the respondent to rely on her pleading that General Sanz Roldán was the appellant's *"great protector and close ally".* As *Jones v Ministry of Interior of Saudi Arabia* makes clear, an act by a state official can still be under colour of authority even if done for a private motive. The conduct alleged here included covert surveillance operations, the classic business of a state intelligence service, and reported as such to the British intelligence service. There is nothing in the original pleading that supports a conclusion that it was simply the personal friendship between the Director of the CNI and the appellant that enabled the appellant to procure the covert operations and other conduct alleged.

54. On the face of the pleadings, and in the absence of any coherent basis for reaching the contrary conclusion, it was only the appellant's position as head of state that enabled him to procure the head of the state security service to act in the manner alleged, using the CNI, whatever his private motives, and however abusive they might have been. To adopt the words of Blake J in *Al Attiya*:

> "25. …It is difficult to see how the two hats can be severed and how the alleged private motive in inducing the torts can be separated from the public office that gave the defendant the status and the ability to direct others and issue instructions.
>
> 26. The fact that the claimant contends that the dispute with the defendant arose as a purely personal matter in 1997, is irrelevant…"

The same is true here. It is highly unlikely that a private citizen could have procured a General and the CNI to carry out the Monaco and Villars operations on their behalf. It is his public office that inevitably gave the appellant the "status and ability" to influence these actors. Whether the appellant had actual power to direct or influence General Sanz Roldán is irrelevant. The pleading necessarily alleged conduct in the appellant's public capacity.

55. The amendments to the Particulars of Claim do not resolve the issue. First, the deletion of all references to the CNI and state activity in the paragraphs identified above in the Amended Particulars of Claim went beyond the leave granted by the judge at [75] and in his order. These amendments are impermissible on that basis. Secondly, to the extent that they were permitted by the judge, the amendments do no more than aver that General Sanz Roldán was acting in a private capacity (though there is in fact no averment as to the capacity in which the appellant was acting). In doing so, they demonstrate that references to the activity being undertaken by the CNI or its agents is inconsistent with any coherent plea that General Sanz Roldán was acting otherwise than in a public or state capacity. It is wholly implausible that people acting in a private capacity conducted international surveillance, covert raids and infiltrated electronic devices. The deletions make a nonsense of the pleaded references to the respondent seeking to raise concerns through diplomatic channels and/or with the British intelligence services. Indeed, in the course of the hearing before the judge, Mr Lewis came close to conceding that the original Particulars of Claim were not consistent with General Sanz Roldán acting in a private capacity.

56. Accordingly, the judge was wrong to conclude that the pre-abdication conduct alleged was private conduct. First, he wrongly focussed on the domestic law cause of action of harassment, when the proper approach is to consider the individual acts alleged. Secondly, he wrongly treated as determinative that the alleged acts were acts any private individual could carry out (see [68]). This was a formulation he took from Lord Goff's speech in *Kuwait Airways Corp v Iraqi Airways Co (No.1)* [1995] 1 WLR 1147 at 1160A, which was merely a shorthand summary. If an act is one that no private citizen – and only a government – could carry out, it is necessarily a public or sovereign act. But acts which an individual could carry out may still be done in a public capacity, and if an act is one that both a private citizen and a government could perform, then in the light of *Jones* further enquiry is required. The question is one of the capacity in which the person purports to be acting: in other words, the test that must be applied in this instance is the "colour of authority" test discussed by Lords Bingham at [12] and Hoffmann at [78] in *Jones v Ministry of Interior of Saudi Arabia*. Although this test was referred to in earlier sections of his judgment, there is no reference to the "colour of authority" test in the section of his judgment that addressed the functional immunity claim, and nothing in that section to indicate that the judge applied it.

57. Mr Lewis sought to rely on the statement made by the judge in the N460 refusing permission to appeal that: *"If the test is whether the acts were done 'in an apparently official capacity or under colour of authority' then my findings were that they were not"*. He submitted that this confirms that the judge made findings that the relevant conduct was not done under colour of authority when he concluded at [72] that, "*As matters stand, I am very far from convinced that there could be any claim to functional immunity on the grounds advanced...*" However, my reading of the statement relied upon when refusing permission to appeal, is that it contains no reasoning and merely states a conclusion; and in any event, suggests that there was at least a degree of uncertainty in the judge's mind as to whether that was the test. Significantly, there are no findings in the relevant section of the judgment (or elsewhere) made by reference to the colour of authority test.

