Neutral Citation Number: [2020] EWFC 18

Case No: ZW20C00036

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 March 2020

Before :

MR JUSTICE MOSTYN

- -

Between :

A Local Authority	**Applicant**
- and -	
AG	**1st Respondent**
- and -	
DG	**2nd Respondent**
- and -	
SG, GG & AG (through their Children's Guardian)	**3rd Respondents**

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- -

Ms Hannah Markham QC & Ms Kate Tompkins (instructed by **HB Public Law**) for the **Applicant**
Ms Gemma Taylor QC & Ms Gemma Farrington (instructed by **Astrea Law**) for the **1st Respondent**
Mr Damian Woodward-Carlton QC & Ms Jennifer Youngs (instructed by **Corper Solicitors**) for the **2nd Respondent**
Ms Jo Delahunty QC & Ms Lucy Logan Green (instructed by **Creightons**) for the **3rd Respondents**

Mr Emeka Pipi, standing counsel for the diplomatic mission, acting as observer

Hearing date: 3 March 2020

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this anonymised version of the judgement to be published. In no report may the children be identified directly or indirectly; breach of this restriction will amount to a contempt of court

Mr Justice Mostyn:

1. There are six children living at the family home in London: S (5), G (9), A (14), N (17), E (18) and D (18, a paternal half-brother). Also living there are the mother and the father. The father is a serving diplomat at a diplomatic mission.

2. These proceedings concern the three youngest children.

3. On 25 November 2019, E contacted the Local Authority and reported that her siblings were being physically chastised at home. She said she was predominantly concerned for D, who she said is hit by her father. She also recalled that G had been hit by her mother for breaking the television, and that S had been pulled from the floor by her hair by her father.

4. On 16 January 2020, the primary school attended by S and G then made a referral to the Local Authority. The referral states:

> "During an English vocabulary lesson the chn [children] were defining the word 'lashing'. When I described 'lashing' as being hit with a whip or a belt [G] said 'oh, I get hit with a thick belt everyday by my Mum, but my Dad is much worse'. I asked him to clarify if he meant what he had said and he said 'yes, every day for watching too much TV.'"

5. On the same day, a social worker employed by the Local Authority spoke to G at school. G said that he was hit by his mother with a belt when he broke the television, which caused his arm to bleed, and that he was hit a lot and gets 'lashings'. He also said that his father had pulled S off the floor by her hair when she 'broke the internet'. The social worker's statement says:

> "[G] advised that in relation to this incident, [his father] advised [his mother] that she should not harm him to the extent which would require hospital attendance as this may lead to professionals becoming aware of the physical chastisement."

6. S was also briefly seen on that day and said that D hit her 'all the time'.

7. On 20 January 2020, G, A, N and S were spoken to at school by social workers. On that occasion, G reported that on 18 January 2020 he and S had been hit with a belt by their mother because they were watching television on a laptop. He said that his mother made them stand with one leg in the air and one finger on the floor for two hours, which made his shoulders hurt, and said it was not the first time he had had to stand in such a position. G recalled that after this, his mother hit him on the back with the strap of a belt twice and hit S with the belt four times. He repeated that he had been beaten with a belt by his father after breaking the television and said that after this E made him kneel on the floor with his hands in the air.

8. Although A did not disclose any incidents when she had been physically harmed, she confirmed that her father hits the children with a belt and said that G had been hit by her mother after he had broken the television. Similarly, S did not disclose any

instances of physical chastisement. She appeared to be reluctant to talk to the social worker.

9. N said that she suffers from pain and loss of sight in her left eye, which she had first noticed after her father had hit her hard on the left side of her face when she was 15. She also recalled that her father had once hit her hand with a broken chair leg because she had left the gas on. She said that he wanted to 'beat her' but did not because she had an optician appointment the next day. N also reported that G had been beaten for breaking the television, and that S had been picked up by her hair. She said that her mother puts hot water on G's face to try to reduce marks from where she has hit him.

