Neutral Citation Number: [2020] EWHC 3185 (Admin)

Case No: CO/4688/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/11/2020

Before:

LORD JUSTICE FLAUX

-and-

MR JUSTICE SAINI

- -

Between:

THE QUEEN (ON THE APPLICATION OF CHARLOTTE CHARLES AND TIM DUNN)	**Claimants**
- and –	
THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS	**Defendant**
-and-	
CHIEF CONSTABLE OF NORTHAMPTONSHIRE POLICE	**Interested Party**

- -

Remote hearing dates: 11-12 November 2020

Covid-19 Protocol: This judgment was handed down by release to Bailli. The date and time for hand-down was deemed to be 10.00am on Tuesday 24 November 2020

Geoffrey Robertson QC, Sam Wordsworth QC, Adam Wagner, Sean Aughey, Monica Feria-Tinta and Emilie Gonin (instructed by **Howard Kennedy LLP**) for the **Claimants**

Sir James Eadie QC, Professor Vaughan Lowe QC, Ben Watson, Jason Pobjoy and George Molyneaux (instructed by **Government Legal Department**) for the **Defendant**

Jason Beer QC (instructed by **East Midlands Police Legal Services)** for the **Interested Party**

APPROVED JUDGMENT

Lord Justice Flaux and Mr Justice Saini:

This judgment is in 8 main parts as follows:

I. Overview

1. The Claimants, Charlotte Charles and Tim Dunn, are the parents of Harry Dunn. These proceedings for judicial review arise out of Harry's death in a road traffic accident on 27 August 2019.

2. On that day, Harry (then aged 19 years) was killed following a collision between his motorbike and a vehicle driven by Anne Sacoolas ("Mrs Sacoolas"). Mrs Sacoolas is the wife of Jonathan Sacoolas, a member of the US Government's Administrative and Technical ("A&T") Staff at RAF Croughton. Harry's motorbike was struck by Mrs Sacoolas' car as she drove out of the base on the evening of 27 August 2019. The evidence strongly suggests she was driving on the wrong side of the road when she struck Harry's motorbike, and Mrs Sacoolas subsequently appears to have accepted this fact through her US lawyers.

3. Following the accident there was a period of dialogue between the US Embassy and the Foreign and Commonwealth Office ("the FCO" - now the Foreign, Commonwealth and Development Office) concerning the potential diplomatic immunity of Mrs Sacoolas from the criminal jurisdiction of the United Kingdom.

4. Upon the conclusion of that dialogue, on 15 September 2019, Mrs Sacoolas left England, the FCO having accepted that Mrs Sacoolas was entitled to immunity from criminal proceedings in the United Kingdom. Although the Defendant is the Secretary of State, for convenience we will refer to the Defendant as "the FCO", as the parties have done in their submissions before us.

5. On 22 December 2019, the CPS began extradition proceedings against Mrs Sacoolas in respect of a charge of causing Harry's death by dangerous driving. The Home Office submitted an extradition request on 10 January 2020, but the US State Department has declined to progress the extradition, asserting that at the time of the accident Mrs

Sacoolas enjoyed immunity from criminal proceedings in the United Kingdom. At present, there seems to be little prospect of Mrs Sacoolas returning to the United Kingdom to face any proceedings in respect of Harry's death.

6. By this claim, Harry's parents challenge the FCO's determination that at the time of Harry's death, Mrs Sacoolas enjoyed diplomatic immunity (Ground 1). They also allege that the FCO unlawfully confirmed and/or advised the relevant police force that Mrs Sacoolas had immunity from criminal jurisdiction and/or obstructed a criminal investigation (Ground 2). Finally, they claim that these acts breached Article 2 of the ECHR (Ground 3).

7. This is a "rolled up" hearing to consider both the issue of permission to apply for judicial review and the substantive merits in respect of these grounds. The hearing was conducted remotely.

8. The FCO's response to Ground 1 is that, as a matter of both domestic and international law, Mrs Sacoolas automatically enjoyed diplomatic immunity from the time she entered the UK and that immunity had not been waived by the US. They also argue that Grounds 2 and 3 are essentially parasitic on Ground 1, but that in any event the FCO did not obstruct or interfere with the independent decisions of the Chief Constable of the Northamptonshire Police (formerly the Second Defendant) who has also concluded that Mrs Sacoolas had immunity at the time of the accident. The Claimants originally made claims against the Chief Constable but those claims were discontinued on 27 July 2020. The Chief Constable is now an Interested Party.

9. Before we turn to the first of the main issues, we should record that the FCO made an application to withhold certain passages in three Ministerial Submissions disclosed in these proceedings on grounds of public interest immunity ("PII"), pursuant to CPR 31.19(1). These Ministerial Submissions are referred to in Section III below. We acceded to the PII application for the reasons given in a judgment dated 9 November 2020: [2020] EWHC 3010 (Admin).

10. For completeness, we have reconsidered the issue of non-disclosure in the light of the specific arguments made to us at the hearing. We remain of the view that the withheld passages are not relevant to the issues we need to decide and the balance of the public interests justifies the redactions.

