Neutral Citation Number: [2019] EWHC 2074 (QB)

Case No: HQ12X03803

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

MR JUSTICE STEWART

- -

Between :

Estate of Michael Heiser and 121 Others	**Claimants**
- and -	
(1) The Islamic Republic of Iran	**Defendants**
(2) The Iranian Ministry of Information and Security	

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Professor Dan Sarooshi QC and Peter Webster (instructed by **DLA Piper UK LLP**) for the **Claimants**
Simon Rainey QC and Paul Henton (instructed by **Eversheds Sutherland (International) LLP**) for the **Defendants**

Hearing dates: 2-5, 22, 31 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE STEWART

Mr Justice Stewart:

The Judgment Plan

A. INTRODUCTION

A1. The Applications and Issues

1. There are two applications before the Court. Both are made by the Defendants. The first is dated 17 October 2014 ("the first application"). The second is dated 11 December 2018 ("the second application").

2. The first application seeks Orders that:

    1) the Order of Master Cook dated 23 July 2014 permitting the Claimants to enter default judgment be set aside

    2) any default judgment entered pursuant to the Order of Master Cook or otherwise be set aside

    3) the Order of Mr Justice Singh dated 2 October 2012 permitting the Claimants to serve the proceedings out of the jurisdiction be set aside

    4) claims in the proceedings be dismissed; and

    5) the Claimants pay the Defendants' costs of the proceedings

3. The brief reasons given on the application notice are:

> "The Orders are sought because the Defendants are immune from the jurisdiction of the Court in these proceedings pursuant to section 31 of the Civil Jurisdiction and Judgments Act 1982, which lays down a statutory prohibition against the Court recognising and enforcing the judgments against the Defendants. Any default judgments entered in the proceedings is contrary to section 31 of the Civil Jurisdiction and Judgments Act 1982 and should be set aside pursuant to paragraph 4 of the Order of Master Cook and/or CPR 13.3. Further, because the Defendants are immune from the jurisdiction of the Court, no Order for service out of the jurisdiction should have been made and the proceedings should be dismissed for want of jurisdiction."

It was made clear that reasons for seeking those Orders would be further particularised. At that stage the Defendants did not have a full record of the proceedings.

4. The second application is to set aside the Order dated 25 May 2018 (the "alternative service Order"), which provides that service on the Defendants of the Order of Master Cook dated 23 July 2014, and other documents in the proceedings, can take place by the Foreign and Commonwealth Office and/or the British Embassy in Tehran transmitting documents via email to the Iranian Ministry of Foreign Affairs in Iran, at Info@mfa.gov.ir or any other appropriate email address, and/or purported service of the alternative service Order and/or purported service of any documents pursuant thereto.

The Preliminary Issues

5. In a Consent Order made by Goose J on 7 November 2018 the following preliminary issues were ordered to be heard:

> "The Service Issues"
>
> a) Whether the Defendants have been validly served with the proceedings on 10 February 2014 or otherwise;
>
> b) If the Defendants do make an alternative service set aside application[1], whether the 25 May 2018 Order for alternative service should be set aside and/or whether service of the Order of Master Cook made on 23 July 2014 and accompanying documents was validly effected.
>
> ("the Service Issues")
>
> "The State Immunity Issues"
>
> Whether the Defendants are immune from the jurisdiction of the English Courts pursuant to the State Immunity Act 1978 and/or section 31 of the Civil Jurisdiction and Judgments Act 1982 or otherwise.
>
> ("the State Immunity Issues")

6. The evidence before me is as follows:

i) Second witness statement of Mark Howarth[2], solicitor for the Defendants. This statement is dated 11 January 2019.

ii) Witness statement of Sean William McGuiness, solicitor for the Claimants. This witness statement is dated 15 March 2019.

iii) Witness statement of Curtis C. Mechling. Mr Mechling is an American lawyer at the law firm Stroock & Stroock & Lavan LLP, the attorneys for a number of the Claimants. His witness statement is dated 15 March 2019.

iv) Third witness statement of Jeremy Edward Needham Andrews. Mr Andrews is a solicitor for the Claimants. His witness statement is dated 15 March 2019.

v) Witness statement of Laina C. Lopez. Ms Lopez is an American lawyer acting on behalf of the Defendants. Her witness statement is dated 12 April 2019.

vi) Third witness statement of Mark Howarth. This statement is dated 12 April 2019.

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[1] Subsequently made on 11 December 2018 – the second application

[2] Mr Howarth had filed a previous statement dated 29 August 2018. However the Defendants were subsequently provided with additional documents. His second witness statement is therefore comprehensive of his evidence as at that date.

vii) Report of Professor Michael D Ramsey dated 12 April 2019. This was served on behalf of the Defendants. Professor Ramsey is Professor of Law at the University of Santiago School of Law in Santiago, California.

viii) Report of Professor David P Stewart. This report is dated 17 May 2019 and was served on behalf of the Claimants. Professor Stewart is Professor of Practice at Georgetown University Law Center, Washington DC.

ix) Affidavit of Shale D Stiller. Mr Stiller is an American lawyer and partner in DLA Piper LLP (US) in Baltimore, Maryland.

Outline of Other Applications not covered by the preliminary issues

7. There are other applications made by the Defendants which are not subject to the preliminary issues I have to determine.

8. The first is an application dated 25 June 2015 which included amending the set aside application to include limitation issues. These concern information on limitation of claims relevant to without notice applications made by the Claimants in the early stages of the proceedings. This application is referred to as "the Amendment Application". If the Defendants do not succeed on the preliminary issues, there will be further matters for the Court to determine on another occasion. These are applications that:

i. The proceedings are time barred in respect of several of the Judgments.

ii. The proceedings/service thereof should be set aside for alleged breach by the Claimants of their duties of full and frank disclosure.

iii. It would be contrary to public policy to enforce the Judgments.

9. The second is an application made on 29 August 2018. The Defendants applied for a retrospective extension of time in which to serve an acknowledgement of service in the proceedings; alternatively relief from sanctions if and insofar as necessary. This has been referred to as "the Protective Application". This application is no longer of relevance. In the recitals to the Order of Goose J, the Defendants undertook to file an Acknowledgment of Service indicating an intention to challenge jurisdiction. The Claimants agreed that the Defendants did not need the permission of the Court to do so. That Acknowledgment of Service was filed on 11 December 2018.

A2. Procedural Background

10. On 8 June 2012 Mr Stiller swore an affidavit in these proceedings. He exhibited 12 Judgments of the United States District Court for the District of Columbia ("the Judgments"). The Judgments arise out of terrorist incidents occurring in a number of countries in the Middle East. There is also one (Acosta) which took place in New York. In the Appendix to this Judgment I give further details of relevant sections of the Judgments. It must be appreciated that each of the Judgments reflects terrible personal tragedy. However, the issues I have to decide involve the application of law and procedure. There is no discretion to be exercised.

11. On 5 July 2012 the Claimants issued the Claim Form and Particulars of Claim seeking to enforce the Judgments. Application was made without notice for permission to serve the proceedings out of the jurisdiction. The application was requested to be dealt with on the papers.

12. Walker J sent emails to the Claimants raising concerns about jurisdiction and state immunity.

13. On 14 August 2012 the proceedings were transferred from the Commercial Court to the Queen's Bench Division. This was at the Claimants' request, following a question raised by Walker J as to the appropriateness of the Commercial Court.

14. On 14 September 2012 the Claimants provided written submissions addressing Walker J's concerns. The matter was listed for a hearing before Singh J (as he then was). On 2 October 2012 Singh J made an Order that, for the purpose of enforcing the Judgments:

    1. "Pursuant to CPR rules 6.36 and 6.38, the Claimants have permission to serve the following documents out of the jurisdiction on the Defendants:

        (i) This Order

        (ii) The Affidavit of Mr Shale Stiller made on 8 June 2012 and accompanying bundles of supporting documents and

        (iii) The Claim Form, the schedule to the Claim Form and Particulars of Claim."

    The time for filing an Acknowledgement of Service was "two months and 22 days after service of the Particulars of Claim on the Defendants by transmission through the Foreign and Commonwealth Office."

    There were further provisions for filing an admission and for filing a Defence when no Acknowledgement of Service had/had not been filed.

15. Singh J gave a brief Judgment explaining the (then) short procedural history. He said that the application raised "potentially complicated issues of law in what Counsel fairly accepts is a novel area … " He then referred to section 31 of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act") and section 5 of the State Immunity Act 1978 ("the 1978 Act"). He gave a very helpful summary in the following terms:

> "5. The State Immunity problem, if it is one, in the present case may arise in the following way. The judgments with which the Court is concerned here are 12 Judgments obtained by various Claimants in the US Federal District Court in the District of Columbia. They arise out of a number of attacks around the world at various times in recent history in which citizens of the United States have either been killed or severely injured. Very often the basis of the finding against the Government of Iran in those cases has been that it conspired to cause the deaths or

injuries concerned. In some of the cases the finding by the US Court has been to the effect that the Government of Iran provided assistance by way of resources to terrorist organisations, knowing that it was doing so and that assistance then led to the deaths or injuries concerned of American citizens.

6. The issue which may arise under the State Immunity Act is whether section 5 would apply if this were a case which arose in the United Kingdom. By way of analogy, the question will become whether the death or personal injury had been caused "by an act or omission in the United States".

7. The essential submission for the Claimants at this stage is that there is a good arguable case that there would be jurisdiction if a similar action were to arise in the United Kingdom, on the basis of a conspiracy being regarded as a composite act. It is said that the conspiracies concerned could properly be regarded as being conspiracies not just against those individuals but their relatives and indeed the public more generally in the United Kingdom. So, by way of analogy, it is said in the present cases conspiracies can be analysed as being conspiracies not just to cause injury or death to American citizens, but also to damage their families and also to damage the public in the United States more generally. That, it is submitted, is one of the inherent features of the scourge of international terrorism, as it has been described by courts both in this country and elsewhere. In some of the other cases the analysis of the American Court was to the effect that the material assistance knowingly provided to terrorist organisations which caused the death or injury in question. Again it is submitted on behalf of the Claimants that it is at least arguable at this stage that section 5 of the State Immunity Act would not preclude an action in the United Kingdom if similar proceedings were brought here. I accept those submissions.

8. The other main issue … is that the Claimants accept that they also may need to show that there is a good arguable case that the Court would have jurisdiction to enforce the American Judgments pursuant to common law on the basis that the government of Iran had a presence in the United States. Suffice it to say that I am persuaded … that the Claimants do have a good arguable case on that also. The argument essentially runs as follows. First, that the American Courts have carefully considered the question and have decided that they have jurisdiction over the government of Iran in these twelve cases. Secondly, that on well-established authority the relevant statute in the United States, the Sovereign Immunities Act 1976, is well known to be a precursor to the United Kingdom's State

> Immunity Act 1978. It is submitted that it follows, therefore, that a similar view would be taken in the United Kingdom and that, at least for present purposes, the Court should grant permission on the basis that there is no statutory bar to service out of the jurisdiction or common law bar to such service.
>
> 9. For the reasons that I have given, I am persuaded that the Claimants should be granted the permission that they seek. I stress that this is a without notice hearing and this does not mean that these issues cannot be revisited on contested argument if the Defendants choose to take part in legal proceedings in this country and if they choose to make representations to that effect in due course."

16. On 28 November 2012 the Claimants' counsel enquired of the Foreign & Commonwealth Office (the "FCO") regarding service of proceedings on Iran. He was advised that service could be effected by the Swedish Embassy in Iran, the Swedish Government then acting as the Protecting Power for the UK in Iran.

17. On 30 November 2012 the Claimants wrote to Master Whitaker enclosing a letter of request to the FCO to arrange for service of the relevant documents, translated into Farsi, on Iran. The request to the FCO was that the documents for service be transmitted to the Swedish Government for subsequent transmission by the Swedish Embassy in Iran to the Ministry of Affairs in Iran ("the MFA").

18. On 20 December 2012 the Claimants applied without notice for an extension of time for service of the Claim Form. That day Master Fontaine granted an extension to 5 July 2013.

19. On 25 February 2013 the Claimants wrote to Master Whitaker requesting that an expanded set of documents be forwarded to the FCO for service on Iran. These documents included an original sealed copy of the Claim Form, English versions of documents already provided, and a Response Pack in English and Farsi.

20. On 18 December 2013, five and a half months after expiry of the time for service, the Claimants applied without notice for a further, retroactive, extension of time for service of the Claim Form. This was granted on that date by Master Fontaine. She extended time to 5 July 2014.

21. On 10 April 2014 the FCO certified that "copies of the documents hereto annexed" were served on the Iranian MFA on 10 February 2014 by delivery in person to Mr Mohammed Hossan Habibollazadeh, non-resident Chargé d'affaires to London. A copy of the certificate was provided. The Claimants emailed the FCO to request a copy of the annexed list of "served" documents referred to in the certificate. There was no response to that request.

22. On 18 July 2014 the Claimants applied without notice for permission to enter default judgment against the Defendants for failure to file an Acknowledgement of Service/Defence.

23. On 23 July 2014 Master Cook gave the Claimants permission to enter default judgment in the sum of $664,112,636.54 (including interest to date). He gave permission to serve out of the jurisdiction a copy of the default judgment, evidence in support and any other Orders, evidence or documents related to the broader action. Finally he ordered:

    i) The default judgment shall become effective and enforceable against the assets of the Defendants in England and Wales (save those assets not for the time being in use or intended for use for commercial purposes) after the expiry of two months from the date of service upon the Defendants of the documents.

    ii) The Defendants have liberty to apply to set aside or vary the Order by no later than two months after the date of service of the documents.

24. On 3/5 September 2014 the Claimants wrote to the Senior Master requesting that the enclosed documents relating to the default judgment be forwarded to the FCO for service on Iran.

25. On 10 September 2014 Mr Howarth said that his firm discovered that the Claimants' leading counsel had published some details of the case on his website. Mr Howarth said that this was the first that the Defendants had heard of a default judgment.

26. On 17 October 2014 the Defendants issued the set aside application and a further application for an Order requiring the Claimants to provide the Defendants with copies of all documents in the proceedings.

27. On 5 November 2014 a Consent Order was made under which the Claimants were required to provide the Defendants' solicitors, Eversheds, with all documents in the proceedings and giving directions in respect of the set aside application.

28. On 12 November 2014 the Claimants provided the Defendants with copies of the documents in the proceedings. The Defendants sought further documents. Some were provided.

29. On 22 December 2014 the Defendants wrote to the Claimants identifying limitation issues and noting that disclosure of these had not been made at the without notice hearings before Singh J in October 2012, nor in the 18 December 2013 application to Master Fontaine.

30. There was also correspondence between the parties as to the documents served by the FCO.

31. On 31 December 2014 the Foreign Process Section at the Royal Courts of Justice (FPS) forwarded to the Claimants a copy of an email received from the FCO on 22 December 2014. This stated:

> ".. I can confirm that although the FCO had performed its role in delivering legal documents in reference to the above matter to the non-resident Chargé d'Affaires to London of the Iranian MFA, the attempted service was later rejected by the said

> MFA. This response therefore nullifies the Certificate of Service that was prepared … at the FCO on 10 April 2014."

32. In January 2015 Professor Sarooshi was in communication with the FCO regarding the failure to effect service of proceedings. On 27 January 2015 Sir Edward Garnier QC, writing in his capacity as consultant to the Claimants' solicitors, DLA Piper, wrote to the legal adviser to the FCO, copy to Mr Tobias Ellwood MP, then Parliamentary Under Secretary of State at the FCO. This letter was in relation to the problems with service. A meeting was requested with Sir Edward and Mr Jeremy Andrews, the partner at DLA Piper acting on the matter. The FCO responded saying "We are currently preparing a letter to the Court to explain the chain of events in these proceedings, but would be very happy to meet you and your colleague, Mr Andrews, to discuss this matter further."[3]

33. On 9 April 2015 the FCO wrote to the FPS. The letter stated:

> " … Jeremy Cook wrote to you via email on 22 December 2014 to inform you that the service of the claim documents in the above case ("the documents") on the Islamic Republic of Iran which was carried out in February 2014 had been later rejected and the documents returned. The email stated that this response from the Iranian Government nullified the Certificate of Service dated 10 April 2014. In fact, having considered the matter further here, we consider that that statement was incorrect: we believe that service did in fact take place in accordance with standard procedures in such cases. We therefore see no reason to withdraw or amend that Certificate and we consider it still to be valid. We do of course accept that the question of whether service has been successfully effected is a matter of law for the Court. The purpose of this letter is to set out the facts of the situation for the Court.
>
> On 20 February 2014 a non-resident UK Chargé d'Affaires to Tehran, Mr Ajay Sharma, and an Iranian non-resident Chargé d'Affaires to London, Mr Mohammed Hossan Habibollazadeh, were appointed by the UK and Iranian Governments respectively and the UK and Iran agreed that bilateral relations would be conducted directly through non-resident Chargés d'Affaires and officials.
>
> On 10 February 2014 a UK delegation, headed by Mr Sharma and including Mr Peter Chamberlain, then Head of Bilateral Team in the FCO's Iran Department made a 24 hour visit to Iran. The visit included a meeting in the Ministry of Foreign Affairs of the Islamic Republic of Iran ("the Iranian MFA") with an Iranian delegation headed by Mr Habibollazadeh and

[3] Mr Howarth says that no notes of any meeting between DLA Piper and the FCO have been provided to the Defendants. Mr Howarth also says that between December and February his firm wrote to DLA Piper asking for copies of correspondence between the Claimants and the FCO. No response was received.

including the Iranian MFA's UK desk officer, Mr Mohammad Sahebi.

It was a very short visit and because of pressure of business, there was limited opportunity to hand over documents during the meeting. Therefore, at the end of the meeting on 10 February 2014, while the UK delegation was speaking to the Iranian delegation outside of the Iranian MFA building (but within in the Iranian MFA compound), Mr Chamberlain explained to the Iranian officials that the UK had some documents to hand over. He then handed the documents over to his counter-part, Mr Sahebi, explaining that they were legal papers that needed to be served on the Iranian MFA. Mr Sahebi accepted the documents and put them in his vehicle.

On 11 February 2014 the FCO's Iran department in London issued a note verbale (copy enclosed) addressed to the Iranian MFA referring to the transmission "*by way of service*" of the documents and stating;

Receipt of the documents by the Ministry of Foreign Affairs of the Islamic Republic of Iran is deemed as service upon the Defendant state under the State Immunity Act 1978 of the United Kingdom.

The note was sent to Mr Sahebi by email.

…. …..

The UK's next bilateral visit to Iran took place on 19 May 2014. The UK delegation consisted of Mr Sharma and FCO Iran Department Officials, including Mr Chamberlain. During this visit Mr Sahebi informed Mr Chamberlain that the Iranian MFA would not accept receipt of the documents … Mr Sahebi took the documents from his vehicle and placed them in the vehicle that was being used by the UK delegation.

Finally, we should clarify that although the Certificate of Service dated 10 April 2014 refers to documents being annexed, this was incorrect; a copy of the document was <u>not</u> in fact annexed to the Certificate. After being returned on 19 May 2014 the documents were retained in an FCO building in Tehran as there was no diplomatic bag service between Iran and the UK at the time, and no official channel for transporting them to London. … A decision was eventually made to return the documents in January 2015. The documents are now being held in the FCO's London offices.

Accordingly we consider that service of process on Iran did as a matter of fact take place in Tehran in February 2014, in accordance with standard diplomatic procedures."

34. On 20 June 2015 the Defendants issued the Amendment Application. Amongst other things, this sought disclosure of all correspondence between the Claimants and the FPS and/or the FCO.

35. On 10 July 2015 the Claimants wrote to the Defendants enclosing a copy of the FCO's 9 April 2015 letter to the FPS which the Claimants said they had received on 9 July 2015.

36. Between July 2015 and January 2016 there was correspondence between the parties.

37. On 11 April 2016 the Claimants' solicitors sent to the Defendants a letter from the FCO to the FPS dated 9 March 2016. That letter attached a witness statement from Mr Ben Fender, Deputy Head of Mission of the British Embassy in Tehran. The witness statement is dated 6 March 2016. It said that service was unsuccessful in serving copies of the documents regarding the default judgment. Mr Fender's witness statement records attempts to serve from 2 September 2015[4]. He then refers to a telephone conversation on 6 September 2015. The witness statement continues:

> "6. Since then, I have on several occasions discussed the delivery of the papers with Mr Mohammad Sahebi, the Deputy Director for Western Europe in MFA. He has told me that MFA staff are not generally permitted to receive legal documents and that the only person authorised to do so is a Mr Esfahani-Nejad, the Head of the MFA's Legal Affairs department. Mr Sahebi advised that I should seek a meeting with him. He also made clear that I should not attempt to get the MFA to accept the documents through any subterfuge and that damage to Iran/ UK relations would result.
>
> 7. I first requested a meeting with Mr Esfahani-Nejad in mid-September 2015. … Mr Esfahani-Nejad has consistently declined to see me, on various pretexts.
>
> 8. In the course of these exchanges, Iranian officials have indicated that they believe that this case, along with other cases whose papers I have been asked to deliver, is politically motivated. Based on my experiences, my belief is that the MFA has a deliberate policy of not accepting papers relating to some cases involving the Iranian authorities and are determined to obstruct service of documents. … "

38. In June/July 2016 there was further correspondence between the solicitors for the parties. The Defendants were seeking clarification of points in Mr Fender's statement and asking for a response to earlier letters requesting correspondence between the FCO and the Claimants. There was also correspondence about procedural matters.