10. These proceedings, seeking a care order under Part IV of the Children Act 1989, were commenced on 21 January 2020. The Local Authority also sought an emergency protection order. Given the father's status the case was allocated within the Family Court to High Court judge level and came before me the following day, 22 January 2020. Clearly, the question of the immunity of the father and of members of his family forming his household from civil proceedings needed to be examined carefully. Until that issue had been determined no emergency orders could be made. Therefore, I granted the Local Authority permission to withdraw the application for an emergency protection order. My substantive order contained a recital which stated that the parents were warned that their conduct towards the children, of which there was strong prima facie evidence contained in the documents before the court, must not be repeated. Further, there was a recital that expressed the opinion of the court that it would be reasonable for the children to be able to speak to the Local Authority's officers in private. These recitals would have been carefully noted by Mr Pipi, standing counsel to the diplomatic mission, who had attended the hearing.

11. My order provided that the question of immunity would be considered at a one-day hearing fixed for 3 March 2020. I directed that the papers should be disclosed to the diplomatic mission and to the Foreign & Commonwealth Office, each of which would be given permission to intervene and to file skeleton arguments. I later gave permission for the papers to be disclosed to the Department for Education for the same purpose.

12. On 23 January 2020, E told the social worker that her father had said she would pay for what she had done. She said that she, N and A had been woken at 4.00am by their parents, who told them to withdraw their allegations. She said that her father had said the children must give statements saying that they had lied because E told them to say they were being abused so that she could stay in the UK for university.

13. On 24 January 2020, the social worker was sent an email from the children containing letters about their life at home. The letters were also sent to the court. They were dated 22 January 2020. A's letter was undersigned by S and G and said:

> 'We didn't mean what we said to [the social worker], we're sorry for our parents and wish to continue with both of them…Therefore we want to stay and live under them. we do not want to do any case against our parents.'

14. Further letters were received from E and D, dated 22 and 23 January 2020. They said that home life was peaceful; that their parents take good care of them; and that they

did not want court proceedings to continue. When spoken to by the Local Authority, A said that she had written a letter because she was worried about her father losing his job.

15. On 31 January 2020, the parents were due to be visited by Children's Services before they went on a trip to their home country. However, the father cancelled the visit, claiming that he had work obligations.

16. On 21 February 2020, D confirmed the allegations made by his siblings and said that the abuse had happened more frequently in their home country. He said that his father often hits, shouts and verbally abuses him. He recalled that in 2019, his father had hit him with the wooden leg of a broken chair because his friend had given him a new pair of shoes. D also spoke about when his father picked up S by her hair. D said that his father had hit S so hard that it was as though he was hitting an adult.

17. On 25 February 2020, the father contacted the Local Authority and agreed to a home visit. This took place on 28 February 2020. The parents denied hitting the children and said that E and D had coerced their siblings into making allegations so that the father would agree to E staying in the UK.

18. The parents refused to sign working together agreements as they saw no need because they denied hitting the children. They said they would allow the social worker to conduct school visits and see the children.

19. The social worker's last visit to the children before this hearing was on 27 February 2020. No new allegations were raised by any of them.

20. The proposed working together agreements were eventually signed by the parents on 28 February 2020. In them the parents agree:

    i) not to hit the children or to use any other form of physical punishment;

    ii) not to discuss the details of the case with the children;

    iii) to communicate openly and honestly with the Local Authority;

    iv) to allow social workers to conduct school visits to see the children in order to ascertain their views; and

    v) to allow social workers to undertake announced and unannounced visits to the home on a regular basis.

21. Miss Markham QC rightly submits that this is a formidable case of deliberate historic harm and risk of future harm, both physical and psychological. It is true that the parents have deliberately chosen not to meet the case against them before the immunity issue has been determined. But even so, it seems extremely unlikely that they would be able to defeat an application for an interim care order which requires proof of no more than reasonable grounds for believing that the children have either suffered or are likely to suffer significant harm: section 38 of the Children Act 1989. Miss Markham QC also rightly submits that the signing of the working together agreements would in a case such as this be hardly likely to persuade the court not to make an interim care order. As she said, such agreements might be sufficient to see

off an interim care application in a routine case of neglect but would be hardly likely to have that effect where there was such a strong case of the infliction of deliberate harm.