II. Diplomatic Immunity: legal framework

11. As explained by Lord Sumption in Al-Malki v Reyes [2017] UKSC 61; [2019] AC 735 at [5], the legal immunity of diplomatic agents "is one of the oldest principles of customary international law". The law is codified in the Vienna Convention on Diplomatic Relations ("VCDR"), to which over 190 States are Parties.

12. In Al-Malki, Lord Sumption at [11]-[12] referred to the primary rule of interpretation laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969). In summary, that provision requires that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Lord Sumption explained that the principle of

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

13. Of specific importance to the present case is Lord Sumption's observation that in the case of the VCDR there are particular reasons for adhering to these principles. He explained at [12]:

> "(1) Like other multilateral treaties, the text was the result of an intensely deliberative process in which the language of successive drafts was minutely reviewed and debated, and if necessary amended. The text is the only thing that all of the many states party to the Convention can be said to have agreed. The scope for inexactness of language is limited.
>
> (2) The Convention must, in order to work, be capable of applying uniformly to all states. The more loosely a multilateral treaty is interpreted, the greater the scope for damaging divergences between different states in its application. A domestic court should not therefore depart from the natural meaning of the Convention unless the departure plainly reflects the intentions of the other participating states, so that it can be assumed to be equally acceptable to them…
>
> (3) Although the purpose of stating uniform rules governing diplomatic relations was "to ensure the efficient performance of the functions of diplomatic missions as representing states", this is relevant only to explain why the rules laid down in the Convention are as they are. The ambit of each immunity is defined by reference to criteria stated in the articles, which apply generally and to all state parties. The recital does not justify looking at each application of the rules to see whether on the facts of the particular case the recognition of the defendant's immunity would or would not impede the efficient performance of the diplomatic functions of the mission. Nor can the requirements of functional efficiency be considered simply in the light of conditions in the United Kingdom. The courts of the United Kingdom are independent and their procedures fair. It is difficult to envisage that exposure to civil claims would materially interfere with the efficient performance of diplomatic missions. But as the Secretary of State for Foreign and Commonwealth Affairs pointed out, the same cannot be assumed of every legal system in every state. The threat to the efficient performance of diplomatic functions arises at least as much from the risk of trumped up or baseless allegations and unsatisfactory tribunals as from justified ones subject to objective forensic appraisal. It may fairly be said that from the United Kingdom's point of view, a significant purpose of conferring diplomatic

> immunity of foreign diplomatic personnel in Britain is to ensure that British diplomatic personnel enjoy corresponding immunities elsewhere.
>
> (4) Every state party to the Convention is both a sending and receiving state. The efficacy of the Convention depends, even more than most treaties do, on its reciprocal operation. Article 47.2 of the Convention authorises any receiving state to restrict the application of a provision to the diplomatic agents of a sending state if that state gives a restrictive application of that provision as applied to the receiving state's own mission. In some jurisdictions, such as the United States, the recognition of diplomatic immunities is dependent as a matter of national law on their reciprocity…"

14. Interpretation according to the VCDR's language is central to the effective operation of the system of diplomatic immunity. It provides for certainty and consistency of application.

15. The VCDR has been domestically implemented, in part, by the Diplomatic Privileges 1964 Act, s.2(1) of which provides that the articles of the VCDR annexed in Schedule 1 "*shall have the force of law in the United Kingdom*". Schedule 1 contains articles 1, 22-40 and 45 of the VCDR.

16. It was common ground that the 1964 Act also falls to be construed by reference to provisions of the VCDR which have not been so incorporated: Propend Finance Pty Ltd v Sing (1996) 111 ILR 611 at p.635 and Fawaz Al Attiya v Hamad Bin-Jassim Bin-Jaber Al Thani [2016] EWHC 212 (QB) at [39].

17. The key provisions of the VCDR for the purpose of the present proceedings are as follows:

    (a) Article 7 provides:

> "Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval."

    (b) Article 9 provides:

> "(1) The receiving State may at any time…notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

> (2) If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."

(c) Article 10 provides that the Ministry of Foreign Affairs of the receiving State (in the UK, the FCO),

> "shall be notified of: (a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission; (b) the arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission…".

(d) Article 11 provides:

> "(1) In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
>
> (2) The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category."

(e) Article 12 provides:

> "The sending State may not, without prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established".

(f) Article 29 provides:

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

(g) Article 31(1) provides: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State…". Article 31(2) provides: "A diplomatic agent is not obliged to give evidence as a witness."

(h) Article 32 provides:

> "(1) The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.
>
> (2) Waiver must always be express".

(i) Article 37 provides:

> "(1) The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
>
> (2) Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties…".

(We note that the term "members of the administrative and technical staff" (i.e. A&T Staff) is defined in Article 1(f) as "the members of the staff of the mission employed in the administrative and technical service of the mission". The term "members of the staff of the mission" is defined in Article 1(c) as "the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission". As members of the staff of the mission, A&T Staff are "members of the mission" (Article 1(b)).)