[4] Particulars of what Mr. Fender says happened in September 2015 are set out later in this judgment in section C THE SERVICE ISSUES.

39. In January 2017 there was further correspondence between Sir Edward Garnier and the FCO as a result of which the FCO confirmed that there had been no further attempts to effect service.

40. On 15 September 2017 the Defendants' solicitors wrote to the Claimants' solicitors noting that the Defendants' position was that service had not been effected and that time for filing any Acknowledgment of Service had not started to run. The Claimants responded, referring to their letter of 16 July 2015. In this letter they said that a Defendant wishing to dispute the Court's jurisdiction must first serve an Acknowledgment of Service.

41. In December 2017 Sir Edward Garnier again asked the FCO about further attempts to effect service of the default judgment documents. The FCO confirmed that there had been no further attempts. In effect, the default judgment documents had still not been served.

42. On 24 May 2018 the Claimants made an application for permission to effect service by alternative means of the Order of Master Cook of 23 July 2014 granting default judgment. The application was made without notice.[5] The Application Notice stated:

> "The Applicant applies for an Order to provide for service on the Defendants of the default judgment entered pursuant to the Order of Master Cook dated 23 July 2014, a copy of the evidence in support of the application for permission to enter default judgment and any other documents relating to these proceedings to take place by email from the Foreign and Commonwealth Office and/or the British Embassy Tehran to the Iranian Ministry of Foreign Affairs in Tehran, these means constituting valid service pursuant to section 12(5) of the State Immunity Act 1978. This application is made entirely without prejudice to the Claimants' case that valid service of the default judgment and other documents in these proceedings on the Defendants has previously been effected."

43. On 25 May 2018 a hearing took place. Leading counsel appeared for the Claimants before Soole J in the Interim Applications Court. The Order made was:

> "1. The service on the Defendant of the default judgment Order of Master Cook dated 23 July 2014 and any other documents in these proceedings can take place by the Foreign and Commonwealth Office and/or the British Embassy Tehran transmitting documents by email to the Iranian Ministry of Foreign Affairs in Tehran, Iran at Info@MFA.gov.ir, or any other appropriate email address, this being in compliance with section 12(5) of the State Immunity Act 1978.
>
> 2 This Order is made entirely without prejudice to whether valid service of the default judgment Order and other

[5] The Defendants say that they were not aware of the Order until early November 2018

documents in these proceedings on the Defendants has previously been effected.

3. The Defendant is entitled to apply to set aside or vary this Order."

44. On 29 August 2018 the protective application was filed.

45. On 6 November 2018 the parties agreed the terms of an Order for directions. Goose J made the Order on 7 November 2018.

46. On 11 December 2018 the Defendants made the second application, i.e. the alternative service set aside application. They also filed an Acknowledgment of Service.

B. THE STATE IMMUNITY ISSUES

B1. Have the Defendants submitted to the jurisdiction?

47. There is an exception to State Immunity provided by section 2(1) of the 1978 Act. This is " .. as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom."

48. The Claimants rely upon section 2(3) which, so far as material states:

> "(3) A State is deemed to have submitted –
>
> (a) …
>
> (b) Subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of –
>
> (a) claiming immunity …"

49. The Claimants refer to the Defendants' applications of 17 October 2014 and 25 June 2015.

50. I have set out the terms of the 17 October 2014 application (the first application) at the beginning of this Judgment. The Defendants' application was based on state immunity and lack of service of the Default Judgment of Master Cooke.

51. The application notice of 25 June 2015 was for directions in relation to the first application, for the production of correspondence between the Claimants and the FPS/FCO and:

> "3. that the set aside application be amended in relation to certain limitation issues and that such issues be determined as preliminary issues."

A draft order was attached to the application which contained the following recitals:

> "AND WITHOUT PREJUDICE TO
>
> The Defendants' right to contest the Court's jurisdiction and assertion of all available immunities whether pursuant to the State Immunity Act 1978 or otherwise
>
> AND ON THE BASIS that the Defendants have not by the application, appeared or taken a step in the proceedings within the terms of section 12(3) of the State Immunity Act 1978 or otherwise. "

It is common ground that in the application and the draft order the Defendants asked for the limitation issues to be tried before the state immunity issues.

52. The witness statement served in support of the application was from Richard Little, the Defendants' solicitor. The statement was dated 25 June 2015. He said:

> "5. I state for the avoidance of doubt that participation by the Defendants in this application or the set aside application does not constitute in any way a waiver of their immunity from the adjudicative or enforcement jurisdiction of the Court pursuant to the State Immunity Act 1978 … common law or customary international law.[6]
>
> …..
>
> 42. The Defendants request an early determination of the issues in relation to limitation because, if the court were to uphold the Defendants' submissions on this point, it would effectively dispose of the case"

53. The application led to a consent order made by Master Eastman on 28 July 2015 in which the recitals in the draft order were repeated. Neither this order nor any subsequent order reflected the application that the limitation issues be tried before the state immunity issues.

54. The Defendants issued a further application notice on 29 August 2018 seeking a hearing of preliminary issues. That application led to the consent order before Goose J on 7 November 2018 listing the preliminary issues. The directions in that order were modified by consent by an Order dated 12 March 2019. Both these Consent Orders contained recitals in exactly the same terms as the draft order and consent order arising out of the application of 25 June 2015.

55. The Claimants submit that the Defendants' application relating to the limitation issues falls within the scope of an intervention or step in the proceedings for the purposes of section 2(3)(b) of the 1978 Act. Therefore the Defendants have submitted to the

[6] This was reinforced by the Defendants' covering letter serving the application. That letter is dated 29 June 2015

jurisdiction of the United Kingdom courts. Therefore they have lost any State Immunity to which they would otherwise be entitled.

56. However, during the course of oral argument the Claimants accepted that the submission that the Defendants have submitted to the jurisdiction cannot succeed before this court. On the facts of this case the High Court is bound, following **Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq**[7] to hold that the Defendants did not submit to the jurisdiction under section 2(3)(b) of the 1978 Act. The Claimants reserve the point for argument in a higher court. I therefore say no more about it. The answer to the question posed, so far as this court is concerned, is "No, the Defendants have not submitted to the jurisdiction".

B2. Section 31 of the 1982 Act

57. Section 31 of the 1982 Act provides:

> "31. Overseas Judgments given against states, etc.
>
> (1) A Judgment by a court of an overseas country against a state other than the United Kingdom or the state to which that court belongs shall be recognised and enforced in the United Kingdom if, and only if –
>
> (a) it would be so recognised and enforced if it had not been given against a state;
>
> (b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978"

58. It is therefore clear that the Claimants have to satisfy both requirements in subsections (a) and (b).

B3. Requirement under section 31(1)(a)

(a) Is presence required?

59. Would the Judgments be "so recognised and enforced if (they) had not been given against a state?"

60. It is common ground that this question is determined according to English Common Law principles of private international Law. In Dicey, Morris & Collins the Conflicts of Laws[8] the jurisdiction rules are summarised as follows:

> "RULE 43 - … a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam*

[7] [1995] Lloyds Law Rep Vol 1 25
[8] 15th edition (2012)

> capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> *First Case* – If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> *Second Case* – If the person against whom the judgment was given was Claimant, or counterclaimed, in the proceedings in the foreign court.
>
> *Third Case* – If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
>
> *Fourth Case* – If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

61. The key question is whether, in accordance with the First Case, presence is required when the Defendant is a state. All the other Cases require submission to the jurisdiction by one means or another.

62. The Claimants note that the rules as summarised were developed mostly from nineteenth century judgments and in respect of judgments against private persons. What must be shown in respect of a judgment against a foreign state has not been decided[9]. Until the case of **Adams v Cape Industries plc**[10] the Court of Appeal had not determined the appropriate rule for judgments against a corporate Defendant.

63. The Claimants therefore submit that the jurisdiction rules set out above should not be regarded as fixed, such that they are the only ways in which an English Court can recognise that a foreign court is competent to exercise jurisdiction over a Defendant. Just as in Adams the Court of Appeal formulated rules to apply to corporations, the Court should now formulate rules in respect of States.[11]

64. In Adams the Claimants brought actions in the Federal District Court at Tyler, Texas, for damages for personal injuries resulting from exposure to asbestos dust. The Defendant companies took no part in the actions on the basis that the Texas Court lacked jurisdiction. Default judgments were entered. Enforcement was sought in England. The Court of Appeal affirmed the first instance decision of Scott J (as he then was). It held that an overseas trading corporation was likely to be treated by the

[9] This is said to be unsurprising given the rule of State Immunity and the fact that until amendment to RSC Order 11 rule 1(1)(m) (now practice direction 6B paragraph 3.4 (10)) a Defendant outside the jurisdiction could not be served in an action on a foreign judgment even if there were assets within the jurisdiction to satisfy the judgment. It may also not have been decided since, with most states, there may be no issue but that the state has a presence in the foreign country.

[10] [1990] Ch 433

[11] Reliance is placed on paragraph 14-082 of Dicey and Morris which states "the rules of Common Law … as to jurisdiction are not necessarily exclusive. Like any other common law rules, they are no doubt capable of judicious expansion to meet the changing needs of society."

English Court as present within the jurisdiction of the courts of another country, only where such corporation had established and maintained at its own expense a fixed place of business in that other country, and had carried on its business from there for more than a minimal period of time. Slade LJ at 517H-518B said:

> "From the three last mentioned authorities read together, the following principles can, in our judgment, be extracted. First, in determining the jurisdiction of the foreign court in such cases, our Court is directing its mind to the competence or otherwise of the foreign court "to summon the Defendant before it and to decide such matters as it has decided" … Secondly, in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the Defendant in the country concerned at the time of suit. … "

65. The Claimants make as their primary submission that, where the Defendant is a state, for the purposes of enforcing a judgment under section 31 of the 1982 Act, it suffices to show that the foreign state was served with the foreign proceedings in the appropriate way. In summary:

(1) The only way in which the courts of state A can exercise the jurisdiction over state B is by proper service of process having taken place upon state B.

(2) The Defendants have not disputed that they were served with proceedings in compliance with US and international law in respect of each of the Judgments.

(3) There is no justification for the English Courts insisting on further criteria being shown, especially since (a) section 31(1) was intended to facilitate enforcement of judgment against states, and (b) the English Courts' concern about ensuring that it was appropriate for the foreign state to exercise jurisdiction is addressed by the separate requirement in section 31(1)(b) that the foreign Court has applied a rule corresponding to sections 2 – 11 of the 1978 Act.

66. Finally the Claimants submit that the requirements for presence for the purposes of *in personam* jurisdiction is a legal fiction. In Adams at page 523B Slade LJ said:

> "The words "resident" or "present" or equivalent phrases have been used interchangeably in argument, just as they have been used in the cases; we see no objection to this terminology if it is understood that in the case of a corporation the concept of "residence" or "presence" in any particular place must be no less of a legal fiction than the existence of the corporation itself. The argument has centred on the features which this concept embodies in the case of a corporation."

67. It is correct that there is no authority on the application of the requirement of presence in relation to states. There is also nothing in any authority which suggests that presence is not a requirement. This Court is bound by Court of Appeal authority,

culminating in Adams, that presence is a requirement. Although there was no issue in Adams about the service of the proceedings in relation to the United States' court's rules, nevertheless, because of the lack of presence of the Defendant corporations within the jurisdiction of the foreign court, the English Courts refused to enforce the judgments.[12]

68. The reference in Adams to the concept of presence being "a legal fiction" does not undermine the requirement. Legal fiction it may be, just – as Slade LJ said – as is the existence of the corporation itself. Nevertheless it is necessary. Section 31(1)(a) requires the same question to be asked in proceedings relating to a state as would be asked if the judgment was not against a state, i.e if it had been against a private individual or a company.

69. Further, the Court of Appeal in Adams saw the force of points which highlighted the possible desirability of further extension of reciprocal arrangements for the enforcement or non-enforcement of foreign judgments by convention. Slade LJ continued[13]:

> "Nevertheless, while the use of the phrase "temporary allegiance" may be a misleading one in this context, we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a foreign country to summon a Defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts … "

This passage gives a reason for the requirement of presence, in addition to the weight of authority.

70. As to the Claimants' point that section 31(1)(b) of the 1982 Act sufficiently addresses the English Courts' concern about ensuring that it is appropriate for the foreign state to exercise jurisdiction:

1) Section 31 on its face has two separate requirements which must be fulfilled.

2) Section 31 was the first enactment introducing enforcement of a foreign judgment against a state.[14] As already said, the language used by Parliament asks the same question of a state as would be asked of a private individual, or a company. Presence is required in relation to both a private individual and a company.

3) Although Dicey, Morris & Collins said that the rules are "no doubt capable of judicious expansion to meet the changing needs of society", the authors then go on to consider a number of attempts which have failed. The fifth one of

[12] For comment in relation to this see Briggs "Civil Jurisdiction and Judgments" (6th edition) paragraphs 7.46 and 7.47; also Dicey, Morris & Collins paragraph 14-129
[13] At 519A - B
[14] See section 31(4)

those is reciprocity. They say[15] "reciprocity is used to describe the view that the English court should recognise the jurisdiction of the foreign court if the situation is such that, mutatis mutandis, the English court might have exercised jurisdiction, e.g. under CPR rule 6.36 and Practice Direction 6B. On the present state of the authorities, the jurisdiction of the foreign court will not be recognised on such a basis."[16]

4) This analysis is reinforced by the Adams decision. In that case the Court of Appeal did not envisage any change in the presence requirement because of the difficulties of adapting it to the case of a limited company. After reviewing the authorities, the court concluded: "in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the Defendant in the country concerned at the time of suit."[17] The Court emphasised[18] that the question of presence "is determined by our courts not by reference to concepts of justice or by the exercise of judicial discretion; it is a question of fact which has to be decided with the help of the guidance given by the authorities." Having given guidance as to the questions relevant to the presence of a company, the Court of Appeal made it clear that ordinarily those propositions "will fall to be applied in the same way whether or not the representative is an individual or itself a corporate body."

5) The Claimants submitted that there is no way a state can be legally present in another state[19]. If this submission is unfounded then there is no inherent illogicality in having a presence requirement in section 31(1)(a) and a separate hypothetical jurisdictional requirement under section 31(1)(b).

6) It would not be appropriate for me to attempt to define comprehensive rules as to the presence of a state in a foreign country. In accordance with Adams it is a question of fact which, adapting Adams at 530 C-D to a state, would require state A, here Iran, to establish and maintain a fixed physical presence for the purpose of carrying on state business in state B, here the United States. One way to do this, but not necessarily the only way, may be to have an embassy, thereby fulfilling both these criteria[20]. Given that a state can establish presence in normal circumstances, there is no good reason to expand rule 43 of Dicey, Morris & Collins so as not to require presence at all.

7) In particular I am satisfied that rule 43 should not be expanded on the basis that the US rules on service out of the jurisdiction permit service out, despite there being no presence in the United States. Rules as to service out of the

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[15] Paragraph 14-087

[16] Reciprocity is essentially the ground on which the argument was put before Singh J, and on which he based his judgment in this case. See Singh J's Judgment at [8]

[17] Page 518 A

[18] Page 519 E

[19] While submitting in the alternative that if there is a presence requirement the Claimants fulfilled it – see below

[20] State to state business may also be conducted through official channels such as diplomatic missions, consulates, official residencies. No such Iranian presence has been in the United States since the 1980s when the Government Iran was officially expelled from United States' territory. See e.g. President Carter's Executive Order 12170 of 1980 and the Department of State's notification of 7 April 1980. In 1983 the Office of Foreign Missions, a division of the State Department, assumed custody of the Iranian Embassy and all other Iranian former diplomatic and consular property.

jurisdiction and presence within the jurisdiction should not be confused. The former is irrelevant to the latter and is not a reason for dispensing with the requirements in English Law. The passage in Adams at 519A-E explains why.

8) The Claimants made reference to **Kuwait Airways Corporation v Iraqi Airways**[21] for the proposition that the presence of an embassy on foreign soil does not equate to the presence there of a state. This again confuses service requirements with section 31(1)(a). In that case the House of Lords held that the service requirements under section 12 of the 1978 Act of transmission through the FCO to the MFA of the foreign state could not be met merely by the FCO delivering a writ to the embassy.

(b) Were the Defendants Present in the US?

(i) Alavi and 650 Fifth Avenue

71. The Claimants' alternative argument in relation to section 31(1)(a) is that the Defendants were present in the USA because of the Alavi Foundation and/or 650 Fifth Avenue Company.[22]

72. I shall now set out the evidence about the Alavi Foundation and 650 Fifth Avenue Company which appears from the documentation and is not based on any US Court's decision. This evidence is contained in paragraphs 129-133 of Mr Howarth's second witness statement and the documents exhibited to it. The evidence from the documents is, in relation to the Alavi Foundation:

(i) That it is a public charitable association incorporated in New York. Its purposes are described as "purely religious, charitable, scientific, literary and educational".

(ii) Its funding is primarily from its 60% ownership of the building which it constructed in the 1970s at 650 Fifth Avenue.

(iii) It was established by the Shah of Iran in 1973 as the Pahlavi Foundation. It has subsequently undergone name changes.

(iv) According to the Alavi Foundation's abbreviated tax filing for the year 2011-2012, the majority of its charitable activities are funded by distributions from the 650 Fifth Avenue Company in which Alavi holds a majority partner interest.

73. 650 Fifth Avenue Company is a partnership comprising two partners, Assa Corporation and the Alavi Foundation. Assa Corporation is a New York corporation incorporated in 1989 and dissolved in 2010. The relevant document before the Court evidences the amendment to the partnership agreement of 650 Fifth Avenue Company where, on 1 August 1994, Alavi transferred a 5% interest in the company to Assa. This resulted in Alavi holding 60% and Assa 40% of the partnership.

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[21] [1995] 1WLR 1147 at 1155H-1156D

[22] It is not the Claimants' case that the US Court held that Iran was present in the USA because of these entities. They did not need to do so, it not being relevant in the proceedings there.

74. The Claimants rely on a case in the US District Court for the Southern District in New York. This is **Kirschenbaum et al v 650 Fifth Avenue[23].** The proceedings concerned (a) a civil forfeiture action brought by the US Government against US property owned by Alavi Foundation, 650 Fifth Avenue Company and two other entities; (b) enforcement proceedings commenced by individual Claimants against the same Defendants. These include Judgments in the proceedings before me.[24] Critical in Kirschenbaum is the status of the two entities and their connection to the Iranian Government. The decision of the New York District Court has been summarised in this way[25]:

(1) Both the Alavi Foundation and 650 Fifth Avenue Company were agents or instrumentalities of Iran under the Terrorism Risk Insurance Act 2002.

(2) 650 Fifth Avenue Company was an agency or instrumentality of Iran under the Foreign Sovereign Immunities Act and did not enjoy immunity from attachment of its assets under section 1610(b)(3).

(3) Regardless of the 650 Fifth Avenue Company's status as an "agency or instrumentality" of Iran, it is Iran's "alter ego" and, therefore, FSIA[26] jurisdiction is properly as it would be over Iran[27].

75. Therefore the Claimants submit that these findings justify the conclusion that Iran was present in the USA.

76. The Defendants' response is that the findings in the US Court are not admissible as evidence of the facts decided. They cite the rule in **Hollington v Hewthorn[28]** and some of its more recent examples, namely **Calyon v Michailaidis[29]** and **Rogers v Hoyle[30]** at first instance and on appeal where Christopher Clarke LJ said at [39]:

> "As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough

[23] 257 F.Supp.3d 463 (S.D.N.Y. 2017) The witness statement of Mr Mechling deals in detail with these proceedings.
[24] Judgments of Greenbaum, Acosta, Heiser, Kirschenbaum and Beer
[25] Claimants' skeleton paragraph 127
[26] Foreign Sovereign Immunities Act 1976

[27] In particular the Claimants rely upon a passage in the Judgments of District Judge Katherine B Forrest where she made findings of fact at page 467.

[28] [1943] KB 587
[29] [2009] UKPC 34 at [19] [23]-[33]
[30] [2015] QB 265; [2013] EWHC 1409 (QB) at [88] and [101]–[104]; [2014] EWCA Civ 257.