22. This case gives rise to a seemingly irreconcilable clash between two international treaties incorporated into our domestic law by statutes. These are the 1961 Vienna Convention on Diplomatic Relations, enacted by the Diplomatic Privileges Act 1964, and the 1953 European Convention on Human Rights, enacted by the Human Rights Act 1998. This is the first case in this country concerning a serving diplomat (as opposed to a former diplomat or a member of a mission's staff) where the issue has had to be considered. Indeed, the researches of counsel have only identified one other case anywhere in the world where the immunity of a serving diplomat from child protection proceedings has been considered. That was in New York in 1988, but in that case the supremacy of diplomatic immunity over local child protection laws was conceded (*In the Matter of Terrence K* (1988) 524 N.Y.S.2d 996).

23. It was because of the importance of the case that I gave leave to intervene to the Foreign & Commonwealth Office, the Department for Education, and the diplomatic mission. On 27 February 2020 the Foreign & Commonwealth Office explained that work on their skeleton argument was nearly complete, but that due to the Foreign Secretary's travel obligations it had not yet received clearance, and therefore a short extension of time for filing was sought. This I granted. However, the following day the court was informed that the Foreign Secretary had decided not to intervene in the case at this stage. A similar communication was received from the Secretary of State for Education. Neither chose to send an observer to the hearing. This is extremely surprising. In virtually all the cases to which I was referred the Foreign & Commonwealth Office had intervened, but none of them concerned a currently serving diplomat. I would have been greatly assisted had the Foreign & Commonwealth Office intervened and made submissions.

24. On the same day, 27 February 2020, Mr Pipi wrote to the court to explain that the diplomatic mission regarded the court proceedings as "extremely serious", and that authorisation to intervene was being sought from the foreign government. However, at that point there had been no response. That was still the position on 3 March 2020, the date of the hearing. Mr Pipi explained that things tended to move at a slow pace in the foreign ministry and that the reason for the delay might well be because the Ministry of Foreign Affairs was taking the advice of the Attorney-General. It is regrettable that the stance of the foreign government is not known, not least because a formal invitation to waive diplomatic immunity in respect of all members of this family was extended to that government by the Guardian of the children.

25. In *Reyes v Al-Malki & Anor* [2017] UKSC 61, [2019] AC 735 Lord Sumption, in a typically erudite and interesting judgment, explained the origin of the rule of diplomatic immunity and the evolution of the 1961 Convention. In that case, the domestic servant of a serving Saudi diplomat had claimed that she was the victim of race discrimination and had suffered both unlawful deduction from wages and failure to pay the national minimum wage. However, during the course of the proceedings the diplomat's posting came to an end and he returned to Saudi Arabia. Lord Sumption explained that the immunity only operated while the diplomat was in post and that therefore the claimant was free to continue with her claim. It is implicit from

his judgment that had the posting not come to an end the immunity would have operated to have prevented the claim from proceeding.

26. Lord Sumption explained how the concept of diplomatic immunity stretches back to Roman times, with texts dating from the second century referring to it. Indeed, the first preamble to the 1961 Convention recalls that peoples of all nations from ancient times have recognised the status of diplomatic agents. In this country, as Lord Sumption explained, the concept of diplomatic immunity was first put on a statutory footing by the Diplomatic Privileges Act 1704 following the arrest for debt in the street of the Russian ambassador, who was returning in his coach from an audience with Queen Anne. Plainly, the potential offence caused to Tsar Peter the Great was extremely worrying. Therefore, the preamble to the 1704 Act states:

> "Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his excellency Andrew Artemonowitz Mattueoff, ambassador extraordinary of his Czarish Majesty, Emperor of Great Russia, her Majesty's good friend and ally, by arresting him, and taking him by violence out of his coach in the publick street, and detaining him in custody for several hours, in contempt of the protection granted by her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other publick ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable."

And the third section stated:

> "And to prevent the like insolencies for the future, be it further declared by the authority aforesaid, That all writes and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other publick minister of any foreign prince or state, authorized and received as such by her Majesty, her heirs or successors, or the domestick, or domestick servant of any such ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever."

The strength of the language used illustrates the importance of preserving a principle that was regarded as sacred and inviolable. I do not think that 316 years later it has become any less sacred and inviolable.

27. This Act was repealed and replaced by the 1964 Act. This incorporated the relevant parts of the 1961 Convention. Lord Sumption explains at [6]:

> "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 …"

28. For the purposes of this civil case the relevant provisions are articles 31(1) and 37(1). Conflating these, they provide that:

> "A diplomatic agent, and members of his family forming part of his household, shall enjoy immunity from the civil jurisdiction of the receiving state 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; or (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions."