58. But even if the test was whether the alleged acts were acts any private individual could carry out, it seems to me that these were not such acts: a private individual could not ordinarily have procured the use of state machinery by the head of the state intelligence and security service. A clearly pleaded evidential basis to support a conclusion or inference that these were acts of a private individual was required, but was not advanced. It is fanciful to suggest, as Mr Lewis did, that the clear facts alleged in the pleading demonstrate that the appellant, when head of state, procured the General to use state machinery simply as his friend. For the reasons already given, that submission is without foundation.

59. The judge was also wrong to regard as significant for the claim to state immunity, whether the acts of surveillance and physical intrusion onto the respondent's property were done by agents of the CNI or other "contractors"; and to conclude that there could not be "any conceivable claim to functional immunity" in respect of contractors: see [70] and [71]. As a matter of international law, where acts of trespass or surveillance are committed by contractors, their conduct as agents of the CNI or as agents of a serving sovereign would be attributable to the state in the same way that the CNI's conduct would be. So much is conceded on the respondent's behalf. Instead, Mr Lewis placed emphasis on the judge's finding that the mission was carried out by contractors "with which the Spanish state had no involvement". But that is not what the pleaded case alleged, and there was nothing ambiguous about it: paragraph 16 expressly alleged the involvement of *"a CNI team dispatched from Spain"* and the Director of the CNI itself, General Sanz Roldán, was allegedly central to much if not all the conduct of which the respondent complains.

60. As I have said, in my judgment the judge was wrong to say that the pleading was ambiguous or unclear; and also to say, to the extent that he did so, that these were matters for evidence, to be addressed in due course, but on which the appellant failed on the burden of proof. The pleading was far from ambiguous or unclear, and the question of immunity had to be addressed on the basis of the respondent's pleaded case, assuming it to be true. Where it applies, state immunity is an absolute preliminary bar that precludes any examination of the merits. As Lord Bingham observed in *Jones v Ministry of Interior of Saudi Arabia*, "*A state is either immune from the jurisdiction of a foreign court or it is not. There is no half-way house and no scope for the exercise of discretion*." Where there is a dispute as to whether acts, although committed by an official, were purely private in character, then there should be a preliminary issue determining that dispute.

61. Although he did not formally base his decision on the point, the judge indicated that the respondent would also have succeeded on the basis that the conduct alleged involved criminal acts occurring outside the territory of Spain, and state immunity would not have been available on this basis: see [73]. That too was wrong in my judgment. It is inconsistent with what the majority said in *Pinochet No3*, and the analysis in *Khurts Bat v Germany* [2011] EWHC 2029 (Admin), [2013] QB 349, to which the judge referred as supporting the proposition, itself recognises that the majority in *Pinochet No 3* made clear that for heads of state there can be immunity even for criminal liability, and a fortiori for civil liability, notwithstanding that the events occur abroad. State immunity from the civil jurisdiction of foreign courts applies just as much to the extra-territorial conduct attributable to a state on the international plane, as to the domestic conduct of a state, even where that conduct is

unlawful. *Khurts Bat* concerned criminal not civil proceedings in any event, and the analysis in that case was confined to criminal liability for acts of non-heads of state (the head of the Mongolian national security department on a mission to London) exercising official functions.

62. Nor is there any justification whatever for the respondent's contention that the appellant conceded that functional immunity did not apply, or in some way *"disavowed"* reliance on section 14(1) SIA in relation to pre-abdication acts. There is nothing in the judgment recording such a concession. On the contrary, at [35] the judge recorded the submission made on behalf of the appellant that *"several of the acts of harassment alleged can be considered to have been done in his public capacity"*; the heading to [65] to [75] of the judgment is *"Functional immunity under s. 14 SIA";* and those paragraphs addressed the argument on that basis. Although there were some confusing statements made in the course of submissions by leading counsel on the appellant's behalf (including an erroneous submission on section 14 as giving rise to "a *ratione personae* type immunity"), read fairly, the transcript plainly shows that the appellant was relying on section 14 SIA for pre-abdication acts done in his public capacity, "*under colour of official authority, because it is only a sovereign or someone of that nature who can direct the head of the intelligence agency."* It is also clear from the transcript that Mr Lewis understood the submission and advanced arguments to meet it. Moreover, despite what the judge said when refusing permission to appeal, the respondent's reliance on such a concession is contradicted by the judge's refusal, at the respondent's invitation when submitting a so-called correction to the draft judgment, to insert into [74] of the draft judgment text to the effect, *"Mr Bethlehem QC confirmed in oral reply submissions that the Defendant did not contend that any such acts were official acts"*.

63. The judge was also wrong to proceed on the basis of a promised but unarticulated amendment to the pleaded case. Unless the particular circumstances make it obviously unnecessary, a formal application to amend is ordinarily required, with a written document setting out the proposed amendments; and, again in general, there is a merits test to overcome in obtaining permission to amend. The pleading must not only be coherent and properly particularised, it must plead allegations which if true would establish a claim that has a real prospect of success. This means that the claim must carry a degree of conviction; and the pleading must be supported by evidence which establishes a factual basis which meets the merits test: see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]; *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [41] and [42]; *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18].