> and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard."

77. The Claimants referred to the decision of Carr J in **Sabbagh v Khoury & ors.**[31] Having been referred to the authorities, the judge said she was inclined to accept that findings in another court may be relied on at an interlocutory stage for the limited purpose of demonstrating whether there is a serious issue to be tried. She distinguished Calyon because there the findings of the Greek court were being relied on, without more, as conclusive, alternatively probative, evidence of a central plank of the claimant's case.

78. The present hearing is not an interlocutory stage in deciding whether or not the Defendants were present in the United States. There will be no further hearing of this matter and the Claimants must prove presence on the balance of probabilities, not just to show a serious issue to be tried or that there is a properly arguable claim. Therefore, Sabbagh does not assist them and the findings in Kirschenbaum are inadmissible as evidence.

79. It appeared to be common ground that, absent the facts found in Kirschenbaum, the only admissible evidence about the Alavi Foundation and 650 Fifth Avenue Company was insufficient to satisfy any presence requirement by the Defendants in the United States. Nevertheless I will briefly deal with why this is so.

80. For assistance as to the definition of a 'state'[32], article 2(1)(b) of the UN Convention on Jurisdictional Immunities of States and their Property provides:

> "(b) 'state' means:
>
> (i) The state and its various organs of Government;
>
> (ii) …
>
> (iii) Agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state.
>
> (iv) Representatives of the state acting in that capacity."

81. Section 14(1) of the 1978 Act says that references to a state include references to –

[31] [2014] EWHC 3233 (Comm) at [202]-[207]
[32] Cf "The Law of State Immunity". - Fox and Webb Revised Third Edition pp350-351

(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.

82. Section 14 therefore distinguishes a state from a 'separate entity'. Can the Alavi Foundation and 650 Fifth Avenue Company be described as 'executive organs' of the Iranian Government? Absent the evidence arising from the decision in the Kirschenbaum case, these two organisations have established formal separate status.

83. In **La Générale des Carrières et des Mines (Gecamines) v FG Hemisphere Associates LLC**[33] the Privy Council considered the distinction between the State and 'a separate entity'. Giving the opinion of the Board, Lord Mance said:

> "28. What then is the correct approach to distinguishing between an organ of the State and a separate legal entity? And is this distinction relevant not only to questions of immunity, but also to questions of substantive liability and enforcement? … In the Board's opinion, it is now appropriate in both contexts to have regard to the formulation of the more nuanced principles governing immunity in current international and national law. These, as explained in paras 10 to 18 above, express the need for full and appropriate recognition of the existence of separate juridical entities established by states, particularly for trading purposes. They do this, even where such entities exercise certain sovereign authority *jure imperii*, providing them in return … with a special functional immunity if and so far as they do exercise such sovereign authority. A similar recognition of their existence and separateness would be expected for purposes of liability and enforcement.
>
> 29. Separate juridical status is not however conclusive. An entity's constitution, control and functions remain relevant; para 25 above. But constitutional and factual control and the exercise of sovereign functions do not without more convert a separate entity into an organ of the State. Especially where a separate juridical entity is formed by the State for what are on the face of it commercial and industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical

[33] [2012] 2 CLC 709; [2012] UKPC 27

> personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa. The assets which are … protected by State immunity should be the same as those against which the State's liabilities can be enforced …
>
> 30. There may also be particular circumstances in which the state has so interfered with or behaved towards a state-owned entity that it would be appropriate to look through or past the entity to the state, lifting the veil of incorporation. But any remedy should in that event be tailored to meet the particular circumstances and need. … "[34]

84. There is no evidence admissible before this court to displace the strong presumption in the present case that the separate corporate status of the Alavi Foundation and 650 Fifth Avenue Company should be respected. The admissible evidence which I have summarised above, based on the documentary evidence exhibited, comes nowhere near the required threshold.

85. A final, alternative, submission by the Defendants is that, if the Alavi Foundation and 650 Fifth Avenue Corporation could be regarded as the Iranian state, they are situated wholly in the state of New York. Applying the English Law test for "presence" they were not present in the state of the District of Columbia where the Judgments were obtained. The Defendants submit that the Claimants have to prove that the jurisdiction of the District of Columbia court is such that the presence of a company in New York State is subject to its jurisdiction. The English courts cannot take judicial notice of this. It is a fact to be proven. There is no evidence before the Court. In Adams the Court received evidence[35] from foreign jurists and heard detailed submissions. It also had to rule on disputed evidence on the foreign law. In detailed obiter dicta the Court of Appeal considered what they described as "the country issue".[36] At 556F the Court of Appeal said:

> "… There seems no doubt that Congress has established a system of federal courts of which each one has jurisdiction, in the terms defined by the various longarm statutes of the foreign states (where no specific federal statute provides otherwise) to exercise in personam jurisdiction over any person or corporation present in any state of the Union"

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[34] See also **Taurus Petroleum Ltd v State Oil Marketing Company [2013] EWHC 3494 (Comm); [2014] 1 Lloyd's Rep 432**
[35] See in particular Scott J at first instance at [1990] 1 Ch 433 at 484D-492G
[36] Beginning at p550F.

There is no evidence before me as to the jurisdiction of the Washington court over the Alavi Foundation and 650 Fifth Avenue Corporation who are present in New York State. Therefore, even if they were to be equated with the Defendants, the Claimants have not adduced any evidence to prove the presence required for the purposes of section 31(1)(a). The Claimants submit that where the Defendant is a state, it is a matter of law if the state is present within the jurisdiction of the relevant court. This is not correct. Alternatively, they submit that the point cannot be taken since the Defendants did not raise it before; however, the onus is on the Claimants to prove factual jurisdiction. The Defendants are entitled to take points of evidential insufficiency, just as they have done in relation to the lack of admissible evidence supporting what the Claimants sought to obtain from the Kirschenbaum judgment.

86. On 15 July 2019, i.e. 10 days after the hearing on the State Immunity issues had finished, the Claimants issued an application to rely on evidence of the Honorable Timothy K Lewis in relation to the jurisdictional reach of the District of Columbia court relating to this point. I ruled that the application to rely on the Lewis Report will be allowed, but it will be prepared for and heard if, and only if, it becomes critical to the success of the Claimants' case after any successful appeal.

(ii) Iran at the United Nations

87. During the hearing before me the Claimants sought to argue that Iran's presence at the United Nations ("UN") in New York was sufficient presence for section 31(1)(a). They referred to Mr Howarth's 2nd witness statement at [145]-[148]. He gives evidence about Iran's permanent mission to the UN with its headquarters in New York, there representing Iran's interests as a member of the UN.

88. The Defendants objected to this argument as it had never been raised before. The Claimants accepted this, but responded that in a witness statement from Mr Jonathan Brook dated 17 October 2014 at [34] the Defendants' solicitors had relied on the Kuwait Airways case as saying that a state is not present in the jurisdiction of another state by virtue of maintaining a diplomatic presence there; yet they now distinguish that case and aver that a diplomatic presence such as an embassy could suffice.

89. My ruling on the state of the evidence before me as at close of submissions on 5 July 2019 is that I do not allow this submission to be made: (1) it was raised far too late. The Defendants are prejudiced by this lateness. It would require a detailed exposition of and/or evidence about the UN presence and its purposes; (2) If the Claimants wished to make this point, that should have been made clear well in advance of the hearing such that the Defendants had a proper opportunity to address it evidentially and legally. The Claimants cannot rely on what Mr Brook said in his statement in 2014. Mr Howarth mentioned the UN in his statement when dealing with why the Defendants did not have a presence in the United States. The Claimants' solicitor, Mr Andrews, responded in his statement of 15 March 2019 in some detail to Mr Howarth's statement. He nowhere suggested that the UN presence would suffice. Indeed at [32] he relied only on Mr Mechling's statement[37].

90. In the application of 15 July 2019, the Claimants applied to rely on new evidence from Mr Mechling dated 10 July 2019 in support of the argument that Iran's UN

[37] His statement provided evidence about Kirschenbaum

delegation amounts to presence for the purposes of section 31(1)(a). I ruled against that application. The reasons in that ruling deal somewhat more fully with why the Claimants should not be allowed to raise this point at this late stage.

91. For all those reasons the Claimants have not satisfied the requirement under section 31(1)(a).

B4. Requirement under section 31(1)(b)

(a) The UK and US personal injury exceptions to the State Immunity defence

92. The Defendants' submission as to the effect of section 31(1)(b) of the 1982 Act, is that the wording of section 5 requires "United States" to be substituted for "United Kingdom", such that the death, personal injury or damage to or loss of tangible property had to be caused by an act or omission of the Defendants in the United States.

93. The UK personal injury exception to the defence of State Immunity is to be found in section 5 of the 1978 Act. This provides:

> "5. Personal injuries and Damage to Property
>
> A State is not immune as respect 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. "

94. In the instant cases the US Courts' jurisdiction was founded on section 1605A (a) FSIA[38] which provides:

> "A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee or agent of such foreign State while acting within the scope of his or her office, employment, or agency."

95. This has been referred to as "the terrorist exception".

96. The American legal position has been addressed by the reports of Professor Ramsey and Professor Stewart. These give helpful context to the American legal position.

[38] Foreign Sovereign Immunities Act 1976

97. Section 1605A FSIA is an amendment introduced in 1996. Prior to 1996 the FSIA contained exceptions, including the "non-commercial tort exception"[39]. The non-commercial tort exception covers cases "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state…."

98. A number of decisions in the US Courts had ruled, prior to the amendment introducing the terrorist exception, that the non-commercial tort exception required both the tortious act and the injury to have occurred in the US. Most actions claiming damages in respect of terrorist attacks failed on this basis.[40] The Claimants' expert, Professor Stewart concluded in his report at [32]:

> "… the majority of US Court decisions to have addressed the issue…. have read the statute more narrowly, to require that the "*entire tort*" (including the causative acts) must have occurred in the United States"

99. Professor Stewart says at [41] about the 1996 amendment:

> "The legislative purpose of this additional exception was clear. An increasing incidence of terrorist attacks around the world had targeted the United States and its property, personnel and citizens, resulting in a growing number of law suits brought by the US victims of these terrorist attacks (and their survivors) to recover damages for the resultant loss of life, injury, pain and suffering, etc. Most such suits had been brought under the non-commercial tort exception, described above, but as previously discussed most courts had limited the reach of that exception, so that many such suits failed on jurisdictional grounds … The state sponsored terrorism exception was enacted specifically to provide a firm jurisdictional basis for lawsuits brought by the victims of certain terrorist acts seeking specifically monetary damages that did not fall within the ambit of other FSIA exceptions as they had been interpreted."
>
> The effect of the amendment is that there are now two exceptions in US Law regarding immunity in respect of death and personal injury, namely the pre-1996 exception, which is similar to section 5 of the 1978 Act, and the specific terrorist exception.[41]

100. In summary the difference between section 5 of the 1978 Act[42] and the terrorist exception is:

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[39] Section 1605(a)(5)

[40] See for example **Smith v Socialist Peoples Libyan Arab Jamahiriya 101 F.3d239, 246 (2dCir.1996) - The "Lockerbie Bombing" case; Argentine Republic v Ameradi Hess Shipping Corp 488 US 428 at 421 (1989); Persinger v Islamic Republic of Iran 729, F2d 835(DC Cir); Cabiri v Government of Republic of Ghana 165,F,3d 193 (1999); in Re Terrorist Attacks 714F. 3d 109, 116 (2dCir 2013)**

[41] For the drafting history of the terrorist exception see the explanation in **Doe v Ben Laden 663F.3d 64-67, 68 (2dCir.2011).**

[42] And similarly, the US position absent the terrorist exception.

i. The words of Section 5 require the act or omission causing the death, personal injury or damage to have been "an act or omission in the United Kingdom"

ii. The terrorist exception requires only that the plaintiffs/victims are US Nationals, the relevant acts are alleged acts of international terrorism as provided for, that the Defendants' state was listed on the US State Department list of "state sponsors of terrorism" and that the Defendants had been served with process as required by section 1608 FSIA. Thus the exception is substantially broader, but is subject to the these requirements which limit its ambit.[43]

(b) Construction of the hypothesis in section 31(1)(b)

101. The first question which arises is the proper construction of the words "rules corresponding to those applicable to such matters in the United Kingdom … "

102. The Defendants rely upon what Lord Collins said in **NML Capital Ltd v Republic of Argentina**[44]. In his judgment, with which Lord Walker agreed, Lord Collins said:

> "118. The natural meaning of section 31(1) is that it requires recognition and enforcement of a foreign judgment against a foreign State (other than the United Kingdom or the State in which foreign proceedings were brought) if (a) the normal conditions for recognition and enforcement of judgments are fulfilled, and (b) mutatis mutandis the foreign State would not have been immune if the foreign proceedings had been brought in the United Kingdom. That meaning is the one which text writers have propounded since the section was enacted: *Collins, The Civil Jurisdiction and Judgments Act 1982 (1983), p 140; Dicey & Morris, The Conflict of Laws, 11th ed (1987), pp 454-455 (now Dicey, Morris & Collins, 14th ed (2006), para 14-095); Cheshire, North & Fawcett, Private International Law, 14th ed (2008), pp 588-589."*

103. What was said by the Supreme Court Judges in NML was strictly obiter since the issue in the case was whether the proceedings for the recognition and enforcement of the New York were proceedings "relating to" that Judgment, or proceedings "relating to" a "commercial transaction".

104. The present edition of Dicey, Morris & Collins[45] at para 14-10 states that the test is that the English Court must be satisfied "that the foreign court would have had jurisdiction if it had applied the United Kingdom rules on sovereign immunity set out in Sections 2 to 11 of the State Immunity Act 1978."

105. The Claimants dispute this construction. They say it is too narrow and ignores the breadth of the word "corresponding". The submission they ask the court to accept is that the language of section 31(1)(b) is sufficiently flexible to accommodate the

[43] As Professor Stewart points out at [47]-[48] the terrorist exception covers acts which are essentially condemned by international and English Law.
[44] [2011] 2 AC 495
[45] 15th edition

differences between the UK rules and (here) the US rules. Therefore, the rules which this court must apply are the rules in the US terrorist exception, since they are the rules which correspond to the UK rules relating to personal injury and death.

106. The Claimants rely on what they say the language of section 31(1)(b) is meant to convey. They also rely on the NML case. Finally they rely on Article 6 of the European Convention on Human Rights, but I shall address this point separately later in this judgment.

107. Firstly, the Claimants say that "corresponding to" does not mean "identical to". It is correct that as a matter of dictionary definition "corresponding to" can mean to be congruous or in harmony with, but can also mean to be similar or analogous to. The Claimants' argument is that the elasticity in the term is precisely to accommodate the fact that the rule applied by the foreign court may not be the same as that which the English court would apply. They point out that the different States have different approaches to the way they give effect to State Immunity;[46] also there are different approaches to the precise formulation of specific well-recognised exceptions to immunity, such as one relating to personal injury.

108. The difficulty with this submission is that section 31(1)(b) requires the application of a hypothesis. Would the US Court have had jurisdiction in the matter "if it had applied rules corresponding to those applicable in the United Kingdom"? The test is not whether the US Court has jurisdiction because it did apply rules corresponding to those applicable in the United Kingdom. If "corresponding to" does not mean the rules applicable in the United Kingdom, then which rules does it mean? Can it really mean the US Court's own rules? The Claimants seek to address this by saying that the hypothesis could be because the foreign court may actually have applied a rule containing an exception to state immunity which does not correspond to the UK rule. In those circumstances the UK courts will enforce the decision if the foreign court would (also) have had jurisdiction by applying another rule which does correspond to the UK rule. To my mind this is a strained and impermissible reading of the hypothesis.

109. The second point which the Claimants make is that the wording is broad enough to accommodate developments in international law. The background against which the 1982 Act was passed was that English Law had lagged behind the recognition of the "restrictive doctrine" on immunity. The 1978 Act changed that. However, it is submitted, international law has not stood still and there is no reason to suppose that when the 1982 Act was passed Parliament imagined international law would do so. The use of the word "corresponding" is broad enough to accommodate further developments in international law. Thus it allows a judgment of a foreign court to apply a corresponding rule, such as (they say) the US terrorist exception, to be enforced.

110. It seems to me that this submission, insofar as it seeks to encompass the subsequent broadening of the exception to state immunity in the US[47], founders on the same basis as the first submission. The language of the hypothesis requires consideration of what the position would have been if the US court had applied the UK rule in section 5.

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[46] Some apparently have a statutory formulation, some do not
[47] As to which see below

111. So far I have dealt with the Claimants' argument without reference to authority. However, they submit that the judgment of Lord Phillips[48] NML is at variance with that of Lord Collins and Lord Walker when they deal, obiter, with the effect of section 31.

112. It is necessary to consider NML in a little detail.

113. Before Blair J[49] NML's case on section 31 was it mandates enforcement of a foreign judgment in England where the foreign state would not have been entitled to assert immunity from jurisdiction had the proceedings been before the English court. Argentina's case was that there is a prior question, namely whether the case falls within one of the 1978 Act exceptions to immunity. Unless it does, the state is entitled to immunity in the usual way. Section 31 is relevant to the substantive merits of a claim, but is not relevant to the anterior question of whether the English court has jurisdiction to hear the claim or application in the first place.[50]

114. Blair J accepted NML's case at [26], relying on the formulation in Dicey, Morris & Collins and at [29] saying:

> "…In any case, the foreign judgment is only recognised and enforced here if the court giving it would have had jurisdiction applying rules corresponding to those applicable in the UK. The state concerned is not subject to a lighter or different regime."[51]

115. In the Court of Appeal[52] Aikens LJ, with whom Elias and Mummery LJJ agreed, summarised NML's and Argentina's rival contentions and Blair J's judgment on this point at [32]-[34]. At [77]–[78] he effectively accepted Argentina's contention. The appeal was allowed.

116. In the Supreme Court Aikens LJ's interpretation was rejected by all the judges. Lord Phillips made this clear at [46]-[54]. At [54] he expressly agreed with paragraph 26 of Blair J's judgment and concluded that the relevant passage in Dicey, Morris & Collins[53] was an accurate summary of the law. The citation specifically included "a foreign judgment against a state will be capable of enforcement in England, if both of the following conditions are fulfilled: first, that the foreign court would have had jurisdiction if it had applied the United Kingdom rules on Sovereign Immunity set out in sections 2-11 of the [1978 Act]. … "

117. I do not read anything Lord Phillips said at [34], [47] or [49] as being inconsistent with what Lord Collins said, as was the Claimants' submission. Indeed if Lord Phillips had, on the one hand, taken a different view from that of Lord Collins and, on the other hand, endorsed the same passage in Dicey, Collins & Morris which Lord Collins and Blair J also endorsed, Lord Phillips' judgment would have been internally inconsistent. This was where, during interaction between Professor Sarooshi and me

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[48] With whom Lord Mance (on this point – see [83]) and Lord Clarke agreed.
[49] [2009] QB 579; [2009] EWHC 110 (Comm)
[50] Blair J's judgment at [20] and [23]
[51] On the basis that NML's case was correct, as found, there was no dispute that the New York court would have had jurisdiction if it had applied rules corresponding to those applicable in the UK; see at [31].
[52] [2010] 3 WLR 874; [2010] EWCA Civ 41
[53] 14th ed (2006) vol.1 para 14-095

in oral argument, it appeared the Claimants' submission ended up. The Claimants' submission must be rejected.

118. Therefore, based on the language of section 31(1)(b) and on the unanimous obiter dicta of the Supreme Court who heard full argument on the point, the Defendants' submission as to the meaning of the words "corresponding to" in s.31(1)(b) is correct. The hypothesis assumes that the US court had applied the UK rules. I will next deal with Article 6 ECHR on which the Claimants rely for the interpretation of section 31(1)(b) and of section 5.

(c) Article 6 ECHR and Benkharbouche

119. The Claimants made it clear that they do not suggest that this court should make a declaration of incompatibility. Their submission is that the statutory provisions must be interpreted so as to comply with Article 6.

120. The submission is that there will be a breach of the Claimants' rights under Article 6 ECHR and the Human Rights Act 1998 if the Court grants immunity to the Defendants in circumstances where that is not required by international law. Section 3 of the Human Rights Act 1998, it is said, requires section 31(1)(b) of the 1982 Act to be interpreted so far as possible in a manner compatible with the Claimants' right of access to the Court, as guaranteed by Article 6 ECHR. Alternatively, if the construction of section 31(1)(b) of the 1982 Act is as I have so far determined it to be, then section 5 of the 1978 Act must be construed so as to give effect to this point. Thus the submission is that unless international law requires the UK to afford the Defendants immunity in respect of the claims, denying the Claimants access to the English Courts violates Article 6. Another way of putting the matter is that the Claimants say that if there is a diversity of international practice, the UK should not grant immunity where other states would not grant it.