29. It is common ground that neither the diplomat nor members of his family can waive the immunity. Only the government of the sending state can do so: article 32. It is also common ground that none of the stated exceptions apply in this case. However, Miss Markham QC for the Local Authority and Professor Delahunty QC for the children's Guardian argue that I should interpret these provisions pursuant to section 3 of the Human Rights Act 1998 to "read in" another exception, namely a public law application to protect children or vulnerable adults at risk within the diplomat's family forming part of his household.

30. I am sympathetic to this argument, but I regret that it is a step too far for me to take.

31. The argument is that the 1964 Act has to be interpreted through the lens of the mores of the time when it is being considered. In 1961 when the Convention was formed, and in 1964 when the Convention was being considered by Parliament, little regard was paid to the welfare and protection of children at risk. Hence the exceptions are exclusively to do with money and property. However, with the advent of human rights laws the protection of children has come to the fore. Article 1 of the 1953 European Convention on Human Rights obliges the contracting parties to secure to <u>everyone</u> within their jurisdiction the rights and freedoms defined in the convention. Article 3 of that Convention provides that no one shall be subjected to inhuman or degrading treatment or punishment. Repeated judgments of the court in Strasbourg have emphasised the importance of protecting children from such treatment. The obligation is reinforced by the 1990 United Nations Convention on the Rights of the Child signed by both this country and the foreign government, article 19(1) of which states:

> "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or

> exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

32. Section 3 of the Human Rights Act 1998 requires the court, so far as it is possible to do so, to read and give effect to primary legislation in a way which is compatible with the Convention rights. Hence, it is argued, the only way in which the state can discharge its duty to protect these children at risk is to "read in" the further exception which I have mentioned. It is argued that such a process would not be inconsistent with the 1969 Vienna Convention on the Law of Treaties as article 31(2)(b) and (c) of that Convention permit later practices and later developments in international law to be taken into account when interpreting a Convention provision. They cite Lord Wilson in *Reyes* at [67] where he stated:

> "Article 31(3)(c) of the [1969] 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 …. "

33. It is further argued that to interpret the Convention in this way would be consistent with its principal objective as stated in its fourth preamble, which states:

> "Realising that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"

Accordingly, it is submitted that the Convention was never intended to give a diplomat a carte blanche for his own personal benefit when to do so conflicts with other international obligations or the rights of a child. Hence, the suggested interpretation is legitimate and consistent with the objective of the Convention.

34. Section 3 of the Human Rights Act 1998 does not give the court an unfettered power to rewrite legislation to include words which Parliament has wittingly or unwittingly excluded. The phrase "so far as it is possible to do so" limits the power to interpretations which are consistent with the natural language of the statute under consideration. Thus, in *Re S (Care Order Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 Lord Nicholls of Birkenhead stated:

> "[37] Section 3(1) provides:
>
> > 'So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights.'

> This is a powerful tool whose use is obligatory. It is not an optional canon of construction. Nor is its use dependent on the existence of ambiguity. Further, the section applies retrospectively. So far as it is possible to do so, primary legislation 'must be read and given effect' to in a way which is compatible with Convention rights. This is forthright, uncompromising language.
>
> [38] But the reach of this tool is not unlimited. Section 3 is concerned with interpretation. This is apparent from the opening words of section 3(1): 'so far as it is possible to do so'. The side heading of the section is 'Interpretation of legislation'. Section 4 (power to make a declaration of incompatibility) and, indeed, section 3(2)(b) presuppose that not all provisions in primary legislation can be rendered Convention compliant by the application of section 3(1). The existence of this limit on the scope of section 3(1) has already been the subject of judicial confirmation, more than once: see, for instance, Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 3 WLR 183, 204, para 75 and Lord Hope of Craighead in *R v Lambert* [2001] 3 WLR 206, 233-235, paras 79-81.
>
> [39] In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament."

35. In that case the judicial innovation of introducing into the Children Act 1989 a requirement on local authorities to observe starred milestones in a care plan was held by the House of Lords to pass "well beyond the boundary of interpretation".