(j) Article 39 provides:

> "(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment which his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> (2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist. …"

18. Bearing in mind Lord Sumption's admonition, and the importance of focusing on the language used in the VCDR, our interpretation of the material provisions of the VCDR is as follows:

(1) A sending State is entitled to "*freely appoint*" a diplomatic agent or member of the A&T Staff (Article 7). As explained in a leading academic commentary, this reflects the "general principle that the sending State has the right to choose all members of its diplomatic mission and that their appointment (except for the head of the mission) is not subject to the previous agrément of the receiving State": Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed., 2016) at p.49. As also explained by Denza, the freedom to appoint under Article 7 also extends to the freedom to specify the classification of mission staff as diplomatic staff, A&T Staff or service staff.

(2) The VCDR sets out express and narrowly defined limitations on the sending State's freedom to appoint in Articles 5, 7, 8, 9 and 11. In terms of the appointment of particular categories of officials, there are only two limitations: first, a receiving State, if it so chooses, may require prior submission of the names of defence attachés (Article 7); second, a receiving State may refuse to accept particular categories of officials, such as defence attachés (Article 11(2)). Subject to those two provisions, the freedom of the sending State to appoint particular officials or categories of officials enjoying privileges and immunities under the VCDR appears to be unfettered. The receiving State is neither required nor permitted to give or withhold its consent to such appointments.

(3) A receiving State retains two remedial powers under the VCDR, the exercise of which may affect the size and composition of the mission. A receiving State may declare a member of the mission *persona non grata* or "not acceptable" under Article 9(1), even in advance of his/her arrival in the receiving State. It may also limit the size of the mission under Article 11(1) (i.e., impose a limit on the number of its members).

(4) Once the sending State appoints a person as a member of the mission, the effect of the VCDR is that this person will without more be entitled to privileges and immunities upon entering the territory of the receiving State (Article 39(1)), unless a declaration of *persona non grata* is made under Article 9(1) in advance of their arrival.

(5) The entitlement to privileges and immunities arises from the automatic operation of the VCDR (given domestic effect by the 1964 Act), not from any 'grant' of entitlement by the Secretary of State.

(6) The same is true of the content of those privileges and immunities. The effect of this is that A&T Staff and their families enjoy inviolability and immunity from criminal jurisdiction automatically (i) as a matter of international law, by operation of Articles 29, 31(1) and 37(2) VCDR; and (ii) as a matter of primary domestic legislation, by operation of s.2(1) of the 1964 Act.

(7) Although in one sense, the family of a diplomatic agent or member of A&T staff enjoy what can loosely be called a "derivative" set of privileges and immunities under Articles 37(1) and 37(2), it is clear in our judgment that the VCDR confers *separate* entitlements to inviolability and immunity on (i) the diplomatic agent or member of A&T Staff; and (ii) his/her family members. These are distinct and independent entitlements.

(8) This follows through to the issue of waiver of immunity from jurisdiction under Article 32(1) which must be waived separately for all persons who enjoy that immunity. Through waiver by the sending State, it is possible for the immunities of the principal to cease in some respect, while those of the family member continue to exist. We refer to the example where the receiving State requests a waiver of a diplomatic agent's immunity in order that he/she may be charged with a criminal offence of which he/she is suspected, and the sending State agrees to that request. In such circumstances, the diplomatic agent's family members would continue to enjoy full immunity from criminal jurisdiction, but the diplomatic agent would not. In principle, the same approach must apply to an "advance" or "pre-waiver".

(9) Immunity from jurisdiction (including criminal jurisdiction) may be waived *only* by the sending State under Article 32 VCDR. Article 32 VCDR makes clear in terms that a waiver "must always be express". The need for waiver to be express (rather than merely implied) has also been repeatedly affirmed and emphasised in the case-law: see, for example, R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 at 217C, 243F, 263D.

(10) There is no room for English law concepts such as implication of terms, or constructive waiver. As explained by Laws J in Propend Finance Pty Ltd v Sing (1996) 111 ILR 611 at p. 643:

> "…the line drawn by the requirement that waiver must be express is not to be found in a simple contrast with what might be implied (which is the usual opposition when these terms are deployed in English law); rather the rule means that the waiver be intended as such by the sending State, and unequivocally communicated as such to the court. I greatly doubt whether there can be any question of constructive waiver".

(11) This is reinforced by the drafting history. The International Law Commission's initial draft article provided that "In civil proceedings waiver may be express or implied". However, the notion of implied waiver was decisively rejected at the Vienna Conference, on the basis, inter alia, that in the context of implied waivers "there would be no certainty that it had been authorized by the sending State", that "[d]iplomatic immunities were intended to benefit the sending States, and any misunderstanding over the waiving of immunity could only cause embarrassment", and that "[t]o disregard diplomatic immunity was to infringe the sovereignty of a foreign State" and it was "therefore proper to require an express waiver as a condition for proceedings of any kind against a diplomat": UN Docs A/Conf.20/C.1/SR.29, 174-7.

(12) This position is confirmed in the leading academic texts: Denza (cited above), 277-278, and I. Roberts (ed.), *Satow's Diplomatic Practice* (7th ed., 2017), section 14.26.

(13) Inviolability of the person and immunity from jurisdiction are separate and distinct. The former is addressed in Article 29, whereas the latter is addressed in Article 31 of the VCDR. They are also conceptually distinct. Immunity from jurisdiction offers protection against legal proceedings, but not against coercive police measures, such as arrest or detention.