121. I will first examine this argument as a matter of legal principle. I elicited from Professor Sarooshi six steps in his argument. They were:

(i) Following the decision of the Supreme Court in **Benkharbouche v Embassy of Sudan**[54] the UK courts must construe its statutes consistently with article 6.

(ii) Article 6 requires the court to construe section 31(1)(b) and section 5 such that state immunity is granted only so far as the international law obligations require.

(iii) If there is no consistency of approach in international law, then the court must adopt a construction which reflects the most restrictive exception to the defence of state immunity.

(iv) Therefore all states governed by Article 6 must adopt that most restrictive exception to the defence.

(v) There are countries, such as the United States and Israel, which have a more restrictive exception to the defence than that which might arise if, say, section 5 was construed in what the Claimants submit is too narrow a way.

[54] [2017] UKSC 62

(vi) Therefore, in summary, all states governed by Article 6 are obliged by it, and by international law, to accede to the defence of state immunity only in circumstances which reflect the most restrictive exception to the defence to immunity of any other international state.

122. As I said in argument, the net effect of the Claimants' submission is this. Irrespective of section 5, and in circumstances where states may decide to restrict the exception to the state immunity defence as time progresses, the United Kingdom exception has to continue being construed so as to conform with the narrowest available exception.

123. It is worthy of note that many countries have adopted a statutory enactment of the personal injury exception to state immunity following the United Kingdom model[55]. In Israel[56] the relevant provision is "..provided the tort was committed in Israel". In Canada[57] immunity is removed in proceedings relating to (a) any death or personal injury or (b) any damage to or loss of property that occurs in Canada. There is also, of course, the case of the terrorist exception in the US which was specifically introduced to deal with such cases in circumstances where the non-commercial tort exception had generally been held by the US courts not to exempt immunity for overseas terrorist acts. In the textbook **The United Nations Convention on Jurisdictional Immunities of States and Their Property, *A Commentary*[58]** the authors state:

"The various national State Immunity statutes, all bar one of which[59] includes an exception to the same effect[60], similarly premise the exercise of jurisdiction over the foreign state not on the character of the impugned act but solely on some nexus with the territory of the forum state, usually in the form of the place of the commission of the act, or of the failure to perform, the relevant act."

124. The Claimants' argument is that Article 6 requires section 31(1)(b) and section 5 to be construed such that the United Kingdom exception is wide enough to include the terrorist exception and/or the Canadian exception.

125. Against that backdrop, I turn to Benkharbouche. The Supreme Court had to decide whether two sections of the 1978 Act relating to contracts of employment were compatible with Article 6. The court held at [75]-[76] that there was no principle of international law that deprived the employment tribunal of jurisdiction, that the UK therefore had jurisdiction over Libya and Syria as a matter of international law and Article 6 was engaged by the refusal to exercise the jurisdiction. The employment of the claimants was not an exercise of sovereign authority. The employers were not entitled to immunity and, insofar as the two sections of the 1978 Act conferred immunity, they were incompatible with Article 6.

126. In support of their steps (ii) - (iv) the Claimants refer in particular to what Lord Sumption said at [31] and [34], namely:

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[55] See Singapore: State Immunity Act 1979 s7, Australia: Foreign States Immunity Act 1985 s13, South Africa: Foreign States Immunity Act 1981 s6.
[56] s 5 Foreign States Immunity Law
[57] s6 State Immunity Act 1985
[58] O'Keefe & Tams (2013) page 210
[59] The terrorist exception is the exception referred to in footnote 9 of the text. The footnote also mentions that Canada requires only that the harm the subject of the claim occurred within the territory.
[60] As Article 11 of the Basle convention – see below

"31. To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (*opinio juris*): see Conclusions 8 and 9 of the International Law Commission's *Draft Conclusions on Identification of Customary International Law* (2016) [A/71/10]. There has never been any clearly defined rule about what degree of consensus is required. The editors of Brownlie's Principles of Public International Law, 8th ed (2012), 24, suggest that "complete uniformity of practice is not required, but substantial uniformity is". This accords with all the authorities. In the words of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* (1986) ICJ Rep, 14, para 186:

> "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."

What is clear is that substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law: *Fisheries Case (United Kingdom v Norway),* (1951) ICJ Rep 116, 131.

…..

34...I conclude that unless international law requires the United Kingdom to treat Libya and Sudan as immune as regards the claims of Ms Janah and Ms Benkharbouche, the denial to them of access to the courts to adjudicate on their claim violates article 6 of the Human Rights Convention"

127. The Supreme Court examined the history of the defence of state immunity in some detail at [40]-[52]. At [52] Lord Sumption derived three points from the history. The first was that there has probably never been a sufficient international consensus in favour of the absolute doctrine of state immunity to warrant treating it as a rule of customary international law. The second was that the only consensus there has ever been about the scope of the immunity is the consensus in favour of the restrictive doctrine. He continued:

"…Thirdly, the adoption of the restrictive doctrine has not proceeded by accumulating exceptions to the absolute doctrine. What has happened is that governments, courts and writers of authority have been prompted by the widening scope of state operations and their extension into commerce and industry, to re-examine the true basis of a doctrine originally formulated at a time when states by and large confined their operations in other countries to the classic exercises of sovereign authority. The true

basis of the doctrine was and is the equality of sovereigns, and that never did warrant immunity extending beyond what sovereigns did in their capacity as such. As Lord Wilberforce put it in the *I Congreso del Partido* [1983] 1 AC 244, 262,

> "It is necessary to start from first principle. The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of 'par in parem', which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate.""[61]

128. Lord Sumption then applied that last point to contracts of employment, saying at [53]: "As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune". He went on to hold:

"63. The result is that the State Immunity Act 1978 can be regarded as giving effect to customary international law only so far as it distinguishes between exercises of sovereign authority and acts of a private law character, and requires immunity to be conferred on the former but not the latter. There is no basis in customary international law for the application of state immunity in an employment context to acts of a private law character."

129. In Benkharbouche at [39], Lord Sumption referred to the decision in **Jones v Saudi Arabia**[62] that torture is by definition a governmental act. In the present case the Judgments are founded on findings of state sponsored terrorism. State sponsored terrorism must also be a governmental act. Therefore, applying with appropriate amendment what was said in Benkharbouche at [53], "As a matter of customary international law if [state sponsored terrorism] arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune". What the mechanism in section 31(1)(b) of the 1982 Act and section 5 of the 1978 Act supplies, in the factual context of a sovereign or governmental act, is a further restriction on the defence of state immunity adopted by the United Kingdom. This reduces the immunity for an inherently sovereign or governmental act provided by customary international law. It therefore increases the right of access to the court beyond that mandated by international law. Article 6 has consequently no role to play in this court's interpretation of either section.

130. Further, and in any event, in **Al Adsani v United Kingdom**[63] the European Court of Human Rights (ECHR) it was said [57]: "Except in so far as it affects claims for damages for torture, the applicant does not deny that the above provision (state immunity for personal injury damages unless caused in the territory of the forum state) reflects a generally accepted rule of international law." The ECHR ruled at [56] that "measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as

[61] See also what Lord Sumption said at [17]
[62] [2007] 1AC 270
[63] 34 EHRR 11

imposing a disproportionate restriction on the right of access to the court as embodied in Article 6(1)."

131. Although not argued before me, it occurs to me that there may possibly be a more fundamental objection to enforcement. This would be that when a foreign state commits an inherently sovereign or governmental act, section 5 has no application since it cannot deprive the state of its defence of state immunity. This is because in such circumstances customary international law provides a complete defence – see Benkharbouche at [17]; see also the reference at [10] that the exceptions in the 1978 Act "relate to a broad range of acts conceived to be of a private law character"[64] Obviously I do not rule on this, in the absence of argument. I merely mention it.[65]

132. The Defendants raised a yet further point. This was that, at the enforcement stage, Article 6 is only 'engaged' to the extent of ensuring access to a fair process to examine whether the conditions for granting execution have been met. It is not a route for attacking the requirements for execution themselves or the merits of the court's decision on enforcement. They cite Saccoccia v Austria[66]. The key paragraph in Saccoccia is [63] where the court said:

> "…in *exequatur* proceedings the domestic courts are not called upon to decide anew on the merits of the foreign court's decision. All they have to do is examine whether the conditions for granting execution have been met."
>
> The court held that Article 6 was engaged, but its requirements had been fulfilled since oral evidence was not needed; the courts could reasonably decide the case on the basis of written submissions and other written materials. They were therefore dispensed from holding a hearing [79].

133. I was not taken to any other authority on this point. Nor was I addressed in any detail on the problems arising from the applicability of Article 6 – see in particular Benkharbouche at [13]-[16]. On the submissions before me I am not persuaded by this further argument of the Defendants. It seems to me that Article 6 is engaged for the purpose of examining whether the conditions for enforcing the Judgments in the UK are met. Thus, it is necessary for me to consider, as I have done, the interaction between section 31(1)(b) and section 5 and to determine whether they need to be construed more broadly than might otherwise be the case because of Article 6. Furthermore, the construction of these sections should be consistent at whatever stage of proceedings it falls for determination. In the event, I have found that Article 6 has no role to play in the construction, so this further consideration has no effect.

(d) Construction of section 5 State Immunity Act 1978

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[64] This did not arise in Al Adsani in the English courts. Although the Government argued in the ECHR that article 6 could not apply "as international law required immunity in this case" [44], that court did not accept this in principle since action against a state is not barred *in limine"* [48]. See also Benkharbouche at [22] on this.

[65] In **Havlish v Iran** [2019TALCH01/00116] in the District Court in Luxembourg, First Chamber, the claimants sought to enforce a judgement of the South District of New York against Iran and others for damages arising out of the September 11, 2011 attack. The court posed the question in relation to the Iranian state Defendants at page 55: "Does the derogation apply only to acts *of jure gestionis* or indistinctly to *jure gestionis and jure imperii* acts?" The court answered: "In the absence of evidence to the contrary, the Court considers that the derogation applies to all categories of States acts". This was based on the Luxembourg's court's view of the significance of the Basle Convention and the 2004 Convention, as to which see later in this judgment.

[66] (2010) 50 EHRR 11

134. On the premise (i) that section 31(1)(b) of the 1982 Act requires the Claimants to satisfy section 5 of the 1978 Act with the substitution of the words "United States" for "United Kingdom", and (ii) that Article 6 has no role in the construction of either section, the parties join issue as to whether the Defendants benefit from the defence of state immunity in the circumstances of these cases. The backdrop is that all the Judgments, save for Acosta, were based on terrorist attacks on US citizens in Middle Eastern countries.

135. In Al-Adsani[67] the Claimant was a member of the Kuwaiti Airforce. He stayed in Kuwait during the Iraqi occupation. He came into possession of video material embarrassing to a member of the Kuwaiti Royal family. After the liberation of Kuwait, the Claimant was allegedly kidnapped and subjected to torture by State security guards. For the purposes of the hearing and in order to determine jurisdiction, it was accepted that Kuwait was vicariously liable for the guards' actions. Stuart-Smith LJ said that it was plain that the events in Kuwait did not fall within the exception in section 5 of the 1978 Act. The submission made on behalf of Mr Al-Adsani was "that international law against torture is so fundamental that it is a *jus cogens*, or compelling law, which overrides all other principles of international law, including the well-established principles of Sovereign Immunity." The Court determined that the Act is a comprehensive code and is not subject to overriding considerations[68]. Stuart-Smith LJ said:

> "At common law, a Sovereign State could not be sued at all against its will in the Courts of this country. The 1978 Act, by the exceptions therein set out, makes substantial inroads into this principle. It is inconceivable, it seems to me, that the draftsman, who must have been well aware of the various international agreements about torture, intended section 1 to be subject to an overriding qualification."

Ward LJ said:

> "It is inconceivable that Parliament legislated for the loss of State Immunity when the Acts causing that person injury are committed in the United Kingdom without having borne in mind its clearest international obligations to recognise the fundamental freedom from torture which everyone should enjoy everywhere. Unfortunately the Act is as plain as plain can be. A foreign state enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to escape that State Immunity is afforded in respect of acts of torture committed outside this jurisdiction."

136. Further allegations in Al-Adsani were that the Claimant had suffered psychological injury as a result of subsequent threats made to him once he had come to England. Mr Al-Adsani's claim was that these anonymous telephone calls had been made by agents of the Kuwaiti Government and that they hindered his recovery from the post-

[67] The Court of Appeal inter partes judgment is reported at [1996] ILR 536
[68] See also for this proposition Benkharbouche at [39]

traumatic stress disorder caused by his experiences in Kuwait; alternatively they added to his suffering by increasing his stress and anxiety. The Court of Appeal agreed with the judge that they could not be satisfied that it was more probable than not that the threats were uttered by agents or servants of the Government of Kuwait. Ward LJ said:

> "Therein lies the weakness of the Plaintiff's case. Connivance will not be sufficient to establish vicarious responsibility. In my judgment, the Plaintiff has failed to satisfy me that he would prove this part of his case, and accordingly, he fails to satisfy me that the Government are exempt from immunity."

137. The Claimants say that there was rightly no discussion of the country from which the calls had originated. Reference is made to the ex parte decision of the Court of Appeal[69] where Evans LJ said "on its face, section 5 requires there to have been an act or omission in the United Kingdom. It might possibly be arguable that section 5 should not be read so strictly, but Mr McDonald has not submitted that that approach would be wrong. He submits that there is evidence of damage here in the form of injury to mental health, which has occurred since the Plaintiff returned to the United Kingdom, and that has been caused by the threats which have been made to the Plaintiff during his time in the United Kingdom, since he returned." Evans LJ referred to the evidence and did not then focus on whether the threats which took effect in the United Kingdom were made from a country outside the United Kingdom. However, the matter is clarified in the first instance decision of Mantell J, unreported 3 May 1995. He described them as the English acts and said he was readily satisfied that they occurred within the UK. I understand this to be a finding that the threats were made from within the UK. Further, in the report of the inter partes decision of the Court of Appeal, in the summary of the facts, the allegations were listed as: "he also alleged that, including death threats, from agents of the Government of Kuwait, in particular, emanating from the Embassy of Kuwait in London."

138. In any event, the above citation from Ward LJ makes it clear that the Court of Appeal's decision is that State Immunity is afforded in respect of acts of torture committed outside the jurisdiction, but not for those committed within the jurisdiction.

139. The Defendants in the present case submit, on the basis of Al-Adsani:

(i) The Claimants must identify acts or omissions on the part of the Defendants which took place within the United States.

(i) Alleged acts of funding from overseas – such as the "connivance" in Al-Adsani – are insufficient.

(ii) It is irrelevant that international law abhors and prohibits terrorism, just as it was irrelevant in Al-Adsani that international law abhors and prohibits torture. There is no ambiguity to be resolved in section 5. It is for parliament, not the courts, to create any further exceptions, if appropriate.

[69] [1994] PIQR P236

140. The Claimants' response is that section 5 should not be construed restrictively since State Immunity is an exception to the normal jurisdiction of the court.[70] They then make further points, which in headline form are:

(i) An act can be committed in a country, whether the UK or the USA, even if the alleged perpetrator is not present in the United Kingdom. They can be liable for the tort, for example as joint tortfeasor.

(ii) Section 5 encompasses a composite act or omission i.e. an act which occurs partly inside and partly outside the foreign state.

(iii) Conspiracy is a continuing offence over which a state's courts will exercise jurisdiction even where there may not be an overt act in the jurisdiction.

(iv) There is importance in the fact that the acts in the present case were terrorist acts.

141. Each of these points needs examination. I shall deal at this stage with all the Judgments save Acosta.

142. First, the Claimants say that the statutory words "an act or omission (in the United States)" encompass a joint tort. Joint tortfeasors are themselves directly responsible for the tort. In **Sea Shepherd UK v Fish & Fish Limited**[71] Lord Sumption said:

> "[37] …the defendant will be liable as a joint tortfeasor if (i) he has assisted the commission of the tort by another person, (ii) pursuant to a common design with that person, (iii) to do an act which is, or turns out to be, tortious.
>
> [38] … He is liable for the tortious act of the primary actor, because by reason of the assistance the law treats him as party to it …"

143. It does not matter that one of the joint tortfeasors is abroad as long as the tort is committed within the jurisdiction. Thus in **Sophocleous v Secretary of State for Foreign and Commonwealth Affairs**[72] at [21], Longmore LJ said:

> "This makes it clear that there is only one tort. If that tort was committed by the primary actor in Cyprus, the fact that a person jointly liable for the commission of the tort was elsewhere when he gave the relevant assistance makes no difference to the fact that the tort was committed in Cyprus."

[70] Reliance is based upon articles by Dame Rosalyn Higgins in "Themes and Theories: Selected Essays, Speeches and Writings in International Law (vol.1 2009) at 375-377; F A Mann in "Further Studies in International Law (1990) at 310
[71] [2015] AC 1229
[72] [2018] EWCA Civ 2167, [2019] 2WLR 956

144. In **DPP v Doot**[73] the English Courts were held to have jurisdiction to try people for conspiracy when the conspiracy to import drugs had been formed abroad. Lord Pearson at page 827D said:

> "It is not necessary that they should all be present in England. One of them, acting on his own behalf as agent for the others, has been performing their agreement, with their consent and authority in England. In such a case the conspiracy has been committed by all of them in England.[74]"

145. In summary a joint tortfeasor or joint conspirator in a criminal case does not himself have to be within the jurisdiction if the primary perpetrator commits an act or omission in the relevant forum, i.e. the United States. Further, vicarious liability may be sufficient on the basis of what was said in Al Adsani.

146. As to this first point, all the Judgments (save Acosta) involved acts or omissions committed in Middle Eastern states, not in the United States. Therefore this point, by itself, does not assist the Claimants in respect of those Judgments.

147. Secondly, the Claimants say that section 5 encompasses a composite act or omission i.e. an act occurring partly inside and partly outside the forum state. It is said that in other contexts it is well established that an act done outside the territory which has harmful consequences inside the territory should in law be treated as an act in the territory. Examples are given such as shooting a gun across a border, planting a bomb on a train which will cross a border and explode in another country, or sending a letter or making a telephone call across state frontiers. At the without notice hearing before Singh J the Claimants gave the example of a dirty bomb detonated outside UK territorial waters which caused death and personal injury in the UK. They submitted it would be absurd if section 5 were to be construed in a way that conferred immunity in those circumstances, simply because the explosion took place outside territorial limits. The Claimants say that all such cases would be within section 5 as being acts "within the United Kingdom", even though the person responsible for the act is not physically present in the United Kingdom and the initiating steps take place outside the United Kingdom. The act is completed in the United Kingdom and that suffices. So, for example, under the old test of jurisdiction, English Courts had jurisdiction for an action "founded on a tort committed within the jurisdiction". A misrepresentation made by telex sent from outside the jurisdiction, but received and acted upon within the jurisdiction, or a telephone call from outside the jurisdiction but answered within the jurisdiction, led to the court finding that the substance of the tort was committed where the representation was received and acted upon – **Diamond v Bank of London and Montreal**.[75]

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[73] [1973] AC 807

[74] cf the case of **Morton–Norwich Products Inc v Intercen Limited** [1976] FSPR 513 (Ch D) at page 524 in relation to a conspiracy or common design to commit a patent infringement.

[75] [1979] 1 QB 333. See also analogous situations in the criminal jurisdiction in **DPP v Stonehouse** [1978] AC 55, 93 and **R v Rogers** 3 QB D34, cited in the Irish case of **County Council of Fermanagh v Farrendon** [1923] IR180. In the American jurisdiction see the US Restatement (2nd) of the Law – Conflicts of Laws (1971) at paragraph 37, **Simpson v State** [1893] 92 Ga41, 17SE 984, **Connecticut Valley Lumber v Maine** [1918] 78NH553

148. The difficulty with this submission is that section 5 of the 1978 Act is not concerned with where the substance of the tort is committed. Its concern is where the act or omission causing the death, personal injury or damage occurred. In this case, did it occur in the United States? Here, apart from the Acosta case, all relevant acts or omissions occurred in Middle Eastern states. The fact that either primary victims continued to suffer injury on return to the United States or that secondary victims never left the United States does not assist the Claimants. Section 5 does not permit eliding the act or omission causing the personal injury with where the personal injury occurs. I do not accept that section 5 can be construed with such flexibility as to permit the Claimants' submission to succeed.[76]

149. This is reinforced to some extent by looking at section 5. At the time the 1978 Act was passed, the European Convention on State Immunity of 1972 ("the Basle Convention") was relevant. Article 11 provides:

> "A contracting state cannot claim immunity from the jurisdiction of a court of another contracting state in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the state of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

150. When introducing the State Immunity Bill in the House of Lords the Lord Chancellor said:[77]

> "The bill is intended to redress the balance. It follows, as I have said, more or less the line of the European Convention, but applies its principles in relation to all foreign states. When the bill is enacted we shall be in a position to ratify the 1972 Convention.
>
> … …
>
> So the European Convention has sought to list all those non-sovereign activities of states where a link justifying foreign jurisdiction can be identified. This bill enacts a corresponding list and the activities are identified in clauses 3 to 10 of the bill …"

151. Also in Al-Adsani v United Kingdom at [22] the ECHR, referring to Article 11, said that section 5

> "…was enacted to implement the 1972 Convention on State Immunity ("the Basle Convention")"

152. I am not saying that section 5 replicates Article 11. It clearly does not. For example it does not have a presence requirement[78]. As the Lord Chancellor said, the 1978 Act

[76] I will deal later with the submission on terrorism which builds on the composite tort argument
[77] Hansard 17 January 1978

more or less follows the line of the Basle Convention[79]. The Claimants also submitted that one does not look to treaties in order to discover customary international law[80]. But that is not the point. The point is that Article 11 and Section 5 are both clear that the act or omission (or facts) which cause the injury or damage must occur in the territory of the state of the forum. Where the death, personal injury, etc. occurs is irrelevant[81].