64. Here, there was no application to amend, still less a formal application supported by a proposed amended pleading and evidence of the kind just indicated. Instead, the approach adopted was strikingly informal. Despite knowing about the state immunity application issued in June 2021 for many months, it was not until shortly before the hearing that the respondent first highlighted an alleged *personal* relationship between General Sanz Roldán and the appellant in her skeleton argument for the hearing. No proposed amended pleading was produced in advance of or even during the hearing. On the second day of the hearing, Mr Lewis asserted that General Sanz Roldán was (at all times) on a private mission, but he also indicated

a potential need to abandon the pre-abdication conduct and submitted that the respondent could live without those allegations and still maintain her claim.

65. There are cases in which the court can dispense with formalities and treat a defect in a pleading as capable of being cured by amendment where it is obvious that to require an application and evidence would be mere formality. But this was not such a case. Given the stark timing of the suggested amendments, and their stark inconsistency with the existing pleading, it is not, and was not, obvious that the respondent could meet the merits test in this case: there was a real question whether the proposed amendments were simply a device to meet the state immunity arguments. Critically, what was required is an explanation for withdrawing the allegations of CNI involvement, which, even now, has not been provided despite the letter of 26 September 2022 in the Unagreed Bundle. The respondent herself accepts that in considering her amended pleadings the court is required to consider whether the amendments are contrived purely to avoid immunity but fail to do so or, as she contends, whether they simply plead a more developed understanding of her case. However, the judge did not consider this question.

66. Moreover, the respondent's approach, in the face of the immunity application, in seeking to disavow, or characterise as ambiguous, allegations made against the CNI was directly contradicted by her statement of truth on her original pleading and by her sworn affidavit evidence deployed in Spanish proceedings. Her amended case of conduct motivated by personal friendship also stands in marked contrast to claims she made to the Spanish media that General Sanz Roldán was acting on behalf of other elements within government, or within the Spanish Royal household, hostile to the appellant, in a bid to bring about the appellant's abdication or destroy their relationship (as evidenced by a transcript of the respondent's interview with Okdiario on 28 September 2020, exhibited in the witness statement of Guy Martin, dated 17 October 2022, and served in opposition to the Unagreed Bundle). These were all matters that required careful consideration before giving leave to amend in the first instance. Had the judge conducted the necessary analysis, he would either have refused to permit a last-minute amendment that did no more than aver that those involved were acting in a private capacity; or at best, adjourned the state immunity application to enable a formal application to amend to be made.

67. This was not, as Mr Lewis suggested, a discretionary case management decision. It was a decision bearing directly on the disposition of the state immunity application. To direct the respondent to amend her pleading in the circumstances and in the informal manner which occurred, was wrong.

The argument under section 5 SIA

68. My conclusions make it necessary to address the argument raised in the Respondent's Notice concerning the exception in section 5 SIA, but I can deal with this issue shortly.

69. So far as injury and damage are concerned, the original Particulars of Claim said the following:

> "7. The course of conduct which constitutes the Defendant's harassment has run consistently from about 2012 to the present time and has resulted in serious consequences:
>
> 7.1. with regard to the Claimant's health, it has undermined her sense of wellbeing. Her lifestyle has been drastically affected. She has suffered great distress, anxiety, sleep deprivation, and concern about her own physical safety and that of her children. She has been subject to a continuing threat of physical harm, trespass and surveillance. The Defendant has sought to disaffect her own children, has systematically sought the breakdown of many of the Claimant's close friendships and professional associations, and has sought to destroy her reputation and livelihood by spreading defamatory remarks and by vilification in the media; …"

70. By way of remedy, the pleading said that the respondent had suffered "great mental pain, alarm, anxiety, distress, loss of well-being, humiliation and moral stigma" (paragraph 55). It claimed general damages for "anxiety" particularised at paragraph 56.1 as follows:

> "56.1 The Defendant's harassment of the Claimant has undermined and continues to undermine her sense of wellbeing. She suffers from sleep deprivation and has frequent nightmares arising out of the threat to her personal safety. Her lifestyle has been drastically affected. She is rarely invited out to social occasions anymore and she hardly goes out at all. When she does go out, she almost always travels by car, and before leaving her home she checks first with Grosvenor Estate security and/or her driver that it is safe to do so. When she does attend social events, she is unable to fully enjoy them due to her concern that people are talking about her behind her back. By reason of the Defendant's harassment of the Claimant, her son has become fearful and stressed and was bullied at school, all of which has added to the Claimant's distress.
>
> …
>
> 56.3 The defamatory remarks made by the Defendant to the Claimant's family, friends and business associates have caused the Claimant emotional and psychological distress and depression. She has suffered the mistrust of her children and estrangement from Nastassia. She has lost a number of close personal friends and business associates. …"

The prayer claimed "damages".