(14) It follows that if a person is *prima facie* entitled to inviolability of the person and immunity from jurisdiction, a waiver of his/her immunity from jurisdiction does not cause him/her to cease to enjoy inviolability of the person (and *vice versa*).

19. Before turning to the Exchange of Notes, we stress that this last point is of particular importance in the present case. It only became clear to us during the course of the hearing that the Claimants' representatives accepted that (irrespective of the position of Mrs Sacoolas in relation to immunity) Mrs Sacoolas enjoyed inviolability. Certain of their arguments in the pleadings had proceeded however on the basis that she could have been arrested, detained and charged by the police (see, for example, Amended Grounds, para.93).

20. It is now common ground that Mrs Sacoolas could not have been arrested and detained by the police before she left for the US on 15 September 2019.

III. The Exchange of Notes

21. The arrangements by which members of the US Embassy were first based at RAF Croughton were agreed between the UK and the US in an Exchange of Notes in 1994. Before turning to the Exchange of Notes, we will summarise the earlier history of arrangements at RAF Croughton.

22. In 1963, the US Government requested permission to use the existing communications facility at the US Air Force base at RAF Croughton as a relay point for US Government diplomatic communications. At that time, the US communications facility was staffed by US Department of Defense civilian personnel, operating under the 1951 NATO Status of Forces Agreement ("the SOFA"). The UK acceded to the US Government's request.

23. It is common ground that the SOFA did not confer any immunity from criminal jurisdiction on the relevant U.S. personnel or their families. Article VII(1)(b) of the SOFA provides that:

> "the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State".

24. On 6 July 1994, the US Embassy sent a letter to the FCO asking that a certain number of US personnel based at the relay facility at RAF Croughton be "included on the Diplomatic and Administrative and Technical lists".

25. The FCO acknowledged receipt of the US Embassy's letter on 20 July 1994, and on 3 August 1994 requested certain further information to assist in considering this request. In particular, the FCO requested information about the number of staff based at RAF Croughton, and inquired as to their rank and functional role, and why they would require immunities.

26. The US Embassy provided the requested information on 15 September 1994. The US Embassy stated that (i) the number of US military personnel at RAF Croughton was being reduced substantially, and that "the drawdown is severely affecting the quality and level of support to Croughton which is responsible for worldwide diplomatic communications"; (ii) the staff at the facility had been Department of Defense civilians, but "[t]he nature of the functions at Croughton have changed", and the facility would in future be run entirely by Department of State personnel and as such "their status should be governed by the [VCDR]"; and (iii) the persons for whom the US Embassy requested diplomatic status "will have senior management roles and will merit diplomatic rank of Communications Attache".

27. In a Ministerial Submission dated 23 May 1995, an official in the Protocol Department of the FCO recommended that the relevant minister agree to the US Embassy's request "if the US Government agrees to waive the immunity from criminal jurisdiction in respect of acts performed outside the course of their duties of staff at Croughton who have only A & T status". The submission records that the FCO was initially cautious and indeed sceptical about the US Embassy's request. It seems that one of the main reasons for the FCO's caution was its concern about the number of the staff and their lack of proximity to the US Embassy in London. It is also noteworthy (given the events that were subsequently to transpire) that the following was said by the FCO:

> "…We remain less than happy at increasing, albeit temporarily, the number of privileged staff accredited by the US Government and that these staff will be based some 60 miles from the Embassy itself. There is perhaps a greater risk of such staff becoming involved in incidents (eg. drunk driving, speeding, parking etc) in such an isolated area than there would be in London and this focussing public attention on the facility and its special status. Nevertheless, the staff at Croughton will be State, rather than Defense Department personnel; [REDACTED] On balance, in these circumstances, we believe that it is now not unreasonable to regard the staff at Croughton as diplomatic/A&T staff".

28. In due course (and following the receipt of further information from the US), the Protocol Department recommended that the UK agree to the US request, subject to the "US Government agree[ing] in advance to waive the immunity from criminal jurisdiction in respect of acts performed outside the course of their duties of the … Administrative and Technical Staff to be based there". The recommendation was accepted by Tony Baldry MP, then a Minister at the FCO. We should record that Tony Baldry (now Sir Tony) has provided a witness statement on behalf of the Claimants concerning his understanding of the US request, but it does not seem to us, with respect to him, that his evidence can assist us in resolving the issues of law in this claim.

29. On 12 June 1995, the FCO sent the US Embassy a letter indicating that the FCO was in principle willing to grant the request in the Embassy's letter of 6 July 1994, subject to the advance waiver referred to above. The FCO indicated that it would require this advance waiver to be done "in the form of an Exchange of Letters between the United States Ambassador and a Foreign and Commonwealth Office Minister".