153. The 2004 United Nations Convention on Jurisdictional Immunities of States and their Property (the "2004 Convention") similarly provides at Article 12 for an exception to state immunity "if the act or omission occurred in whole or in part in the territory of that other state and if the author of the act or omission was present in that territory at the time of the act or omission". This is of little significance in construing section 5 as (i) it postdates the 1978 Act, (ii) it has been signed but not ratified by the United Kingdom and has not come into force since an insufficient number of states have ratified it, and (iii) it is subject to the comments about it, and other treaties, in Benkharbouche[82]. Nevertheless, Lord Sumption did say about the 2004 Convention at [12]: "For the most part, it is consistent with the United Kingdom Act, which indeed was one of the models used by the draftsman."[83]

154. Thirdly, the Claimants say that the conspiracy is a "continuing offence" over which a state's courts will exercise jurisdiction even where there may not be an overt act in the jurisdiction. Three cases are relied upon in support of this. These are: **Liangsiriprasert (Somchai) v Government of the United States of America,[84], R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)[85]** and **HM Advocate v Megrahi[86].** These three cases establish[87] that in the crime of conspiracy the UK courts will regard the offence as punishable in this jurisdiction even if the conspiracy was formed abroad, and nothing was actually done in this country in furtherance of the conspiracy. Reliance is also placed on the Morton-Norwich case at page 524 and the similar position in relation to civil common law conspiracies.

155. It seems to me that none of these cases assists the Claimants. Unlike the crime or civil tort of conspiracy, section 5 expressly founds the exception to State Immunity on an act or omission in the United Kingdom.

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[78] It was common ground that the presence requirement imported into section 31(1)(a) by the common law is not relevant to this point.
[79] See also Benkharbouche at [10]
[80] Relying on Benkharbouche at [32] and [39]
[81] Indeed the death or personal injury could occur anywhere. Thus a person exposed in state A to asbestos who later suffers personal injury by virtue of contracting mesothelioma in state B would be entitled to sue the state which exposed him to asbestos in the place where the exposure occurred. It would be irrelevant that the personal injury materialised and the cause of action arose in State B.
[82] See [12] [32] and [39].
[83] I have previously set out the position in a number of other states regarding the personal injury exception to state immunity, many of which follow the wording of section 5.
[84] [1991] 1 AC 225
[85] [2000] 1 AC 147
[86] [2000] JC 555 (the "**Lockerbie Bombing case**")
[87] See in particular the **Somchai case** at page 251A-D, **Pinochet case** at page 233 and the **Lockerbie Bombing case** at page 560D-E

156. Fourthly, the Claimants rely upon the fact that the acts the subject of the judgments are terrorist acts. In this regard the submission is based upon the following:

(1) Terrorist acts are not only intended to cause immediate loss of life, injury and destruction of property but also, and the Claimants say crucially, injury in the target state by communicating a threat and by instilling intense fear, psychological distress and anxiety to persons in the target state, including the family members of the victims and the general public. Indeed the latter are the main targets.[88] Seven of the twelve Judgments[89] were attacks abroad specifically against a US target.

(2) The law places enormous importance on combating terrorism.[90] From the above conclusions are drawn which I shall briefly set out and address. These are:

(i) Since acts of terrorism were specifically directed at, and intended to harm, the US and its citizens, they should be considered in part to have taken place in the US.

(ii) This is reinforced by the fact that in seven of the twelve judgments the attacks were specifically against a US target.

(iii) If the court has a choice about how to interpret a piece of legislation between an interpretation which would protect victims of terrorism, or an interpretation which would restrict their rights and provide greater freedom for terrorists to operate, it should adopt the interpretation which vindicates victims' rights.

(iv) Where a terrorist act has been perpetrated which is directed at a particular state or its citizens, and has caused death or injury to citizens of this state within the state, then section 5 should be interpreted such that there is an "act" within that state.

157. Professor Sarooshi clarified in oral argument that the key point was the intention to cause harm in the United States. Building on the composite torts analogy, he said that even if the terrorist act such as a bombing took place in the Middle East, the intention to harm secondary victims in the United States made the act composite such that it occurred in part in the Middle East and in part in the United States. He said intention made the act travel from one country to the other.

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[88] See the definition of terrorism in the Convention for the Prevention and Punishment of Terrorism 1937, UN Security Council Resolution 1566 (2004), the evidence of Dr Clawson and Dr Cable in the Heiser 1 case, transcripts 2 September 2000 and 2 October 2004 and extracts from what Lord Carlile then UK Independent Reviewer of Terrorism Legislation said in "The Definition of Terrorism" (HMSO 2007)

[89] i.e not the Acosta case and attacks in Jerusalem which did not target specifically a US target

[90] The Claimants rely upon the broad definition of terrorism in section 1 of the Terrorism Act 2000, the comments of the Court of Appeal in **R v Gul** [2012] 1 Cr App R 37 at [42] and of Sir Igor Judge in **R v F** [2007] QB 960; further, the steps taken to protect the public against terrorist activity for example freezing assets under the Terrorist Asset Freezing Act 2010

158. As a preliminary point, even if this was correct, the primary victims who suffered the batteries in the Middle East would not be able to recover since, for them, the act was there, not in the United States. This would give rise to the unusual situation that the secondary victims could recover but the primary victims could not.

159. I reject these arguments because:

(1) There is no interpretation, however elastic, which brings these cases within the wording of section 5. In my judgment the court has no choice about how to interpret this legislation.

(2) This is particularly the case in the light of the Al-Adsani decision which is binding upon me.

(3) Further, the argument is not a principled one. It would mean that relatives in the United States of somebody killed/severely injured abroad by the negligent act of a foreign state could not recover, whereas they could recover if the death or injury was caused intentionally. There is nothing in the section 5 which possibly permits this distinction.[91]

160. In coming to this conclusion I make no decision on the composite act submission e.g. whether firing a missile from country A into another country B is an act in both countries for the purposes of section 5. It is not necessary for me to decide that point since it does not arise on the facts of any of the cases before me.

(e) Decisions of Courts in other EU states

161. In this section I will set out some decisions of European Union courts where US judgments arising from Iranian state sponsored terrorism have not been enforced. The reasons for not enforcing have differed, but the outcome, on the cases put before this court, has been a consistent refusal to enforce. These decisions give some support to (i) the Defendants' submission of comity between the courts of European Union countries, and (ii) that Article 6 does not require section 31(1) or section 5 to be interpreted as the Claimants have submitted.

162. In **Rubin v Iran**[92] the Rubins sought to enforce the Judgment of the District Court for the District of Columbia awarding damages arising out of the Defendants' involvement in the Jerusalem bombing of 4 September 1997. The French court held that Iran had immunity. Material extracts are:

> "However, the universally prevailing custom in international law requires that all states, quite wisely, agree on the principle of their reciprocal
> immunity, in such a manner that any state should be forbidden to interfere in the exercise of another state's public authority, including its stately authority of rendering justice…….

[91] It could also give rise to questions as to where state A targets and kills/injures citizens of state B in state C by a terrorist act. As a result of the terrorist act, citizens of state D (say the US) are killed/injured. In those circumstances it appears that the secondary victims in the US could not recover. It seems that the Claimants accept this since they appeared to except the Jerusalem bombings, where the United States was not the target, from this particular submission.

[92] Paris Court of First Instance 18 November 2009. Ist Chamber -1st Section

> ……..
> since the acts attributed to it are …….acts that fall within its central sphere of sovereignty *(acta jure imperii)* and not management.."
>
> The same reasoning is contained in the decision in Ben Haim, a decision of the same court on the same day.

163. In **Turner v Iran**[93] the District Court for the District of Columbia had awarded damages to Mr Turner and his family arising out of his kidnapping in the Lebanon between 1987 and 1991. Recognition of the US judgment was refused. The court, applying Italian private international law, said:

> "..the only relevant place is that where the causal fact directly produced an effect on the victim. In the case in question, the illicit conduct and the initial events, namely capturing the hostage and depriving him of his freedom, took place in Lebanon…"

164. In **Havlish v Iran**[94] the claimants sought to enforce in Luxembourg a judgement of the South District of New York against Iran and others for damages arising out of the September 11, 2011 attack. Under the heading "Derogation from immunity from jurisdiction for acts which would have caused death, bodily harm or material injury to private persons?" the court[95] said at page 56:

> "..to the extent that the under-examination condition finds its justification in establishing a close link between the territory of the forum State and the activity of the State invoking jurisdictional immunity, the condition cannot be interpreted otherwise than as requiring the activity of the potential beneficiary of jurisdictional immunity be located in the territory of the forum State so that the derogation from jurisdictional immunity can be effective."[96]

165. In **Flatow v Iran**[97] the Claimants sought to enforce a judgment arising out of the terrorist-caused death of Ms Flatow in Israel in 1995. The Italian Court of Cassation held that such a crime qualified as a crime of humanity such that the claim to state immunity had to be dismissed. However, enforcement was refused on the basis of Italian law which requires that judgments of non-EU Member States are to be recognised and enforced in Italy only if "the court rendering the judgment had competence recognised by the Italian legal order". The US judgment had not been rendered by a court possessing jurisdiction under any of the grounds recognised in Italy.[98]

(f) The Acosta Judgment

166. I turn to deal separately with Acosta. This was a shooting incident in New York carried out by an individual who is not a Defendant in the proceedings. The District

[93] The Court of Appeals in Rome, 12 April 2011
[94] Civil Judgment 2019TALCH01/00116
[95] pages 54-56
[96] This was based on the Luxembourg's court's view of the significance of the Basle Convention and the 2004 Convention.
[97] Italy: Supreme Court of Cassation 28 October 2015 reported in Oxford Reports on International law
[98] This, as the Defendants submit, appears to be roughly equivalent to s31(1)(a) of the 1982 Act.

Court held that the Defendants were party to a conspiracy to commit the attack and that the Claimants had incurred damages caused by that conspiracy. The tort of conspiracy in the US requires:

(i) Agreement between two or more persons

(ii) To participate in an unlawful act or a lawful act in an unlawful manner

(iii) An injury caused by an unlawful overt act performed by one of the parties to the agreement

(iv) The overt act was done pursuant to and in furtherance of the common scheme

167. It is agreed that there was an act in the United States for the purposes of section 5. The question is whether it was an act of the Defendants.

168. The Defendants submit there was no act by them. The alleged involvement of the Defendants was said to be providing continuous material support to terrorist organisations (overseas), analysed as participation in a civil conspiracy (overseas) to cause harm/damage in the United States, without any specific linkage to this particular incident or that the Defendants participated in a conspiracy in relation to the particular act. This is different from some of the cases, such as Heiser, where the findings were that the Defendants conspired to carry out the specific acts which caused the deaths/personal injury.

169. In Acosta the Defendants say what was found against them was not even "connivance" as described in Al-Adsani. In their skeleton they said "there are no findings by virtue of which Iran could be vicariously liable under English Law for the specific acts/omissions of the shooter in the US or the group from which he came". This is "albeit that the language used in US Judgment is in places couched in terms of "conspiracy" and "vicarious liability" as a matter of *US law*". In oral submissions in reply the Defendants said that if Iran was a joint tortfeasor that did not get over the hurdle that the state conspired to commit the particular act in question.

170. The facts and findings of the US Judgment in Acosta are more fully set out in the Appendix to this Judgment. There are detailed findings about the involvement of these Defendants. Specifically:

(i) It was found that acting as agents of Iran, MOIS performed acts within the scope of its agency which caused the wounding of Carlos Acosta. Specifically, MOIS acted as a conduit for Iran's provision of support in the form of, inter alia, documents, training and funding to Sheikh Abdel Rahman and the Islamic group. Nosair, the shooter, was a member of the Islamic Group, a terrorist organisation headed by the Sheikh. Expert evidence was given that Iran, acting through MOIS, provided material

support to the Islamic Group, including, *inter alia*, facilities, transportation, weapons, training and financial support[99].

(ii) The Court expressly found that the four elements of conspiracy required under American Law were established between the Islamic group and the Defendants Iran and MOIS. The basis of this was that Iran continuously provided support in the form of funding, training and safe haven to the Islamic group so that it may undertake terrorist attacks like the one in this action.

171. In the Sea Shepherd case there was no difference of opinion in the Supreme Court about the legal principles for liability as joint tortfeasor. At [21] Lord Toulson said:

"To establish accessory liability in tort it is not enough to show that D did acts which facilitated P's commission of the tort. D would be jointly liable with P if they combine to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort …"

See similarly Lord Sumption at [37], Lord Neuberger at [55].

Lord Sumption referred to the fact that mere similarity of design on the part of independent actors, causing independent damage, is not enough. There must be a concerted action to a common end. Later at [39] he said that the mere facilitation of the tort will not give rise to such a liability, even when combined with knowledge of the primary actor's intentions. The principal concern of the law is to recognise a liability for assisting the commission by the primary actor of a tort. Finally, at [45] he said:

> "it is clear that SSUK cannot incur liability as a joint tortfeasor simply by assisting its activities in general. If they are to incur such liability at all, it must be on the ground that they have specifically assisted its tortious activities …"

Lord Neuberger agreed at [57]-[58] that the assistance provided by the Defendant must be substantial, in the sense of not being de minimis or trivial. However a Defendant will not escape liability simply because his assistance was (i) relatively minor in terms of its contribution to, or influence over, the tortious act when compared with the actions of the primary tortfeasor, or (ii) indirect so far as any consequential damage to the Claimant is concerned. Facilitation of the tortious act will not do. There must be a common design that the tortious act be carried out. Lord Neuberger further said:

> "60 … It is unnecessary for a Claimant to show that the Defendant appreciated that the act which he assisted pursuant to a common design, constituted or gave rise to, a tort or that he intended that the Claimant be harmed. But the Defendant must have assisted in, and been party to a common design to commit,

[99] Paragraphs [18], (11), (27), (31)

> the act that constituted, or gave rise to, the tort … The Claimant need not go so far as to show that the defendant knew that a specific act harming a specific defendant (*sic – presumably claimant)* was intended." [100]
>
> (my italics)

172. On the basis of those statements of principle, allied to the findings in the United States Court, the Defendants satisfy the test such that they must be regarded as joint tortfeasors with the primary tortfeasor in the Acosta case. On the US court findings the Defendants assisted and were a party to a common design to commit the act that constituted or gave rise to the tort, albeit that they may not have known that a specific act harming a specific person was intended. They "specifically assisted its (i.e. the Islamic Group and Nosair's) tortious activities."

173. In those circumstances I find, on the basis of the US findings in Acosta, that the Defendants did, with their agents, co-conspirators and joint tortfeasors, carry out the act of shooting. They satisfy the 3 conditions set out by Lord Neuberger at [55], namely, (i) they assisted the commission of the act by the primary tortfeasor, (ii) the assistance was pursuant to a common design that the act be committed, (iii) the act constitutes a tort as against the claimant.

174. For those reasons the requirements of section 31(1)(b) are satisfied in the Acosta case.

(g) The Commercial Transaction Exception

175. Until recently the Claimants' case had been based solely on section 5 of the 1978 Act.

176. The Claimants now put forward an alternative submission based on section 3. Section 3 provides:

> "(1) A state is not immune as respects proceedings relating to-
>
> (a) a commercial transaction entered into by the state; or
>
> (b) an obligation of the state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.
>
> (2) …
>
> (3) In this section "commercial transaction" means-
>
> (a) any contract for the supply of goods or services
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it

[100] see also at [69]

engages otherwise than in the exercise of sovereign authority;

But neither paragraph of subsection (1) above applies to a contract of employment between a state and an individual."

177. The Claimants rely on subsections 3(3)(b) or 3(3)(c). They give examples of findings in the judgments relating to the extensive support provided by the Defendants to the terrorist organisations[101]:

- In **Holland** which was an attack on US Marine barracks in Beirut there is a finding that the Iranian Government purchased the explosives used in the attack on the barracks in Beirut and provided "complete financial support for the operation going so far as to use the Iranian Embassy in Damascus to cash various checks to provide funding for Hezbollah".

- In **Heiser 1**, the Khobar Towers Bombing, evidence is recorded in the Judgment that senior Iranian Government officials provided Hezbollah operatives with the funding to carry out the attack on the Khobar Towers. The Court said that the bombing was, among other things, "funded … by senior leadership in the Government of the Islamic Republic of Iran."

- In **Blais** the Court held that the Defendants "provided material support and resources to Saudi Hezbollah for the attack on the Khobar Towers, including financing"; in **Valencia**, the Court referred to the funding in Blais and independently held that Saudi Hezbollah was funded by MOIS and the IRGC.

- In **Welch,** which was an attack on the Beirut Embassy, the Court held that Hezbollah was amongst other things financed by the Iranian Government, and that the Iranian Government supplied equipment, arms and explosives. See also similar findings in the case of **Brewer.**

178. The Claimants say that if, pursuant to the construction of s 31(1)(b) of the 1982 Act that I have adopted, the US Courts had been applying section 3(1)(a) of the 1978 Act, they would have found that the Defendants did not have immunity.

179. The Defendants put the possible applicability of section 3 into this context. They say that there are no English decisions referable to any application to apply section 3 to factual circumstances in any way similar to those in these cases. Further, the expert evidence from the US Legal Experts notes that there is a similar commercial activities exception under the FSIA.[102] No US authority has applied this exception in any case involving allegations of state sponsored terrorism. This is despite the fact that, prior to the US terrorism exception to State Immunity, there were numerous cases in which the US tort exception was tried, and found wanting. Nobody appears to have considered the possibility of the commercial activities exception. Yet further, there is

[101] Fuller details are set out in the extracts from the US Judgments in the Appendix
[102] Section 1605(a)(2)

no decision cited from any jurisdiction in the world which has applied any similar commercial transactions exception.[103]

180. Turning to the section itself, the two questions are whether the proceedings (i) related to (ii) a commercial transaction entered into by the state.

181. The construction of section 3 was considered by the House of Lords in **Holland v Lampen-Wolfe.**[104] There the Claimant, a US citizen and Professor at a US University, taught at a military base in England, operated and maintained by the US Government. The Defendant, also a US citizen, was employed as Education Services Officer by the US Government at the base. The Claimant sued him for defamation on the basis of a memorandum which the Defendant sent in his official capacity. Section 3 of the 1978 Act was fully argued but, in the circumstances, was not necessary to the decision. Lord Millett gave the leading speech. He said, at 1587F-H:

> "In my opinion, section 3(1)(a) is not satisfied because although the contract between the University and the United States Government is a contract for the supply of services and therefore a commercial contract within the meaning of the section by virtue of section 3(3)(a), the present proceedings do not relate to that contract. They are not about the contract, but about the memorandum. The fact that the memorandum complains of the quality of the services supplied under the contract means that *the memorandum* relates to the contract … But it does not follow that *the proceedings* relate to the contract, which is what section 3(1)(a) requires. In my opinion the words "proceedings relating to" a transaction refer to claims arising out of the transaction, usually contractual claims, and not tortious claims arising independently of the transaction but in the course of its performance.
>
> For the same reason I doubt that the writing and publication of the memorandum constituted "activity" of an official character in which the United States engaged through the medium of the Defendant, so as to bring the proceedings within section 3(3)(c). The context strongly suggest a commercial relationship akin to but falling short of contract (perhaps because it was gratuitous) rather than a unilateral tortious act …"

182. In summary this obiter dictum, after full argument, from Lord Millett[105] is strong persuasive authority for the propositions that:

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[103] There were three US authorities before the Court. In **Strange v Islamic Republic of Iran** 320F Supp 3d 92 (DDC 2018), the court rejected a submission that financial arrangements between the USA and Afghanistan were such that the acts of Afghanistan which were said to support terrorism were commercial activities. In **Saudi Arabia v Nelson** 507 US 349(1992) the Court held that acts of kidnap and torture were abuse of sovereign state power and not private commercial activity. See also **Republic of Argentina v Weltover** 504 US 607 (1992) at [116]

[104] [2000] 1 WLR 1573

[105] With whom Lords Hope, Cooke and Hobhouse agreed

(1) The words "proceedings relating to .. a commercial transaction" require that the claim arises out of such a commercial transaction and not out of tortious claims arising independently of it, but in the course of its performance.