36. It is true that there have been in the field of family law some interpretations of statutes pursuant to section 3 of the Human Rights Act 1998 which alter the natural literal meaning of enacted words. Thus in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 Fam 186 Sir James Munby P had to consider the seemingly unextendable six-month time limit in section 54(3) of the Human Fertilisation and Embryology Act 2008 for seeking a parental order in respect of a child born through surrogacy. The President held that the time limit was in fact extendable. He justified his decision (secondarily) by reference to article 8 of the European Convention on Human Rights. However, his primary reasoning relied on the well-known canon of statutory construction enunciated by Lord Penzance, sitting as Dean of Arches, in *Howard v Bodington* (1877) 2 PD 203 at 210-211, namely that it is the function of the court to determine, having regard to the facts and the context, whether the rule in question was imperative or merely directory.

37. In contrast, in *Re Z (A Child : Human Fertilisation and Embryology Act : parental order)* [2015] EWFC 73, [2015] 1 WLR 4993 the President concluded that the

requirement in section 54 (1) specifying that the application for a parental order had to be made by a couple could not be "read down" to mean a single applicant. That would be outside the boundary of legitimate interpretation. Rather, a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998 would be made: see *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), [2016] 3 WLR 1369.

38. In my judgment the innovation proposed in this case passes well beyond the boundary of interpretation for the following reasons, all of which are reflected in the judgment of Lord Sumption.

    i) It violates the plain, natural literal meaning of the words in article 31. The exceptions were framed after considerable debate and were obviously intended to be a finite list. The principle of construction *inclusio unius exclusio alterius* means that a construer cannot infer an additional tacit exception based on safeguarding children at risk.

    ii) The Convention must mean the same thing in all the 191 states that have signed it. The majority of these will not have subscribed to the European Convention. That majority would no doubt find it most surprising that there existed a tacit exception based on safeguarding children at risk. For the Convention to work as intended there must be global uniformity as to what it means.

    iii) The foundation of the Convention is the idea of reciprocity. As Lord Sumption says at [12(3)], a significant purpose of conferring diplomatic immunity on foreign diplomatic personnel in Britain is to ensure that British diplomatic personnel overseas enjoy corresponding immunities. If a tacit exception based on safeguarding the children of diplomats were to be excavated it would not be difficult to imagine another state, a theocracy for example, claiming that the teenage children of British diplomats were at risk because their parents allowed them to drink alcohol or to dress immodestly.

    iv) The principle of immunity for serving diplomats and their families is one of the most important tenets of civilised and peaceable relations between nation states. It may be abused, but that is a price that must be paid in order to uphold the higher principle. As Lord Sumption says at [7]:

    > "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."

39. I am therefore regretfully driven to conclude that the arguments advanced on behalf of the mother and father are correct and that I must reject the arguments advanced on behalf of the Local Authority and the Guardian. It follows that I do not agree, respectfully, with the obiter views of the then President, Dame Elizabeth Butler-Sloss, in *Re B (A Child) (Care Proceedings: Diplomatic Immunity)* [2003] Fam 16 and of

Gwynneth Knowles J in *A Local Authority v X* [2018] EWHC 874 (Fam), [2019] 2 WLR 202.

40. In *Re B (A Child)* the father of the injured child was a foreign national employed as a driver by his country's embassy. As such he enjoyed only limited immunity under the terms of article 37(2) of the Convention, which provides that:

> "Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving state, enjoy the privileges and immunities specified in articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving state specified in paragraph 1 of article 31 shall not extend to acts performed <u>outside the course of their duties</u>." (emphasis added)

41. Unsurprisingly, the President found that beating his children did not fall within the course of duties of that embassy driver, and that therefore there was jurisdiction to make a care order. However, at [38] she stated:

> "It is not strictly necessary for me to consider the impact of the European Convention on the 1964 Act. But in a case where the threshold has been crossed under section 31 of the Children Act 1989 and there is paediatric evidence of beating, scars and serious bruising, it would seem clear that there is evidence that the European Convention article 3 rights of B have been breached. I would have little difficulty in supporting my interpretation of the 1964 Act by reference to the positive obligation on the court as a public authority to protect a child who has been exposed to such treatment which appears to fall within article 3. It is clear that there are positive obligations upon states to investigate alleged article 3 violations and to take steps to protect against such violations."