30. This process, leading to the Exchange of Notes, was followed. So, on 15 August 1995, Sir Nicholas Bonsor MP (then a Minister at the FCO) sent to the US Ambassador a letter which indicated they would accept US personnel as A&T staff with the privileges and immunities accorded to such staff pursuant to Article 37(2) VCDR. The full terms of his letter are important (our underlined emphasis):

> "I have the honour to refer to the Embassy's Note No 68 of 6 July 1994 requesting that the [REDACTED] American personnel working at the Department of State's diplomatic communications relay facility at RAF Croughton be included on the Diplomatic and Administrative and Technical (A&T) lists. As a result of discussions between the Protocol Department and the Embassy of the United States of America, I now have the honour to propose the following: -
>
> The Governments of the United Kingdom and of the United States of America have discussed the status of American personnel working at the Department of State's diplomatic communications relay facilities at RAF Croughton.
>
> Of the [REDACTED] persons which it is proposed will be based there, the Government of the United Kingdom are prepared to accept [REDACTED] persons as members of the diplomatic staff of the US mission with the privileges and immunities accorded to such staff under the Vienna Convention on Diplomatic Relations (VCDR). <u>However, since a large number of non-diplomatic staff are to be based a considerable distance from the Embassy itself, the Government of the United Kingdom are only willing to accept the remaining [REDACTED] persons as members of the A&T staff of the United States Embassy in London with the privileges and immunities accorded to such staff pursuant to the provisions of Article 37.2 of the VCDR, on the understanding that the United States Government, by its reply to this letter waives the immunity from criminal jurisdiction of these employees in respect of acts performed outside the course of their duties.</u> Furthermore, it is a condition of these arrangements that all the US personnel working at RAF Croughton (diplomatic and A&T staff), will like the members of the US mission in London, be under Your Excellency's control and responsibility.
>
> This arrangement will be of indefinite duration".

31. On 17 August 1995, the US Ambassador replied to Sir Nicholas and said: "We do accept the conditions regarding criminal immunity for the… members of the Croughton facility who will have A&T status". His letter further stated:

> "It is also the understanding of the United States Government that the relay station will be considered an office forming part of the Embassy pursuant to Article 12 of the [VCDR]".

32. On 20 October 1995, the US Embassy sent a letter to the FCO which referred to the Exchange of Notes and said:

> "In light of this exchange of letters, the Embassy of the United States of America wishes to inform Her Majesty's Government that the office, now designated as the Regional Information Technical Centre in Croughton, is to be considered diplomatic premises in accordance with the 1987 Diplomatic Privileges Act".

33. The FCO consented to this designation in a letter dated 4 January 1996.

34. There were further rounds of diplomatic correspondence concerning RAF Croughton between 2000-2006. That correspondence is essentially concerned with increasing the number of staff and led to an agreement on a number of increases but on the same terms as the Exchange of Notes of 1995. Neither party contended that this later correspondence changed the substantive nature of the arrangements concluded by the Exchange of Notes.

35. The main points arising out of that correspondence may be summarised as follows:

(1) On 26 June 2000, an official at the US Embassy wrote to the FCO to request a meeting to discuss various matters, including a US proposal to increase the number of staff based at RAF Croughton. The requested meeting took place on 27 July 2000, and there was further correspondence about the proposal over the following months.

(2) On 8 May 2001, the US Embassy wrote to the Secretary of State formally to request that the United States be allowed to base a number of additional personnel at RAF Croughton. They asked that the additional personnel be accepted "as members of the Administrative and Technical Staff of the U.S. Embassy in London, with the privileges and immunities accorded to such staff pursuant to Article 37.2 of the Vienna Convention on Diplomatic Relations". The request confirmed "that the U.S. Government is content to waive the immunity from the UK's criminal jurisdiction of all of these extra staff members in respect of acts performed outside the course of their duties". We note here the use of the term "staff members" while the Exchange of Notes had referred to "employees" at Croughton. Nothing however turns on this.

(3) On 13 July 2001, the FCO replied to the US Embassy and indicated that the proposal contained in the Embassy's letter of 8 May 2001 was acceptable to the UK.

(4) On 5 November 2001, the FCO consented to a request from the US Embassy that an additional building at RAF Croughton be recognised as diplomatic premises in accordance with the Diplomatic and Consular Premises Act 1987.

(5) On 8 June 2006, the US Embassy sent the FCO a Diplomatic Note which requested that the United States be permitted to increase the number of staff working at RAF Croughton. Again, the Note requested that the additional staff be accepted "as members of the Administrative and Technical Staff of the U.S. Embassy in

London, with the privileges and immunities accorded to such staff pursuant to Article 37.2 of the Vienna Convention on Diplomatic Relations". The request confirmed, as before, that "the U.S. Government is content to waive immunity from the UK's criminal jurisdiction of those additional staff members in respect of acts performed outside the course of their duties".

(6) A Ministerial Submission dated 26 July 2006 recommended that the US Embassy's proposal be accepted. A draft diplomatic note to the US Embassy was annexed to the Submission. The draft said that the proposals in the US note were "acceptable to the Government of the United Kingdom". The Minister's private secretary indicated via email on 27 July 2006 that the Minister agreed with the proposal in the submission of 26 July 2006. A final version of the note has not been located, but the parties are agreed that nothing turns on this.

36. Pausing here, and putting matters neutrally at this stage, a number of broad points can be drawn from this diplomatic correspondence (and specifically, the Exchange of Notes):

(a) in broad terms, the US was seeking a form of indulgence from the UK by way of permission to include a number of additional diplomatic and A&T staff at premises away from the London Embassy as part of the US mission;

(b) that indulgence was granted in the terms of a specific offer and acceptance of terms;

(c) in those terms, there was an express waiver of immunity from UK criminal jurisdiction of "employees" and "staff members" in the A&T category at RAF Croughton;

(d) there was no express reference to the position of family members of A&T staff in the terms; and

(e) the material correspondence refers to the VCDR and the discussions clearly took place against the framework of that Convention and by reference to it (most clearly in the 15 August 1995 letter from the FCO).