(2) in order to constitute a "commercial transaction" under subsection 3(3)(c) there has to be a "transaction or activity". This suggests a commercial relationship or a commercial relationship akin to contract, rather than a unilateral tortious act. Under that subsection it also has to be a transaction or activity entered into or engaged in by the state, otherwise than in the exercise of its sovereign authority.

183. The Claimants submit that when considering whether an activity is commercial or not, the purpose is not relevant. They rely on the passage in Kuwait Airways[106] where the House of Lords referred to what Lord Wilberforce said in I Congreso Del Partido[107] as authoritative. The central part of the citation is:

"..the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity….

[the ultimate test] is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform."

184. Following this authority, the act of state sponsored terrorism is of its own character a governmental act as opposed to an act which any private citizen can perform[108].

185. On that basis, the state financial sponsorship of terrorism found by the US courts (i) did not amount to a commercial transaction i.e. Iran was exercising its sovereign power *de iure imperii*; in any event, (ii) the proceedings leading to the Judgments did not relate to a commercial transaction. Section 3 is not therefore applicable.

186. In the end Professor Sarooshi accepted that, if I regarded myself as bound by the obiter dicta in Holland, he would have to reserve this argument for a higher court. I do regard myself as so bound, and I respectfully agree with what Lord Millett said.

B5. Summary of decision on State Immunity Issues

[106] [1995] 1 WLR 1147
[107] [1983] 1 AC 244 at 262, 267 and 269
[108] cf Benkharbouche at [39].

187. It follows that the Claimants must fail in their attempt to enforce the Judgments. This is because

(i) The Defendants have not submitted to the jurisdiction under section 2 of the State Immunity Act 1978

(ii) Under section 31(1)(a) of the 1982 Act, at the time when the proceedings were instituted, presence of the Defendants in the United States is required. The Claimants have not satisfied this requirement.

(iii) It is necessary for the Claimants to fulfil the requirements under section 31(1)(a) and section 31(1)(b) of the 1982 Act. Therefore failure to fulfil the section 31(1)(a) requirements disposes of the case in favour of the Defendants

(iv) The Acosta Judgment alone satisfies the requirements of section 31(1)(b) as it comes within section 5 of the 1978 Act. None of the other Judgments do so.

(v) None of the Judgments satisfy the requirements of section 31(1)(b) pursuant to the Commercial Transaction Exception in section 3 of the 1978 Act.

C. THE SERVICE ISSUES

C1. Section 12(1) and 12(5) of the 1978 Act: preliminary

188. Section 12 (1) of the 1978 Act provides:

> "(1) Any writ or other documents required to be served for instituting proceedings against a state shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry."

189. Section 12(5) of the 1978 Act provides:

> "A copy of any judgment given against a state in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that state and any time for applying to have the judgment set aside … shall begin to run 2 months after the date on which the copy of the judgment is received at the ministry."

190. In **General Dynamics United Kingdom Limited v The State of Libya**[109] the Court of Appeal made it clear (obiter) at [62]-[63] that there is no power to dispense with service on a state. The requirements of section 12 are mandatory. The mandatory requirements are incorporated into the CPR by Rule 6.44. In the White Book 2019 at page 341 it says: "section 12 of the 1978 Act is modelled on art.16" of the Basle Convention. That is not to say that the 1978 Act replicates the Convention[110]. I have

[109] [2019] EWCA Civ 1110
[110] See General Dynamics at [55]-[56]

considered the interrelationship between the 1978 Act and these Conventions earlier in this judgment in a different context. I take account of that.

191. Article 16 of the Basle Convention provides:

> **"**(1) In proceedings against a contracting state in a court of another contracting state, the following rules shall apply.
>
> (2) The competent authorities of the state of the forum shall transmit
>
> - The original or a copy of the document by which the proceedings are instituted;
>
> - A copy of any Judgment given by default against a state which was defendant in the proceedings,
>
> through the diplomatic channel to the Ministry of Foreign Affairs of the defendant state, for onward transmission, where appropriate, to the competent authority. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the defendant state.
>
> (3) Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs …"

192. The 2004 Convention provides in Article 22 that service of process shall be effected:

"1…

(c) in the absence of such a convention or special arrangement:

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned, or

(ii) …

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs"

In **Jones v Ministry of Interior of the Kingdom of Saudi Arabia** Lord Bingham of Cornhill said at [8]:

> "This convention is not in force, and has not been ratified by the United Kingdom. But, as Aikens J observed in **AIG Capital Partners Inc v Republic of Kazakhstan** [2006] 1WLR 1420, 1446, para 80: "its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN ad hoc committee, powerfully demonstrate international thinking on the point.""

C2. Were proceedings served on 10 February 2014?

(a) Service requirements

193. Under section 12(1), the document "required to be served to institute proceedings" is the Claim Form[111]. In the present case the Particulars of Claim were attached to the Claim Form. CPR rule 7.8 then provides:

> "(1) when Particulars of Claim are served on a Defendant … they must be accompanied by –
>
> (a) A form for defending the claim;
>
> (b) A form for admitting the claim and
>
> (c) A form for acknowledging service."
>
> (These three forms constitute the so-called "Response Pack").

194. Further rule 6.45 requires:

> (1) Every copy of the Claim Form, or other document filed under rule 6.43 … must be accompanied by a translation of the Claim Form or other documents.
>
> (2) The translation must be –
>
> (a) In the official language of the country in which it is to be served.

(b) The facts relating to the transfer of documents

195. I have already set out in detail in the Procedural Chronology the FCO letter of 9 April 2015 relating to what happened on 10 February 2014. The central paragraph is:

> "It was a very short visit and because of pressure of business, there was limited opportunity to hand over documents during the meeting. Therefore at the end of the meeting on 10 February, while the UK delegation was speaking to the Iranian delegation outside the Iranian MFA building (but within the Iranian MFA compound), Mr Chamberlain explained to the Iranian officials that the UK had some documents to hand over. He then handed the documents over to his counterpart Mr Sahebi, explaining that they were legal papers that needed to be

[111] CPR Rule 7.2(1) provides "proceedings are started when the Court issues a Claim Form at the Request of the Claimant."

> served on the Iranian MFA. Mr Sahebi accepted the documents and put them in his vehicle."

196. Mr Howarth's second witness statement says this:

> "72.3 I am instructed by the Defendants that on the afternoon of 10 February 2014, following a meeting in Tehran which took place outside the MFA, Mr Chamberlain approached the UK desk officer of the MFA, Mr Sahebi. Mr Chamberlain told Mr Sahebi that he had forgotten to hand some papers to the Iranian Charge d'Affaires to the UK, Mr Habibollahzadeh, at a meeting earlier that day. When Mr Chamberlain and Mr Sahebi reached the street, Mr Chamberlain had his driver give Mr Sahebi a cardboard box, which was taped shut and had Swedish Embassy markings. Mr Chamberlain's driver put the (still unopened) box in the car boot of Mr Sahebi's car. The documents were not therefore received at the MFA at all".

197. The Swedish Embassy markings probably reflect that the Swedish Embassy had previously been protecting UK interests prior to what has been described as the "diplomatic thaw" which took place in February 2014. An email from the FCO (Mr Bryant) of 31 October 2013 to Professor Sarooshi says "we have finalised everything and have sent all the necessary information to the Swedes". Diplomatic relations between the UK and Iran did not resume until 20 February 2014. The visit on 10 February 2014 appears to have been part of the groundwork for re-establishing those diplomatic relations.

198. On 11 February 2014 Mr Chamberlain sent an email to Mr Sahebi in which he said "As requested I've attached a note verbale for the service of process documents I gave you yesterday." That note stated:

> "The Iran Department of the Foreign and Commonwealth Office of the United Kingdom and Northern Ireland presents its compliments to the Ministry of Foreign Affairs of the Islamic Republic of Iran and has the honour to transmit by way of service the enclosed documents regarding the matter Heiser et al and other cases v Iran, this being a court proceeding instituted in the United Kingdom."

199. Therefore there are differences of account in that:

(a) The Claimants say that the documents were handed over outside the Iranian MFA Building but within the Iranian MFA compound. The Defendants say that the handing over took place in the street.

(b) The Claimants say that Mr Chamberlain explained to Mr Sahebi that they were legal papers that needed to be served on the Iranian MFA, this being confirmed by the email and note

verbale the next day. The Defendants' account is that Mr Chamberlain just gave Mr Sahebi a cardboard box describing them as papers which he had forgotten to hand over to Mr Habibollazadeh earlier that day.

200. As to the approach to the evidence:

(i) The FCO's version is in the letter dated 9 April 2015, some 14 months after the event and signed by Josie Farrell (Manager). There is no evidence from Mr Chamberlain.

(ii) Mr Howarth's evidence is on the basis of what he was "instructed by the Defendant".

201. During the course of the hearing, after questions had been raised as to the weight/admissibility of Mr Howarth's evidence on this point, it being based solely on his instructions, the Defendants made an application to adduce further evidence by way of a fourth witness statement from Mr Howarth dated 22 July 2019. This clarified that the instructions came from Mr Sahebi himself[112]. The Claimants objected to this late evidence.

202. In **Foster v Action Aviation**[113] Hamblen J said at [8]-[9]:

"8….this is a very late application and to allow evidence in would be a relatively exceptional course which the court is unlikely to take without good reason.

9. In considering how to exercise my discretion I would regard the following considerations being of particular relevance; (1) the reason why the evidence was not put forward before, (2) the significance of the evidence, (3) the prejudice to the applicant if the application is refused, (4) the prejudice to the other parties if the application is allowed and (5) the need to do justice to all the parties having regard to the overriding objective."

203. Following these principles, there is no good explanation as to why the evidence was not put in before, the evidence has potential significance in that it adds some weight to what is in Mr Howarth's evidence by citing the source of his instructions and the potential prejudice to the applicant is not insubstantial. The Claimants sought to argue that they were prejudiced if the evidence was allowed in, on the basis that they may have carried out further enquiries. I am not convinced by that. I consider that the overriding objective is in favour of allowing in this brief, but not unimportant, evidence.

204. I shall first address the question as to whether, on the Claimants' version, such documents as were handed over on 10 February 2014 were "transmitted" to the "Ministry of Foreign Affairs" of Iran.

205. Although the word "compound" has not been amplified, it seems to be a clear inference that they were on MFA premises. Further, the Defendants' evidence does

[112] I heard no oral evidence. Both parties proceeded on the basis that I could accept the evidence in the witness statements and documents
[113] [2013] EWCH 2930 (QB)

not specifically address whether Mr Chamberlain explained that the papers were legal papers. Mr Chamberlain's email of 11 February 2014, only a day after the intended service, does on the balance of probabilities mean that he had said at the time that this was by way of service of process documents (or other equivalent words).

206. There was a dispute as to whether, if the documents were handed over in the compound, on MFA premises, that would be sufficient for them to have been "received at the Ministry" within section 12(1). Mr Rainey QC submitted that this was not sufficient and that they had to be within the building itself. I do not accept this. If the information in Mr Chamberlain's email of 10 February 2014 is correct, then the documents were transmitted and received at the MFA.

(c) Which documents were given to Mr Sahebi?

207. The Defendants say that there is confusion as to which documents were said to be served on 10 February 2014 and there is no contemporary record to assist. Reference is made to letters from Professor Sarooshi requesting service of documents. These letters are:

(i) Professor Sarooshi's letter to Master Whitaker of 30 November 2012. The documents attached to this letter appear to have included only a copy of the Claim Form (and the translation but not a Response Pack).

(ii) A letter from Professor Sarooshi to the FCO on 30 November 2012 attaching only the Farsi translations, but not the Claim Form or the Response Pack.

(iii) Professor Sarooshi's letter of 25 February 2013 to Master Whitaker. This included three sets of the original Claim Form, plus translations and a Response Pack.

208. It is accepted that if the documents attached to the letter of 25 February 2013 were in the box given to Mr Sahebi, then these were the documents required to be served. If there was only a Response Pack missing as suggested by the letter of 30 November 2012 to Master Whitaker, then service was not good but was capable of being cured[114].

209. The Claimants submit that the FCO Certificate of Service dated 10 April 2014 should be treated as conclusive evidence of service. CPR Rule 6.44(5) provides that an official certificate by the FCO stating that a Claim Form or other documents have been duly served on a specified date in accordance with a request made under the rule "is evidence of that fact." The question is to what extent, if any, has the evidence provided by the official Certificate dated 10 April 2014 from the FCO been undermined?

[114] CPR 7.8.1; **Hannigan v Hannigan** [2000] 2 FCR 650

210. The Defendants say that it is not contemporary by being some two months late, it is not signed by Mr Chamberlain, but rather by Catherine Pochkhanavala-Gleeve[115]. Neither of these points by themselves casts any real doubt upon the Certificate.

211. Nevertheless further points are made as follow:

(i) The Certificate refers to service of "the documents hereto annexed" but no documents were annexed. This was confirmed in Miss Farrell's note of 9 April 2015 from the FCO to the FPS. She said that the documents which the FCO had attempted to serve and which had been returned on 19 May 2014 were being held in the FCO's London offices. There is no information as to what had been returned and in what form. The Defendants say that, assuming only one set was given to Mr Sahebi, then there would presumably have been at least two further sets of documents in various states of completeness at the FCO.

(ii) The Certificate refers to documents having been handed over "in person to Mr Mohammed Hossan Habibollazadeh, non-resident Charge d'Affaires to London of the said Ministry of Foreign Affairs." That does not accord with the Claimants' case set out above, based on Miss Farrell's 9 April 2015 document, that the documents were given by Mr Chamberlain to Mr Sahebi.

(iii) On 31 December 2014 the FCO withdrew the Certificate on the basis that "there has been an error and documents were not served after all". After communication from the Claimants, the Certificate was reinstated in April 2015.

(iv) The evidence from the Claimants' solicitor, Mr McGuiness, shows at [14]-[18] that he attended the FCO office in London in May 2017 to inspect the entirety of documents that the FCO held there. These documents were in six boxes. An inventory was taken with an FCO official. The boxes were then returned to the Claimants' solicitors. Photographs were taken of the contents in February 2019 and these are exhibited. The Defendants say that this causes concern in that the accounts of the 10 February 2014 service referred to one box being given to Mr Sahebi. They say it is unclear as to which of any of the six boxes might have contained the various documents on the inventory.

(v) After numerous attempts the Defendants obtained from the Claimants a record of communications between them and the FCO. However the full record is still not before the Court. There appear to have been numerous calls and meetings between the Claimants' lawyers and the FCO, evidence of which has not been disclosed.

[115] A desk officer who does not provide the evidence on which she based the certificate

212. Mr McGuiness' statement at [11] relies upon the Claimants' letter of 25 February 2013 which sets out the documents sent to the RCJ for onward transmission to the FCO for service pursuant to CPR 6.44(3). These contained three sets of copies in English of "English bundles" which were numbered 1-6. They contained the Claim Form (original and copy), copy Particulars of Claim, copy Orders made to date, Response Pack and various supporting documents. The letter also confirms that three sets of copies of translations into Farsi organised into the "Farsi bundles" numbered 1-6 were sent to Senior Master for transmission to the FCO for onward service on the Defendants.

213. Before analysing and drawing conclusions on the evidence, I must first determine whether the Claimants have to prove on the balance of probabilities: (1) which documents were given to Mr Sahebi and (2) whether Mr Sahebi was within or without the MFA at the material time. The Claimants say that they need only show that they have a good arguable case on these issues.

214. The Claimants' argument relies on the following authorities:

(1) In **Tseitline v Mikhelson**[116], in the context of an application challenging the jurisdiction of the court, there was an issue as to whether Mr Mikhelson had been personally served with proceedings within the jurisdiction. At [35] the Court recorded that it was common ground that it was for the Claimant to demonstrate "a good arguable case that service was effected …"

(2) In **Relfo Limited (In Liquidation) v Varsani**[117] the Deputy High Court Judge held for the purposes of CPR rule 6.9, that the test was whether the party serving the claim was able to satisfy the Court that there was a good "arguable case" that the premises served were the addressee's usual or last known residence. This was not challenged in the Court of Appeal[118]

(3) In **Canada Trust v Stolzenberg (No 2)**[119] the House of Lords referred to the Court of Appeal's decision that, for the purposes of RSC order 11, the standard of proof of a Defendant's domicile was that of a good arguable case.

(4) In **Four Seasons Holdings Incorporated v Brownlie**[120] the Supreme Court considered the question of a Claimant establishing that the case fell within one of the jurisdictional gateways in CPR 6BPD, so as to obtain permission for service of originating process out of the jurisdiction. In his judgment at [4]-[7][121] Lord Sumption said that the gateways on which the Claimant relied depended on the Court being satisfied of some jurisdictional fact. He said that one of the problems

[116] [2015] EWHC 3065 (Comm)
[117] [2009] EWHC 2397 (Ch).
[118] [2010] EWHC Civ 560; see also the recent decision of Popplewell J in **Sullivan v Ruhan and Others [2019]** EWHC 1336 (Comm)
[119] [2002] 1 AC1 (HL)
[120] [2017] UKSC 80
[121] On this point all of the Judges agreed with Lord Sumption

was that some jurisdictional facts may be in issue at trial if the case is allowed to proceed. In that context the Claimants had to show a good arguable case that the question of jurisdictional fact was satisfied. He approved the test that that meant that one side has a much better argument on material available. He continued:

> "7… In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof… what is meant is (i) that the Claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it…[122] "

215. The requirement on a Defendant to file a defence or acknowledgement of service arises when the particulars of claim are "served on a defendant". CPR rule 9.2. By PD 12 para 4.1 in order to obtain default judgment "the court must be satisfied that- (i) the particulars of claim have been served on the defendant (a certificate of service on the court file will be sufficient evidence)". Therefore the court must be satisfied as to service. In **Shiblaq v Sadikoglu**[123] Colman J at [22] said that the Claimant must prove that valid service has been effected on a particular date.[124]

216. It seems to me that for purposes of obtaining a default judgment it is necessary to prove proper service, as required by the above authorities specifically on this point. None of the cases cited by the Claimants are in respect of obtaining a default judgment.

(d) Conclusions on Service of Process

217. I now take account of the points made on both sides and come to my conclusions as to

(i) Where documents were handed to Mr Sahebi on 10 February 2014

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[122] This test was approved by the Supreme Court in **Goldman Sachs International v Novo Banco SA** [2018] UKSC 34. See also the consideration in the case of **Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV** [2019] EWCA Civ10, especially at [75]-[80].

[123] [2005] EWHC 1890 (Comm)

[124] See also Evans-Lombe J in **Fairmays v Palmer [**2006**]**EWHC 96 (Ch) at [1]. In **Henriksen v Pires** [2011] EWCA Civ 1720, Ward LJ said that filing a certificate of service was not a requirement for obtaining default judgment. This was on the basis that: "the failure may have occasioned the defendant no meaningful prejudice because it is established by the evidence that the claim form was undoubtedly served at a specific time and on a specific date…."

(ii) Which documents were handed to him

218. My findings are in fact on the balance of probabilities. It follows that if the threshold test is lower, namely a "good arguable case", then that must be satisfied. I find that the documents were handed over "within the MFA compound". They were therefore "transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State" and "received at the Ministry". The documents transmitted and received on that occasion comprised a full set of documents, namely those sent to the Court on the 25 February 2013 for service.

219. The reasons for the finding as to the place where the documents were received are in summary:

(i) There is no good evidence seriously to undermine the FCO letter dated 9 April 2015 from Ms Farrell.

(ii) Although the certificate dated 10 April 2014 is inconsistent as to whom the documents were delivered, when compared with the letter of 9 April 2015, it is nevertheless specific that they were served upon an authorised official of the MFA in the delegation of which Mr Habibollahzadeh was the head.

(iii) Although it would have been preferable if Mr Chamberlain had signed the 9 April 2015 letter and/or the Certificate of Service, both these documents constitute good evidence.

(iv) The quality of the information contained in Mr Howarth's second witness statement [72.3] that the documents were handed over when Mr Chamberlain and Mr Sahebi "reached the street" is not sufficient seriously to undermine the above evidence. This remains the case, even allowing in the late evidence from Mr Howarth to the effect that his instructions came from Mr Sahebi. For example, we do not know how long after the event Mr Sahebi was asked to try to remember what had occurred.