And at [40]:

> "… if I were wrong in the view I have taken of the Diplomatic Privileges Act 1964, leaving this court with jurisdiction to entertain the Local Authority's application, I would find myself satisfied that such a result is necessary in order to read the 1964 Act in a way that is compatible with the Human Rights Act 1998."

42. In *A Local Authority v X* the mother of the four subject children was employed in an administrative role at the High Commission of a foreign country. However, shortly before the final hearing of the proceedings the diplomatic privileges and immunities of the mother and members of her family had come to an end. Accordingly, and unsurprisingly, the court held that there was jurisdiction to make care orders. Moreover, it could not be said, during the period when the mother enjoyed immunity,

that her treatment of the children fell within the course of her duties. However, at [60] Gwynneth Knowles J expressly agreed with the view of the President in *Re B* at [40].

43. For the reasons I have given, I do not agree with these views. I am supported by Professor Denza, the leading academic authority on the law of diplomatic relations, in her seminal work *Diplomatic Law*, 4th ed (2016) at 235 where she states:

> "Immunity from civil and administrative jurisdiction covers not only direct claims against a diplomatic agent or his property but also family matters such as divorce or other matrimonial proceedings, proceedings to protect a member of the family of a diplomat by a care order or make him or her a ward of court…"

44. What if there was a genuine emergency and there was clear evidence that a child within the home of a diplomat was at risk of imminent death or serious bodily harm? Could the police enter the home to rescue the child? This would be in direct violation of article 30(1) which provides that "the private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.". However, in *Re B* at [33] the President stated:

> "The argument of Miss Booth that the inviolability of the residence extends to acts done within the premises was not pursued at length in her oral submissions, but I should deal briefly with it. This child was seen at a London school in the area of the Local Authority, which is also the education authority, which referred the case to the social workers. It is not clear as to the extent to which the Local Authority or the police could enter or intervene if the child was beaten at home. There is a suggestion in the textbooks, supported by cases across the Atlantic, that steps could be taken in an emergency to protect the offender and avert a dangerous situation. In a case where the rights of a child under article 3 of the European Convention were breached, I would like to believe that this would be seen as an emergency and action taken."

45. I was not addressed about this scenario and I do not express a view on it other than to state that it gives rise to a virtually insoluble dilemma. It seems to me that an amendment to the Convention is necessary at the very minimum to address this scenario.

46. My conclusion is that by virtue of diplomatic immunity these proceedings cannot proceed and must be stayed. They will not be dismissed because there is outstanding a request by the Guardian that the foreign government waives the diplomatic immunity enjoyed by this family so the children can be properly protected in proceedings under Part IV of the Children Act 1989. If that waiver is granted the stay can be lifted and the proceedings can revive. The order granting the stay will record the agreements made by the mother and father to which I have referred above.

47. The fact that proceedings cannot take place does not mean that there is nothing that the organs of the British state can do to discharge its duty under articles 1 and 3 of the

European Convention on Human Rights. There are diplomatic and other steps which may be taken.

48. First, it is open in a case such as this for a Local Authority to write to the Foreign & Commonwealth Office drawing the facts to the attention of the Secretary of State and inviting him to take such diplomatic steps as may be necessary. Second, it is open to the Secretary of State for Foreign & Commonwealth Affairs, on receipt of that information, to seek to persuade the foreign government to waive diplomatic immunity in respect of the diplomat and his family so that the necessary protective measures can be taken. Third, as a last resort, it is open to the British government to expel the diplomat and his family so that on their return to their homeland protective measures can be taken in respect of the children there.

49. Finally, I refer to the remedy of a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998. This relief was not sought by the Local Authority in its application. It was too late for that relief to be sought at the hearing before me since the requisite 21-day period of notice to the Crown prescribed by FPR 29.5 had not been given. It will be apparent from what I have written above that I am of the view that inasmuch as articles 31 and 37 of the Convention prevent protective measures being taken in respect of the children of diplomats who are at risk then they are irreconcilable, and therefore incompatible, with the duties imposed on the state under articles 1 and 3 of the European Convention on Human Rights. They are probably incompatible with the rights under articles 6 and 8 also. However, as the application was not formally before me and as I heard no specific argument about this form of relief, I will say no more about this beyond observing that such a declaration would likely be no more than symbolic given that the British government would not be in a position unilaterally to amend the terms of the Convention.

50. That concludes this judgment.