IV. The Facts

37. We received statements from Mr Hugo Shorter (FCO Director, Americas), who was the principal individual dealing with this matter at the FCO at the time of the accident, and from DI Hemingway and DC Pegg, both of NP. No challenge was made to the accuracy of any of this evidence and we are not aware of any material dispute of fact. Our summary is based on those statements and the contemporaneous documents, particularly emails and the diplomatic correspondence.

38. Mr Sacoolas was at the material time a member of the US Embassy's A&T Staff based at RAF Croughton. The US Embassy had notified the FCO of Mr Sacoolas' appointment on 5 August 2019, as required under Article 10 VCDR.

39. This formal notification for VCDR purposes identified Mr Sacoolas' diplomatic category as "C – Administrative and Technical Staff". The notification was on FCO's Form 1. The opening paragraph of the form stated:

> "This form should be used to notify the Foreign and Commonwealth Office (as required under Article 10 of the Vienna Convention on Diplomatic Relations 1961; Article 24 of the Vienna Convention on Consular Relations 1963 or, for international organisations, their respective legislation) of the arrival and final departure of those officials entitled to privileges and immunities, members of their families forming part of their household, and private servants. …"
>
> (emphasis in original)

40. In addition to Mr Sacoolas, Form 1 also identified Mrs Sacoolas and their children as dependants. Mr Sacoolas was designated as "Information Management Programs Officer- LAC" ("LAC" being London Annexe Croughton). There was nothing on Form 1 to indicate any waivers or limitations as regards the privileges or immunities of Mr Sacoolas or his family.

41. The information on Form 1 was recorded in the database of the Parliamentary and Diplomatic Protection Section of the Metropolitan Police ("the PaDP").

42. On Tuesday 27 August 2019, after dinner at RAF Croughton, the Sacoolas family left the base at around 8pm in two cars. The first vehicle was driven by Mr Sacoolas with one child, followed by Mrs Sacoolas with two children in a Volvo XC90. The evidence is that she drove out of the base and onto the B4031 towards Croughton Village on the wrong side of the road.

43. At 8:21 pm, her car collided with Harry, who was riding his motorbike on the correct side of the road. Harry sustained severe injuries, but was able to tell police officers attending the scene what had happened, before being taken to the John Radcliffe Hospital at Oxford. He died later that evening.

44. The Northamptonshire Police (NP) officers attending the incident had taken Mrs Sacoolas' name and address, and arranged a meeting with her at midday on the next day, 28 August 2019. The meeting took place at 12.00, at the Sacoolas' home, with a US lawyer and a US State Department official in attendance. The officers from NP attending (DI Hemingway and DC Pegg) informed Mrs Sacoolas that she was suspected of causing death by dangerous driving and would be asked to attend an interview at a police station. The evidence is that she assured the police at that time that she had no plans to leave the UK. No mention was made to the officers of any immunity.

45. The events over the next few days (which we summarise below) reveal that it was not immediately clear to FCO officials that Mrs Sacoolas enjoyed immunity.

46. On Wednesday 28 August 2019, the US Embassy notified the FCO that the spouse of a member of staff at RAF Croughton had been involved in a fatal road traffic accident.

47. On the same say day an official in the FCO's Protocol Directorate drew to the attention of colleagues the arrangements relating to the posting of US Embassy staff at RAF Croughton, including the advance waiver, to which we have made reference above. It was understandably assumed at that time by the official that this waiver would also apply to Mrs Sacoolas.

48. Another Protocol Directorate official contacted the PaDP, and ascertained that the matter was being handled by NP. The Protocol Directorate official said to the PaDP that "unusual arrangements" applied to the immunity of Embassy staff and their families based at RAF Croughton, including an advance waiver, and that further work was being done to clarify the position.

49. On the afternoon of Wednesday 28 August 2019, DC Pegg of NP was called by PaDP and informed that Mrs Sacoolas had "Category C criminal immunity" and that a waiver would need to be applied for. At 15:38 that day, PaDP wrote to DC Pegg to ask her to submit Form 2102 in relation to Mrs Sacoolas. The email states that Mrs Sacoolas "has immunity so to interview her you will have to request a waiver of this immunity". DC Pegg informed DI Hemingway of this information.

50. DI Hemingway's evidence is that NP accepted the information from PaDP as to Mrs Sacoolas' status as factual. She refers in her evidence to the CPS Guidance that it is a matter for the police to establish if a person has diplomatic immunity and the procedural guidance also states that PaDP/FCO will provide information as to whether a suspect has diplomatic status. She explains that "…to me this meant that Mrs Sacoolas had criminal immunity and that the police could not do anything in terms of interviewing/charging her until a waiver of that immunity was granted". She emphasises that she did not consider whether the information had come from the FCO but had relied on the PaDP who had access to the database and their confirmation of immunity. DI Hemingway states that her view was that this was accurate information provided by the Metropolitan Police Service.