(v) This is especially so in the light of Mr Chamberlain's email and note verbale on 11 February 2014. On the face of matters, Mr Chamberlain is confirming that he served the documents upon Mr Sahebi. There is a proper inference that Mr Chamberlain is to be taken as having served those documents such that they were received at the MFA. The Defendants say that no inference can be drawn in the context that (a) there were, as at 10 February 2014, no diplomatic relations with Iran, (b) Mr Chamberlain was in Iran as part of the team establishing new relations and not as a regular diplomat charged with serving documents and (c) the handover of documents was done outside at the end of the meeting, rather than in a more formal way. I disagree and consider that some inference can be drawn. Mr Chamberlain was an FCO official, he wrote an email and signed a formal note verbale the following day. As to the fact that the handover took place outside, this is explained by the opening words of the paragraph cited above from the FCO letter of 9 April 2015.

220. In those circumstances I do not regard other points made by the Defendants, such as the fact that the Certificate certifies service which had taken place two months earlier, or that no documents were annexed to the Certificate of Service, as casting any real doubt on where service took place.

221. As to the finding that a complete set of documents was served:

(i) What was sent to the Senior Master under cover of letter of 25 February 2013 was a complete set containing the documents which the Order of Singh J, sealed on 12 October 2012, had given permission to serve. That letter specifically requested "my clients would be most grateful if you would, pursuant to section 12(1) of the UK State Immunity Act 1978 and CPR 6.44, send these documents to the ... FCO ... with a request that it arranges for them to be served on the Co-Defendants at the Ministry of Foreign Affairs …". This was therefore the formal request, pursuant to which the Senior Master was required under Rule 6.44(2) to send the documents to the FCO with a request that it arrange for them to be served.

(ii) The documents sent on 25 February 2013 bore the titles on the bundles "English Bundle 1" to "English Bundle 6" and "Farsi Bundle 1" to "Farsi Bundle 6".

(iii) Mr Chamberlain's email of 11 February 2014 refers to "the service of process documents I gave you yesterday"

(iv) The earlier documents sent to the Senior Master on 30 November 2012, with a copy of Farsi translations only to the FCO being sent on the same date, did not bear the titles "English Bundle…." or "Farsi Bundle…".

(v) The letter of 9 April 2015 refers to "service of the claim documents". It then confirms that the FCO "believe that service did take place in accordance with the standard procedure in such cases. We therefore see no reason to withdraw or amend the certificate and we consider it to be valid".

(vi) While the letter was written by Ms Farrell and the certificate of service had been signed by Ms Pochkhanaval-Cleeve, it is clear that investigations had taken place. There is a paragraph in the 9 April 2015 letter explaining that Mr Chamberlain had notified Ms Pochkhanaval-Cleeve that the documents had been handed over.

(vii) The document signed on 24 May 2017 by Mr McGuiness and Ms Hourmouzios (desk officer Iran at the FCO) confirms that, inter alia, there were two copies of a complete set of English documents and translations into Farsi remaining at the FCO. The photographs of the bundles bear this out. They show two full sets of documents labelled

"English Bundle" 1-6 and "Farsi Bundle" 1-6.[125] Thus these documents are the ones sent in February 2013.

(viii) We know from the letter of 9 April 2015 that on 19 May 2014 the Defendants returned to the English delegation's vehicle documents which they say they received on 10 February 2014. We also know that the documents in the photographs and on Mr McGuinness' inventory are the only ones the FCO say they held as at 2017.

(ix) It is not known why there were only two sets of English and Farsi bundles if one was returned and made its way back to the FCO. However it is more likely, with two bundles remaining, and three to begin with, that it was one of these three sets which had been handed over to Mr Sahebi, leaving the two remaining sets. If that is right, then it is more likely that the set handed over was one of the sets sent to the Senior Master on 25 February 2013, rather than the November 2012 sets.

(x) It is true that there is a mystery as to what became of the sets sent in 2012, but the above shows on the balance of probabilities that it was not one of those that had been given to Mr Sahebi.

(xi) As to the number of boxes in the photographs, the inventory and photographs demonstrate that the two sets of February 2013 bundles were in 3 boxes. The other 3 boxes contained documents "relating to 2014 default judgment application". The default judgment was in July 2014 and is included. Therefore these documents could not have been the ones handed over in February 2014.

(xii) I am not prepared to draw any inference adverse to the Claimants on the basis that the instructions from Mr Sahebi are that one box was given to him. The weight of that evidence is not strong, the other circumstances militate against it and, in any event, it is possible that what is seen in the photographs as requiring three boxes for two sets could have been re-boxed for service into one larger box, albeit that the boxes in the photographs look to be of reasonably substantial size. There are too many reasons not to rely on this evidence as undermining service of the English and Farsi bundles.

(xiii) Nor are my conclusions affected by the fact that the FCO withdrew the certificate on 31 December 2014. The basis of the email of 31 December 2014 is "the attempted service was later rejected by the said MFA. This response therefore nullifies the Certificate of Service … ". This was an erroneous basis since return of documents does not invalidate service.[126] It appears from the email from the FPS that the FCO received the information from a new member of staff at the Iran desk and were therefore awaiting confirmation. Further, irrespective of the fact that there had been substantial communication between the Claimants' solicitors and the FCO thereafter, the FCO confirmed in their

[125] Plus one unlabelled – perhaps the label had been lost
[126] See **Pocket Kings Limited v Safenames Limited [**2010] Ch 438 at [25]-[26]

letter of 9 April 2015 that there had been proper service; this, notwithstanding the fact that the Certificate did not annex a list of the documents served. Thus, following investigation, the FCO has maintained the Certificate of Service.

(xiv) Finally, I do not accept that any discussions between the Claimants and the FCO, which have not been minuted or documented, cast any doubt on the reliability of what the FCO have said in their communications. I accept Professor Sarooshi's point that the FCO would not change its version of the factual situation as a result of any such discussions.

222. One more point made by the Defendants was that in the three bundles sent to the Senior Master on 25 February 2013 English Bundle 1 contained "the Claim Form (an original sealed version of this document is included in one of the sets with a copy being included in the other two sets)". It is said (a) that it is not clear if the copies were photocopies of the sealed claim form or just copies of the claim form; (b) that neither a photocopy of the sealed claim form nor an unsealed copy would suffice.

223. What is required to be filed for service, according to CPR Rule 6.44(3) is "a copy of the claim form." This was done. If relevant, which I do not believe it to be, the probabilities are that photocopies of the sealed claim form were in two bundles. Further, in **Weston v Bates**[127] Tugendhat J held that for the purposes of service of "a claim form" under Rule 6.40(3), what constitutes a claim form is a matter of substance. Therefore there is nothing in this point.

224. For those reasons I find that there was good service of the proceedings on 10 February 2014.

C3. Service of the Default Judgment

(a) Outline

225. The second service question is whether the default judgment was validly served upon the Defendants. The Claimants say that this was served either:

(a) on 2 September 2015 or

(b) by email on 6 September 2018

(b) 2 September 2015

226. I have already set out under the "Procedural Background" section in this judgment an extract from Mr Ben Fender's witness statement dated 6 March 2016 in which he says that he had been unsuccessful in serving the documents regarding the default judgment. It should be remembered that Mr Fender was part of the diplomatic Mission in place in Teheran in 2015. Notwithstanding this, the Claimants rely upon these paragraphs in Mr Fender's statement:

> "3. I first tried to deliver the documents to the MFA on 2 September 2015 under cover of a formal *note verbale* from the

[127] [2012] EWHC 590 (QB)

> British Embassy. This note asked the MFA to forward the documents to the Ministry of Information and Justice.
>
> 4. The MFA accepts *notes verbales* at a kiosk. When I went there, the officer on the door asked to read the *note verbale* through a glass screen. When he saw that it involved legal papers, he made a telephone call to a colleague - Mr Hadi from the Protocol Department of the MFA – and said that the MFA refused to accept the *note*, and that I should instead contact the MFA's Western European Department. I attempted to leave the papers in the kiosk, but the officer made clear that this would not be possible…..
>
> 9. The papers relating to this case have not been in the possession of the Ministry of Foreign Affairs at any time"

227. Thus the documents were presented by a senior FCO official, along with a *note verbale*. Mr Fender sought to leave the documents at the MFA. He was not permitted to do so.

(c) Service by email on 6 September 2018

228. On 25 May 2018 Soole J made an Order for service by email. I have set out the terms of the Order under the Procedural Background section of the Judgment. The Order stated in paragraph 1 that transmitting the documents by email was "compliance with section 12(5) of the State Immunity Act 1978"[128]. There is no issue but that, if service by email does constitute valid service under section 12(5), then there has been proper service of the default judgment.

229. Soole J's Order is, as the Claimants accept, solely declaratory of sufficient compliance. Except for the fact that he was prepared to make the Order ex parte, it does not take the matter any further. Either as a matter of law transmitting the documents by email to the Iranian MFA complies with section 12(5) or it does not. A without notice order cannot validate it.

230. In other words, the question which must be asked is as to whether, absent any order of the court, email service is sufficient compliance with section 12(5).

(d) Section 12(5) - Discussion

231. There are two ex parte High Court decisions. I will come to these in a moment. I shall consider the arguments first in the absence of authority.

232. The relevant contentions for me to evaluate are:

for the Claimants

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[128] In **Ben Rafael v Islamic Republic of Iran** Nicklin J made an Order on 6 February 2018 in terms equivalent to those of Soole J's Order in the present case.

(i) The words transmit and receive are ordinary English words which require no embellishment

(ii) If a State (a) can evade physical service and (b) cannot be served by email (or post) then this could render ineffective the provisions of the 1978 Act.

for the Defendants

(iii) The 1978 Act requires transmission and receipt. Receipt connotes some voluntary act of taking the documents. Refusing to accept proffered documents, as occurred on 2 September 2015, cannot fulfil the requirements of transmission or receipt, and certainly not the latter.

(iv) Email service is not permitted by the 1978 Act. Although the statute does not expressly require service through diplomatic channels, that is what is needed, having regard to the Basle Convention and the 2004 Convention and to CPR Rule 6.44.

233. In relation to 2 September 2015, the Claimants rely on **Certain Underwriters at Lloyds London v Syrian Arab Republic and ors**[129]**.** In that case**,** Mr Andrew Henshaw QC, sitting as a Judge of the High Court, had to consider, ex parte, service under Section 12(1). Here the documents were taken to the Syrian MFA where the reception consignee refused to accept the documents and insisted that the couriers remove them from the premises. Teare J's order of 14 December 2016 provided that service on the First Defendant by transmission by the FCO by courier to the Syrian MFA "*shall be deemed to be good and sufficient service*", and that transmission by the FCO by courier to the Syrian Ministry of Justice to the Second and Third Defendants would similarly be deemed good service on them[130]. At [19] the Judge said that the word "received" meant that the documents must actually reach the relevant Ministry, but did not require them to be accepted upon delivery; otherwise the recipient could evade service simply by declining to accept delivery. He therefore held at [23] that the documents had been transmitted to and received at the Syrian MFA, notwithstanding the representative's insistence upon their immediate removal. The Judge said:

> "[19]… the Act contains no definition of the words 'transmitted' or 'received' in section 12, … It seems likely that the word 'received' is intended, at least, to indicate that it is not sufficient merely for documents to be transmitted in the sense of being dispatched: they must actually reach the relevant Ministry. Conversely, section 12 does not in my view require the documents to be accepted upon delivery: otherwise the recipient could evade service simply by declining to accept delivery…..
>
> 22. The Claimants also referred to two of the numerous definitions of the word "*receive*" in the Oxford English Dictionary, which include at 16a and b:
>
> "To have (a thing) given or handed to oneself …"
>
> and

[129] [2018] EWHC 385 (Comm)
[130] The question as to whether such an Order was correct did not arise in the case, nor expressly before me.

> "To get (a letter, etc.) brought to oneself or delivered into one's hands"

. 23. In the present case, the documents were not merely transmitted to the Syrian MFA but actually arrived within the Ministry's premises. Further, it appears from the FCO's letter quoted in § 16.iv) above that the consignee knew the identity of the sender, but refused to take the package and instead insisted on its removal from the premises. In these circumstances, there was no further step that could have been taken in order to effect service, and in my judgment no further step which needed to be taken. The documents had been transmitted to and received at the Syrian MFA, notwithstanding that the Ministry's representative insisted on their immediate removal. I do not consider that the reception consignee's refusal to take the package into his hands prevented it from having been received at the Ministry for the purposes of section 12, and I conclude that service under that section was complete when DHL proffered the package to the consignee."

234. The words "transmitted" and "received"/"receipt" in sections 12(1) and 12(5) are not terms which are generally to be found in English procedural rules relating to service. They are to be found in Article 16 of the Basle Convention, which pre-dated the 1978 Act, and Article 22 of the 2004 Convention, which post-dated the 1978 Act.

235. The main focus in relation to 2 September 2015 is what is meant by the judgment having to be "received" at the MFA for time to begin to run for applying for the Judgment to be set aside[131]. It seems to me that a document, or anything else, cannot be received if a person expressly refuses to accept it. The rules as to ordinary service are drafted in a way such that service cannot be evaded by non-receipt or non-acceptance[132]. This is not the case with section 12(5). Nor can the outcome of a state being able to evade service by refusing to take documents override the natural meaning of the word 'receive'[133]. Thus, I am afraid I disagree with the ex parte decision in Certain Underwriters. I note also that the dictionary definitions referred to in that case at [22] tend not to support a finding that refusing to receive/accept a document amount to it being received. In the circumstances there was not service of the judgment on 2 September 2015.

236. I now turn to service by email. In **The European Union v Syrian Arab Republic**[134] Teare J, again ex parte, referred to section 12(1). He said that the subsection was a mandatory requirement as to the mode of service. Relying on the Court of Appeal decision in **Anson v Trump**[135] he accepted that there had been proper service by email.

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[131] No argument was put by the Claimants that the judgment did not have to be both transmitted and received.
[132] Rules as to personal service have been interpreted such that a person has sufficient opportunity of possessing the document to enable him to exercise dominion over it. So personal service is validly effected if the person is told what the document contains and it is left with him or near him. See e.g **Gate Gourmet Luxembourg IVSarl v Morby** [2-1] EWHC 74 (Ch). See also CPR Rule 6.5(3)(a) where personal service of a claim form is achieved by "an individual leaving it with that individual".
[133] Peter Gibson J expressed disquiet at such an outcome in **Westminster City Council v Iran** [1986] 1 WLR 979.
[134] [2018] EWHC 181 (Comm)
[135] [1988] iWLR 1404

237. In the passage cited by Teare J in Anson Otton LJ said at page 1411F:

> "transmission must be given a meaning which is consonant with modern communication technology and commercial practice. I would hold that "transmission" means the process from the moment that the document is dispatched by the sender to a time when the complete document has been received into the recipient's fax equipment."

238. As Teare J recognised, the issue in Anson concerned whether service by fax was effected when the fax was received into the recipient's fax machine, even though it may not be read till later. The Court of Appeal held that it was so effected. However, that was in the context of an RSC rule permitting service of a defence by fax and providing that "…service is effected by the *transmission* to the business address of such solicitor".

239. Again I have had the benefit of argument which Teare J did not have. In the light of the above, I do not believe Anson can assist as to transmission for the purposes of section 12(5). In my judgment, albeit that the statute does not rule out service by email, there cannot be service by email for the following reasons:

(i) When considering the word 'received' in section 12(5) there has to be some act of volition in receiving the judgment. Service by email allows for no possibility of refusing to receive the document. Of course, if service by email is good, then that would circumvent the problem which presented on 2 September 2015. Nevertheless, I do not agree that it can be so circumvented because of the wording of the statute.

(ii) If the statute did permit email service, then a state could be so served in circumstances where an ordinary person/body within the United Kingdom could not. Such a person/body has to have indicated in advance that they will accept service by electronic means – see CPR Rule 6.23(5) and (6) and PD 6A para 4[136]. It would be surprising if a foreign state which has to be served within the meaning of the 1978 Act did not need to indicate acceptance of email service. This is particularly so where the email would be, as here, to a generic email address for the MFA. A state can of course expressly agree to accept email service pursuant to section 12(6).

(iii) this construction has the benefit of (a) according more closely to what is said in the Basle and 2004 Conventions, and (b) fitting better within CPR Rule 6.44 whereunder a party must file at the Central Office a request for service and the requisite documents. The Senior Master has to send the documents to the FCO. If a state has agreed to an alternative method of service under section 12(6), the documents can either be served in that manner or in accordance with Rule 6.44 – Rule 6.44(7).

For those reasons there was not valid service of the default judgment by email on 6 September 2018.

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[136] I was taken to **Abela v Baadarani** [2013] UKSC 44. That does not assist. It deals with retrospectively validating a party's actions under Rule 6.15(2) in relation to an individual where the Hague Convention or a bilateral service treaty did not apply.

D. APPENDIX: INFORMATION IN RELATION TO THE US JUDGMENTS

A. Common elements in relation to all US Judgments

This information comes from Mr Stiller's affidavit

(1) Documents initiating proceedings in each of the cases before the US Federal District Court were translated into Farsi and served on the Defendants through US Diplomatic channels in accordance with requirements of the US FSIA 1976. Based on this service, the court held in each of the cases that it had in personam jurisdiction over the Defendants.

(2) The Defendants failed to appear in each of the cases within 60 days of service as required by the FSIA 1976. Therefore the court proceeded to hear each of the cases on an ex parte basis.

(3) The court held in each of the cases that the Defendants did not enjoy state immunity from the jurisdiction of the US courts in relation to the claims for damages, solatium, and pain and suffering arising out of the personal injury or death caused by the acts of terrorism since these constituted extra-judicial killings that were caused or materially supported by the Defendants.

(4) The court in each of the cases conducted a review of the evidence in order to determine whether the Claimants had sufficient evidence to establish their claims to the satisfaction of the court as against the Defendants. This is an important safeguard that exists in the US in relation to an ex parte hearing involving a foreign state. It is provided for in terms by the FSIA 1976.

(5) The court in each case undertook a review of the evidence relating to each Claimant under relevant laws within the US to assess the amounts of damages to be awarded. Based on the expert and factual evidence adduced by the Claimants, the court awarded specific damages in each of the cases.

(6) None of the Judgments was appealed by the Defendants.

(7) All of the successful Claimants under the Judgments are US citizens. They are variously the victims, or their family members or the personal representatives of their estates, of the terrorist attacks found to be caused or materially supported by the Defendants.

B. The Khobar Towers Bombings.

The relevant Judgments here are ***Heiser I, Heiser II, Blais and Valencia***.
The bombing at Khobar Towers took place on 25 June 1996. Khobar Towers was a residence on a US military base in Saudia Arabia.

Heiser I – extracts from the US Judgment

> "11. The attack was carried out by individuals recruited principally by a senior official of the IRGC [Iranian Revolutionary Guard Corps], Brigadier General Ahmed Sharifi. Sharifi, who was the operational commander, planned the operation and recruited individuals for the operation at the Iranian embassy in Damascus, Syria. He provided the passports, the paperwork, and the funds for the individuals who carried out the attack.
>
> 12. The truck bomb was assembled at a terrorist base in the Bekaa Valley which was jointly operated by the IRGC and by the terrorist organisation known as Hezbollah. …

13. The terrorist attack on the Khobar Towers was approved by Ayatollah Khameini, the Supreme leader of Iran at the time. It was also approved and supported by the Iranian Minister of Intelligence and Security ("MOIS") at the time, Ali Fallahian, who was involved in providing intelligence security support for the operation. Fallahian's representative in Damascus, a man named Nurani, also provided support for the operation.

14. Under Louis Freeh, the FBI conducted a massive and thorough investigation of the attack, using over 250 agents.

…

16. In addition, as a result of this investigation, the FBI also obtained a great deal of information linking the defendants to the bombing from interviews with six admitted members of the Saudi Hezbollah organization, who were arrested by the Saudis shortly after the bombing. Id. At 11-30. These six individuals admitted to the FBI their complicity in the attack on the Khobar Towers, and admitted that senior officials in the Iranian government provided them with funding, planning, training, sponsorship, and travel necessary to carry out the attack on the Khobar Towers. (Exh. 7 at 11, 13-14, 27; *see also* Dec 18, 2003 Tr at 24-30). The six individuals also indicated that the selection of the target and the authorization to proceed was done collectively by Iran, MOIS, and IRGC, though the actual preparation and carrying out of the attack was done by the IRGC. (Dec. 18, 2003 Tr at 25)

17. According to Director Freeh the FBI obtained specific information from the six about how each was recruited and trained by the Iranian government *in Iran* and Lebanon, and how weapons were smuggled into Saudi Arabia from Iran through Syria and Jordan. One individual described in detail a meeting about the attack at which senior Iranian officials, including members of the MOIS and IRGC, were present. (Dec.18, 2003 Tr. At 23.) Several stated that IRGC directed, assisted, and oversaw the surveillance of the Khobar Towers site, and that these surveillance reports were sent to IRGC officials for their review. Another told the FBI that IRGC gave the six individuals a large amount of money for the specific purpose of planning and executing the Khobar Towers bombing.