71. The judge addressed the argument advanced on the respondent's behalf by reference to the personal injury exception in section 5 SIA as follows:

> "76. Although, based on my decision, the point does not arise, I should deal, finally, with the submission that, had an immunity subsisted, the Claimant's claim could nevertheless continue on the basis of s.5 SIA. I would have rejected that argument. The Claimant's claim is for pure harassment. The loss she claims does not include a claim for any recognised psychiatric injury (see [10] above). As such, I do not accept that the Claimant's claim is, or includes, a claim for personal injury. A claim for distress and anxiety arising from an alleged course

> of conduct amounting to harassment is not, without more, a personal injury claim. Neither of the authorities relied upon by Mr Lewis QC assists the Claimant. The claimant in ***Jones -v- Ruth*** was pursuing a claim for psychiatric injury (i.e. a claim for personal injury). ***Nigeria -v- Ogbonna*** is authority only for the proposition that "*personal injury*", as used in s.5 SIA, should be given its normal meaning in domestic law; i.e. to include a claim for a recognised psychiatric injury (see [27] *per* Underhill J). The short point is that, in her Particulars of Claim, the Claimant makes no claim that she has been caused a recognised psychiatric injury by the alleged harassment. Her claim is therefore not a claim for personal injury within the terms of s.5 SIA; it is a claim for distress caused by the alleged harassment."

72. Mr Lewis accepted that the original pleading did not specifically use the phrase "personal injury" or adduce a medical expert report as to any asserted psychiatric injury suffered by the respondent, as is required for a personal injury claim by CPR 16PD 4. However, the Particulars of Claim pleaded a claim at paragraph 7.1 for damages caused by anxiety and damage to the respondent's health caused by harassment. Moreover, he relied on the clearly pleaded claim at paragraphs 56.1 and 56.3, for damages for anxiety, distress and depression. Although in writing he submitted this sufficiently pleaded a recognised psychiatric injury, he accepted in the course of the hearing, that it did not, and that personal injury was not in fact pleaded in the original Particulars of Claim.

73. However, he maintained that these passages made clear that the respondent intended to claim damages for injury to her health, and it was open to her to provide further particulars documenting the extent of her injuries (which she has now done in the draft Re-Amended Particulars of Claim, including by reference to an expert medical report). Certainly, by the time of the hearing before the judge and having raised reliance on section 5 SIA, it was clear that she regarded her claim as a claim for personal injury, and the amended pleading demonstrates that this is the case she intends to run. The amendment would cure any defect and she should have been given the opportunity to cure any defect in her pleading, if there is one.

74. I do not accept these submissions and can see no error in the judge's conclusion in respect of section 5 SIA. The claim was plainly not pleaded as a personal injury claim nor were damages for personal injury claimed in the prayer. As the judge correctly held, a claim for distress and anxiety arising from an alleged course of conduct amounting to harassment is not, without more, a personal injury claim. The short point, again as the judge observed, is that the respondent made no claim that she has been caused a recognised psychiatric injury by the alleged harassment. Her claim is therefore not a claim for personal injury within the terms of section 5 SIA. It is simply a claim for distress, anxiety and depression (none of which, as pleaded, are recognised psychiatric conditions) caused by the alleged harassment.

75. As to the suggestion that the respondent may now wish to rely on new medical evidence or a re-amended pleading, there is no application to amend. Any such application would have to be made to the judge. Moreover, the respondent has made no application to adduce fresh evidence on this appeal, and any such application, if it had been made, would have had to overcome the obstacle that this evidence could

plainly have been obtained with reasonable diligence for the hearing before the judge (see CPR 52.21(2)).

Conclusion

76. For all these reasons, I would allow the appellant's appeal. The appellant established his claim to functional immunity under section 14(1) SIA in respect of paragraphs 15 to 23 of the Particulars of Claim, and the judge was wrong to conclude otherwise. The exception in section 5 SIA does not apply. Accordingly, the pre-abdication conduct alleged is immune from the jurisdiction of the courts of this country.

77. The judge should not have permitted any of the amendments to the Particulars of Claim set out in the Amended Particulars of Claim. Any application to amend will require a formal application with a proposed draft and must be supported by evidence as to the merits of the proposed amendments.

Popplewell LJ

78. I agree.

King LJ

79. I also agree.