51. Later on Wednesday 28 August 2019, the PaDP sent the FCO a form which indicated that NP wished to interview Mrs Sacoolas under caution, and to seek a waiver of her diplomatic immunity. The PaDP sent the FCO equivalent forms the next morning in respect of Mr Sacoolas and one of the Sacoolas children.

52. On Thursday 29 August 2019, an official in the Protocol Directorate spoke with an official at the US Embassy, and informed him that in light of the advance waiver there was no need for any further waiver of immunity. The Protocol Directorate followed this up in writing with the US Embassy stating in an email at 10:14am: "As just discussed with [xx], please see attached documents outlining the waiver of immunity arrangements agreed between the FCO and the US Embassy for A&T staff based at Croughton". We note that the attachments included documents related to the 1995 and 2001 Exchanges of Notes, which we have summarised above.

53. This view was reflected in the FCO's note to the Parliamentary Under-Secretary on Friday 30 August 2019 which explained that "our initial view is that it would not have been the intention of the drafters of the 'Croughton Agreement' to provide greater immunity for family members than to a diplomat", but that "there remains the possibility that the US government will withdraw the family from the UK at any time".

54. On Friday 30 August 2019 this position was expressly challenged by a US Embassy official who said that the US's view was that the advance waivers only applied to A&T Staff, and did not extend to their family members, so that Mrs Sacoolas had diplomatic immunity. Later that day, the US Embassy delivered to the FCO a formal Diplomatic Note which stated that Mrs Sacoolas enjoyed "complete criminal immunity, full personal inviolability from arrest or detention, and complete testimonial immunity", and that the US "has not waived any immunity with respect to Anne Sacoolas". The Note asked that the FCO remind the appropriate authorities of these protections.

55. Later on Friday 30 August 2019, the Protocol Directorate placed an urgent request with the FCO's archive retrievals service for any documents referring to the US Diplomatic Communications Relay Facility based at RAF Croughton. The evidence before us is that this request was made with a view to trying to identify any records which might assist in challenging the stance that the US had adopted in relation to the scope of the advance waiver.

56. The FCO decided to seek a waiver of immunity, while it continued to consider the US Government's position on immunity.

57. On behalf of the FCO, Mr Shorter explains that the FCO decided to adopt this approach for a number of reasons: (i) having closely analysed the matter, officials considered that the US was correct that the advance waiver applied (only) to staff members; (ii) even if the materials being retrieved from archives yielded documents which could be used to argue for a different interpretation, it was considered unlikely that the US would concede the issue of principle regarding the interpretation of the Exchange of Notes; and (iii) it is very common for the UK and other States to request waivers in cases where persons with diplomatic immunity are suspected of having committed criminal offences, or may be able to provide law enforcement authorities with relevant evidence.

58. Also on Friday 30 August 2019, in response to her inquiry in relation to the immunity issue and obtaining a waiver, DI Hemingway of NP was informed by PaDP that she should contact the FCO directly. When she contacted them the FCO informed her that they were the ones dealing with the US Embassy over the waiver requests but that they did not know how long it would take to obtain a formal response to those requests.

59. On Monday 2 September 2019, the FCO emailed NP and PaDP with details of the waiver requests that it was in the process of making to the US Embassy. That email said: "…following consultation with the US Embassy we are going to proceed with a formal request to the US Government to seek a waiver of the immunity held by Anne Sacoolas".

60. In her evidence, DI Hemingway explains that she believed this email from the FCO confirmed the FCO's view that Mrs Sacoolas did enjoy immunity and that a waiver was necessary before NP could interview her. She also says that because she had been advised by PaDP that Mrs Sacoolas enjoyed criminal immunity, and she was not made aware of any restriction or limitation on the immunity, she believed there was no need to carry out further investigation into the immunity issue.

61. DI Hemingway adds however that "…If I had been notified that there were limitations I would have made further inquiries with the PaDP to clarify what those limitations were in order to fully understand the implications for the investigation…I accepted the

information from the PaDP and the FCO as being correct". Her evidence is that she had no reason to believe that the US would not grant a waiver of Mrs Sacoolas' immunity.

62. On the basis of the materials before us, there does not seem to have been any further communication between the FCO and NP until 16 September 2019 (see paragraph [70] below). Specifically, it is common ground that NP were not informed at any stage of doubt there may have been over Mrs Sacoolas' immunity, or of the Exchange of Notes and surrounding correspondence.

63. It is also common ground that, although the immunity issue was no longer explored by NP after Monday 2 September 2019, that did not mean that the NP ceased its investigation. DC Pegg's evidence is that she continued to gather evidence and pursue the investigation in the normal way and she was not diverted by the immunity issue, save that the interview of Mrs Sacoolas was put on hold (pending the waiver request).

64. On Thursday 5 September 2019, Protocol Directorate officials formally delivered to the US Embassy a Diplomatic Note which requested waivers of immunity in respect of Mrs Sacoolas and one of her children "without prejudice to the UK's ultimate position on the proper interpretation of the arrangements". The Note also stated that "there is no question that Mr Jonathan Sacoolas' immunity has been waived by the US government".