18. Louis Freeh has publicly and unequivocally stated his firm conclusion, based on evidence gathered by the FBI during their five-year investigation, that Iran was responsible for planning and supporting the Khobar Towers attack. *Blais at* *4
……

Conclusion

…

Accordingly, having considered the evidence and testimony admitted at trial in the present case, this Court finds that the Plaintiffs have met their burden under the state sponsored terrorism exception of the FSIA by establishing their right to relief "by evidence that is satisfactory to the Court". The totality of the evidence at trial, combined with the findings and conclusions entered by this Court in *Blais*, firmly establishes that "the Khobar Towers bombing was planned, funded, and sponsored by senior leadership in the Government of the Islamic Republic of Iran; the IRGC had the responsibility and worked with Saudi Hizbollah MOIS to execute the plan, and the MOIS participated in the planning and funding of the attack."

…
C Vicarious Liability[137]
…
The doctrine of civil conspiracy is recognized under the laws of each of the states each claimant has brought an action. Though each state has its own particular means of describing civil conspiracy, upon inspection of each state's laws the elements of civil conspiracy are met in each state if it can be demonstrated that: (1) there is an agreement between two or more persons or entities; (2) to do an unlawful act, or an otherwise lawful act by unlawful means; (3) there was an overt act committed in furtherance of this unlawful agreement; and (4) damages were incurred by the plaintiff as a proximate result of the actions taken pursuant to the conspiracy.
In this case, the elements of civil conspiracy between Iran, MOIS, the IRGC and Saudi Hezbollah have been satisfied. As this Court has previously held, "sponsorship of terrorist activities inherently involves a conspiracy to commit terrorist attacks."

27. It is undisputed that Saudi Hezbollah committed the attack on the Khobar Towers. It has been established by evidence satisfactory to this Court that Saudi Hezbollah and defendants Iran, MOIS and the IRGC conspired to commit the terrorist attack on the Khobar Towers.

Blais – extracts from the US Judgment[138]
… "It has been established by evidence satisfactory to this Court that Saudi Hezbollah and defendants Iran, MOIS and the IRGC conspired to commit the terrorist attack on the Khobar Towers. The evidence shows that senior Iranian, MOIS and IRGC officials participated in the planning of, and provided material support and resources to Saudi Hezbollah for the attack on the Khobar Towers, including providing financing, training and travel documents to facilitate the attacks. The evidence also shows that Saudi Hezbollah, Iran, MOIS and the IRGC reached an understanding to do an unlawful act, namely the murder and maiming of American servicemen. Moreover, the sheer gravity and nature of the attack demonstrate that the defendants also intended to inflict severe emotional distress upon the American servicemen as well as their close relatives. The financing, training and providing of travel documents ably satisfy the overt at requirement for civil conspiracy under Florida law. …"

Valencia – extracts from the US Judgment[139]
"… …
Here, the evidence plainly establishes that defendants, in providing Saudi Hezbollah with the materials, training, and money necessary to detonate a significant explosion near an Air Force residence, acted with an intent to harm plaintiffs. Indeed, acts of terrorism are – by their very nature – intended to harm and terrify others. … On the basis of this evidence, defendants are responsible for plaintiffs' injuries under a battery theory.
…
Just as terrorist acts are designed to harm others physically, they are also designed to inflict psychological terror by instilling fear of future harm into the victims… … And just as plaintiffs here suffered physical injuries as a result of the attack on Building 131, the evidence set forth in the special master reports indicates that plaintiffs were all also struck with fear following the attack … … Thus, the evidence demonstrates the defendants also committed an assault.

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[137] The Claimants say that vicarious liability is a broad concept in the US and includes the tort of conspiracy
[138] This was given as an example of a finding of intentionally inflicted emotional distress
[139] Apart from similar findings about the Defendants involvement, the Claimants relied upon a section in the Judgment about injury sustained

… …
Finally, plaintiffs may also recover upon a theory of intentional infliction of emotional distress. In articulating the scope of this theory, courts have set forth the following standard: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."
… …
Here, all four plaintiffs may rely upon theories of intentional infliction of emotional distress to recover under s.1605A. There can be no dispute that defendants, in working with Saudi Hezbollah to plan and execute the attack, sought to cause severe emotional distress to Air Force personnel living in Building 131 and the surrounding area, and thus, consistent with the special master's findings … the three plaintiffs who were stationed at Khobar Towers at the time of the explosion certainly were afflicted with emotional distress. As for the fourth plaintiff – Luz Southard – the evidence demonstrates that she … ... was distraught and inconsolable as she waited anxiously for news of her son's condition follow the attack ... … Based on this evidence, plaintiffs have set forth valid claims based on a theory of intentional infliction of emotional distress."

C. US Embassy Attack Beirut (1984)

Brewer – extracts from the US Judgment

"On September 20, 1984, a suicide bomber drove a truck packed with explosives through the gate of the United States Embassy Annex building in East Beirut, Lebanon, killing fourteen people and wounding thirty-five. The attack was carried out by Hezbollah, a terrorist organisation that operates in Lebanon. This action has been brought by a surviving victim of the attack, Richard Paul Brewer, and his mother, Joyce Louise Leydet … …"
The *Wagner*[140] and *Welch* opinions not only illustrate the general connection between Hezbollah and Iran, but also justify a specific finding that defendants provided support for the 1984 attack on the US Embassy Annex in Lebanon. Relying on the pleadings and the above findings of other judges in this jurisdiction, this court concludes that defendants provided "material support and resources" to Hezbollah in carrying out the September 20, 1984 attack on the Embassy Annex in East Beirut.

Welch – extracts from the US Judgment

"… …
The Ayatollah Khomeini was the supreme leader of both the Shi'ite faction of Islam and the Iranian Government.
……
Dr Tefft testified that the supreme leader is the head of a special committee which oversees day to day operations and activities relating to terrorism … The committee makes recommendations to the supreme leader regarding assassinations, supporting various terrorist organizations, and funding, training, and personnel for terrorist activities. The committee presents proposals to the supreme leader who either adopts or accepts the proposals. For example, the committee suggests assassination targets throughout the world, kidnappings, and hijackings and then, if approved by the supreme leader, the committee implements the plans. … The committee is run by the Minister of the MOIS and the general in charge of the IRGC is a member of the committee. Leaders of various terrorist organizations are also members of the committee. For example, Osama bin Laden is an honorary member of the committee. Dr Tefft testified that the inner workings of the committee on terrorism and the

[140] This case is not before the English courts in these proceedings

role of the supreme leader in approving and ordering terrorist activities is well researched and documented …

Hezbollah was created by the special committee on terrorism in 1983, as a source of wholly owned subsidiary that was financed, trained, and equipped by the Iranian Government in an effort to influence affairs in Lebanon. …

Dr Tefft testified that to support Hezbollah, the Government of Iran, through the MOIS and IRGC, provided extensive training, including basic military training on how to shoot guns, make bombs, and conduct basic tactics. The MOIS and IRGC also supplied Hezbollah with equipment and arms, conventional and plastic explosives, syntax RDX which is generally only available to Governments for military use. These supplies were sent to the Beka'a Valley training facilities on Iranian airplanes that were monitored flying into Damascus, Syria. The planes were unloaded with the assistance of the Syrians and then the materials were transported to the Beka'a Valley on trucks …

In addition to providing intensive training and equipment, the Iranian government provided substantial financial support to Hezbollah … The support grew to $80 million per year by 1997, at which point the Iranian Government pledged to increase support to $100 million per year. Dr Tefft testified that in 1984, at the time of the bombing of the US Embassy Annex, Hezbollah received between $10 million and $20 million in support from the Iranian Government.

…

B Proposed findings regarding Defendants' responsibility for September 20, 1984 Bombing

The evidence presented at the hearing establishes that "the Islamic Republic of Iran, utilizing its Ministry of Information and Security and the Revolutionary Guard Corps have provided material support to [Hezbollah] which enabled the September 20, 1984 terrorist attack, that resulted in the death of Kenneth Welch.""

… …

D Attack on the US Barracks in Beirut in 1983

Holland – extracts from the US Judgment

"…

This action arises from the most deadly state-sponsored terrorist attack against American citizens prior to September 11, 2001 – the October 23, 1983 Marine barracks bombing in Beirut, Lebanon, during which 241 American servicemen acting as part of a multinational UN–authorized peacekeeping force were murdered in their sleep by a suicide bomber.

…

The engagement with and promotion of Hezbollah marked a profound shift for the MOIS which, until 1983, had focused on the assassination of former Iranian government officials under the Shah and other Iranian dissidents living in Europe; from 1983 forward, Iran and the MOIS would look to employ international terrorism against non-Iranians. ….

Based on the evidence presented at trial, the Court concludes that the MOIS was a vital conduit for Iran's provision of funds to Hezbollah, providing explosives to Hezbollah, and – at all times relevant to these proceedings – exercising near-complete operational control over Hezbollah…

…

In addition to conceiving and ordering that Hezbollah undertake simultaneous attacks on the Americana and French forces stationed in Beirut, Iran provided substantial support for the operation in other ways. First, because the explosives that were to be used in the operation were covered by end-use requirements that mandated only government-to-government sales, the government of Iran actually purchased the explosive materials used in the operation from the government of Bulgaria and then provided the explosives to Hezbollah … Second, the Iranian government, MOIS, and the IRGC provided complete financial support for the operation, going so far as to use the Iranian embassy in Damascus to cash various checks to provide finding for Hezbollah. Indeed, even at its inception during the 1982-83 period, Hezbollah was provided $50 million or more by Iran; as Dr Tefft noted, "economically Hezbollah would not have existed or been able to be formed without the Iranian financial support." … Third, Iran provided Hezbollah with virtually all of its operational training, as the members of Hezbollah were highly inexperienced and required training by the IRGC and other Iranian agencies in various terrorist camps located in Lebanon's Beka'a Valley, Syria, and outside of Tehran. … More specifically, the MOIS was directly involved in the preparations for the attack, conducting the relevant surveillance and intelligence, coordinating with Syrian officials for safe passage for the trucks and materials used in the attacks, and paving the way for the operation through a variety of liaising activity. … The IRGC was the primary mover behind the attack itself, acting as the authorizing agent for the Iranian government in Tehran in addition to recruiting the individuals involved, training the suicide bombers, preparing the explosives, and installing the explosives in the trucks in camps located in the Beka'a Valley.

… …

Here, it was reasonably certain that Robert Holland's death and the attendant suffering of his family would occur given the defendants' actions. The evidence adduced at trial in this case shows conclusively that Defendants Iran, the MOIS, and the IRGC were engaged in a deliberate and unfortunately successful campaign to destroy the US Marine barracks, cause the massive loss of American lives, and compel the United States to withdraw from Lebanon. …"

E Jerusalem Suicide Bombings

Kirschenbaum – extracts from the US Judgment

"This case arises from the December 1, 2001 suicide bombing at the pedestrian mall on Ben Yehuda Street in Jerusalem, Israel. Plaintiffs are Jason Kirschenbaum, who was a victim in the attack, and his parents and siblings. Plaintiffs allege that the Islamic Republic of Iran ("Iran"), and the Iranian Ministry of Intelligence and Security ("MOIS"), are jointly and severally liable for damages from the attack because they provided material support and assistance to Hamas, the terrorist organization that orchestrated and carried out the bombing.

…..

The basis of defendants' liability is that they provided material support and resources to Hamas, which personally completed the attack. One may be liable for the acts of another under theories of vicarious liability, such as conspiracy, aiding and abetting, and inducement. This Court finds that civil conspiracy provides a basis of liability for defendants Iran and MOIS and accordingly declines to reach the issue of whether they might also be liable on the basis of aiding and abetting and/or inducement.

…

The evidence in the instant action is consistent with the Court's previous findings as to the impact of terrorist attacks. Here, the evidence demonstrates that the defendants' motives in providing material support to Hamas were to facilitate a deliberately outrageous act of terrorism intended to not only cause physical harm to those present on Ben Yehuda Street,

but also to instil terror in their loved ones and others. Thus, no presence requirement is necessary for plaintiffs to bring IIED claims under New York law. Standing to seek recovery for an IIED claim is limited, however, to the victim's near relatives which include the victim's spouse, child, sibling, or parents…"

Beer – extracts from the US Judgment

"…
Here, it has been established by evidence satisfactory to this Court that Iran has continuously provided material support in the form of, *inter alia*, funding, training, and safe haven to Hamas and its members so that they may undertake terrorist attacks like the one in this action. It is undisputed that Alan Beer's death was caused by a wilful and deliberate act of extrajudicial killing perpetrated by Hamas in furtherance of the terrorist Jihad goals shared by Hamas and defendants. Finally, as will be discussed below, the plaintiffs in this action incurred damages resulting from the death and injuries caused by the conspiracy. Accordingly, the elements of civil conspiracy are established between Hamas and defendants Iran and MOIS.
…
Based on the evidence presented, the elements of plaintiffs' claim for intentional infliction of emotional distress are met. Defendants' conduct, in providing material support in a civil conspiracy with Hamas to conduct suicide bombings, is extreme, outrageous and goes beyond all possible bounds of decency. Further, it is abundantly clear to this Court that plaintiffs have suffered severe emotional distress as a result of Alan's tragic and untimely death. Lastly, this Court finds that defendants' actions proximately caused the death of Alan Beer and the subsequent emotional distress experienced by his mother and siblings. As such, this Court concludes that defendants Iran and MOIS are liable for intentional infliction of emotional distress under a theory of vicarious liability."

Greenbaum – extracts from the US Judgment

"…
It is undisputed that Hamas committed the attack that killed Judith Greenbaum. It also has been established that the attack was committed in furtherance of the broad common scheme between Hamas and Iran. Therefore, the elements of civil conspiracy are established between the defendants in this case and the actual perpetrators of the attack.
…
As such, the elements of civil conspiracy under California law are subsumed within the elements of the same doctrine under New Jersey law. In this case, therefore, since the conspiracy has been demonstrated under New Jersey law, it has been demonstrated under California law as well."
…

Campuzano – extracts from the US Judgment[141]

"Iran provides ongoing terrorist training and economic assistance to Hamas … Dr Bruce Tefft, an expert in the field of terrorism, testified that Iran's support of Hamas was $30,000,000 in 1995 … Another expert in terrorist activities, Dr Patrick Clawson, testified that Iran supported Hamas with $20,000,000 - $50,000,000 annually over the past decade. …
"

F The New York Shooting Incident 1990 (The Acosta Case)

"……

[141] I will not repeat the court's findings in Campuzano.

[18] Findings of Fact and Conclusions of Law

This action arises from the assassination of Rabbi Meir Kahane and the shooting of Irving Franklin and US postal police officer Carlos Acosta on November 5, 1990 in New York … Rabbi Meir Kahane was killed and Irving Franklin and Carlos Acosta were seriously wounded by El Sayyid Nosair. Nosair was and is a member of Al-Gam'aa Islamiyah (or, the "Islamic Group"), a terrorist organisation headed by Sheik Omar Ahmad Ali Abdel Rahman … Plaintiffs allege that the Islamic Republic of Iran ("Iran"), and the Iranian Ministry of Information and Security ("MOIS"), are liable for damages from the shooting because they provided material, support and assistance to the Islamic Group. As such, Defendants are subject to suit under the recently revised terrorist exception to the … FSIA …
… …
Findings of Fact
… …
(10) Defendant Iran, "is a foreign State and has been designated a state sponsor of terrorism pursuant to section 69(j) of the Export Administration Act of 1979 … continuously since January 19, 1984 …
(11) Defendant MOIS is the Iranian Intelligence Service, functioning both within and beyond Iranian Territory. Acting as an agent of Iran, MOIS performed acts within the scope of its agency, which caused the death of Rabbi Meir Kahane and the wounding of Irving Franklin and Carlos Acosta. Specifically, MOIS acted as a conduit for Iran's provision of support in the form of, inter alia, documents, training and funding to Sheik Abdel Rahman and the Islamic Group.

II. The November 5, 1990 Shooting
….
(26) After his arrest, Nosair was indicted and tried first in New York State Court, where he was convicted only of weapons offenses … … An investigation which began subsequent to both Nosair's arrest and the first World Trade Center bombing, lead to the indictment and conviction of Nosair along with nine other individuals, including Sheik Abdel Rahman. Nosair and his co-conspirators were convicted of "seditious conspiracy and other offenses arising out of a wide-ranging plot to conduct a campaign of urban terrorism." … "Among the activities of some or all of the Defendants were the rendering of assistance to those who bombed the World Trade Center, planning to bomb bridges and tunnels in New York City, murdering Rabbi Meir Kahane and planning to murder the President of Egypt…."

III. Iranian Sponsorship of the Shooting

(27) Nosair is a member of the Islamic Group, a radical Islamic fundamentalist terrorist group headed by Sheik Abdel Rahman. As head of the organization, Sheik Abdel Rahman issued "*fatwas*" to conduct "*jihad*" against the United States … Proof of this terrorist organisation, the role of Rahman and Nosair in the organisation, and its responsibility for the assassination of Rabbi Meir Kahane has previously been established … (affirming Nosair's conspiracy conviction upon finding that the government presented sufficient evidence as to his motivations for the murder of Rabbi Meir Kahane and attempted murder of Acosta and Franklin).

(28) Nosair's killing of Rabbi Meir Kahane and shooting of Irving Franklin and Carlos Acosta were found by the jury to have been accomplished with the statutory motive – to maintain or increase his position within a racketeering enterprise, here the *jihad* organization

… (finding that Rabbi Meir Kahane's murder was consonant with the purposes of the *jihad* organization and that the murder was in furtherance of Nosair's membership therein). This organization was "opposed to nations, governments, institutions and Individuals that did not share the group's particular radical interpretation of Islamic law", as charged in the indictment ….

(29) … other members of the Rahman led *jihad* organization were shown to have been involved in the murder of Rabbi Meir Kahane, and Sheik Abdel Rahman commented that "he would have been honoured to issue a *fatwa* regarding the murder".
…
(31) … Mr Lang testified on Plaintiffs' behalf as an expert in the area of terrorism, counter terrorism, and the investigation and analysis of terrorist events … he, provided sworn testimony that Defendant Iran, acting through Defendant MOIS, provided material support to the Islamic Group, including *inter alia*, facilities, transportation, weapons, training and financial support …
…
(33) Mr Johnson was a member of the State Department's Office of Counterterrorism at the time of the November 5, 1990 shooting. … He testified that as early as 1990, the State Department reported information that Iran was providing support to the Islamic Group headed by Sheik Abdel Rahman … He also expressed the opinion that Nosair was part of an international Islamic jihadist conspiracy carried out through the Islamic Group, which at the time of Rabbi Meir Kahane's murder, received direct support from the government of Iran …

(34) The conclusions of Mr Lang and Mr Johnson that Iran provided material support to Sheik Abdel Rahman and the Islamic Group were based upon publicly available sources including the State Department's 1992 *patterns of global terrorism,* … and a number of different public articles reporting Iranian training and financial support of the Islamic Group and Sheik Abdel Rahman during the time period contemporaneous with the killing of Rabbi Meir Kahane.
…

Liability

A. Vicarious Liability

The basis of Defendants' liability is that they provided material support and resources to the Islamic Group, which through the acts of Nosair, completed the extra judicial killing giving rise to this action. … One may be liable for the acts of another under theories of vicarious liability, such as conspiracy, aiding and abetting, and inducement. This court finds that civil conspiracy provides a basis of liability for Defendants Iran and MOIS and accordingly declines to reach the issue of whether they might also be liable on the basis of aiding and abetting and/or inducement. …… the elements of civil conspiracy consist of: (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme …

As this court has previously held, … "sponsorship of terrorist activities inherently involves a conspiracy to commit terrorist attacks… here it has been established by evidence satisfactory to this court that Iran continuously provided material support in the form of, *inter alia*, funding, training, and safe haven to the Islamic Group so that it may undertake terrorist attacks like the one in this action. The assassination of Rabbi

Meir Kahane and the wounding of Irving Franklin and Carlos Acosta were caused by a willful and deliberate act of extrajudicial killing by El Sayyid Nosair who, as a member of the Islamic Group headed by Sheik Abdel Rahman, was acting in furtherance of the terrorist *jihad* … goals of each of them and of Defendants. Finally, as will be discussed below, the Plaintiffs in this action incurred damages resulting from the death and injuries caused by the conspiracy. Accordingly, the elements of civil conspiracy are established between the Islamic Group and Defendants Iran and MOIS ….."