65. Around this time (5 or 6 September 2019) various papers relating to the Exchange of Notes were delivered from archive to the FCO. These documents were reviewed in detail over the next few days, and the FCO found nothing that would assist in challenging the US's interpretation of the Exchange of Notes, which the FCO had concluded was correct. It was nevertheless hoped that the US would grant a waiver of that immunity.

66. On Friday 13 September 2019, two Protocol Directorate officials met with officials from the US Embassy, who handed over their own Diplomatic Note which stated that the US declined to waive the immunities of Mrs Sacoolas or her child. At the meeting, the Protocol Directorate officials were informed that the Sacoolas family would be leaving the UK the next day (a Saturday), unless the UK had strong objections. The Protocol Directorate officials objected to the proposed departure in strong terms, and repeatedly emphasised that the FCO wanted the Sacoolas family to cooperate with the UK authorities.

67. On Saturday 14 September 2019, a Protocol Directorate official sent a text message to a US Embassy official which stated: "I think that now the decision has been taken not to waive, there's not much mileage in us asking you to keep the family here. It's obviously not us approving of their departure but I think you should feel able to put them on the next flight out…". The official who sent the message was the person who the previous day had informed the recipient (in person) of the UK's strong objections to the US's intended course of action.

68. The FCO submits that the text message reflected the fact that, where a request for a waiver of immunity is refused in cases where an offence has allegedly been committed, it is standard practice for the individual in respect of whom the request had been made to be withdrawn (failing which they would ordinarily be declared *persona non grata* or not acceptable by the receiving State).

69. The evidence before us from the FCO is that their view at that time was: (i) that there was no realistic prospect of convincing the US to change its approach, and (ii) that it would have been unlawful to have tried to prevent any member of the Sacoolas family from leaving the UK, given that they (in the FCO's view) enjoyed inviolability of the person (under Article 29 VCDR).

70. On Monday 16 September 2019, the FCO was informed by the US Embassy that Mrs Sacoolas and her family had departed from the UK the previous day. On the afternoon of Monday 16 September 2019, the FCO informed NP that the waiver request had been rejected and that Mrs Sacoolas had left the country. It asked them not to inform the Claimants for a day or so, because "it would help if we could get our ducks in a row beforehand". DI Hemingway's evidence is that she agreed with this course because she wanted to review the case with the CPS and avoid greater distress for the family at the time of Harry's funeral.

71. The Claimants were informed in person on 26 September 2019 by DI Hemingway of Mrs Sacoolas' departure from the UK

72. The FCO expressed its disappointment at the US decision in strong terms, and asked it to reconsider in a letter of 24 September 2019:

> "The FCO notes the government of the United States' decision to decline to waive the immunity of Mrs Anne Sacoolas and her [REDACTED], for any purpose, following Mrs Sacoolas' involvement in a fatal road traffic accident on 27 August 2019. The FCO further notes that the Sacoolas family was withdrawn from the UK on 15 September 2019.
>
> The FCO wishes to place on record its grave disappointment at the decision of the government of the United States. The UK and the US share common law traditions and have confidence in each others' judicial and investigative processes. Therefore the FCO does not believe the US action was justified or appropriate. The FCO understands that, as part of its consideration process, the government of the United States looked at the matter of precedent. In response, the FCO reminds the government of the United States that it is the policy of Her Majesty's Government that immunity should only be claimed in exceptional circumstances, such as to protect staff from hostile action from host authorities. In line with this policy, the FCO is not aware of any occasions, since at least 2004, when the UK has refused to waive immunity for UK staff in the US when requested to do so by the government of the United States.
>
> In light of the above, the FCO requests that the government of the United States immediately reconsiders its decision not to waive the immunity of Mrs Anne Sacoolas. The FCO respectfully submits that provision of a waiver of Mrs Sacoolas' immunity to, at the very least, allow her to be interviewed by Northamptonshire Police. This would enable the police to be

> able to provide the Dunn family with a fuller account of the incident that led to Harry Dunn's death.
>
> The FCO also wishes to notify the government of the United States of its intention to review the existing arrangements for the US Embassy's London Annex Croughton (LAC) Operation. The review would include an examination of the immunities enjoyed by family members of those currently accepted as Administrative and Technical (A/T) Staff serving at RAF Croughton. The FCO will contact the Embassy of the United States about this matter in due course".

73. In its response dated 8 October 2019, the US Embassy refused to reconsider and, informed the FCO that "as the individual had returned to the U.S., in their view, the question of a waiver of immunity was no longer pertinent".

74. The matter was raised with the US again on 7–9 October 2019. It was first raised by the British Secretary of State with the US Secretary of State, Mike Pompeo, and then directly by the Prime Minister with President Trump.

75. After the FCO's diplomatic efforts were rebuffed, the Claimants raised money by crowdfunding and travelled to Washington. On 15 October 2019 they were invited to the White House to meet President Trump. They agreed to meet Mrs Sacoolas if she returned to the UK, but the US national security adviser, Robert O'Brien, told them directly at the meeting that she "was never coming back".

76. On 21 October 2019, the Secretary of State made a statement in the House of Commons on the case. He stated that Mrs Sacoolas had diplomatic immunity at the time of the accident, because the Exchange of Notes "waived immunity for employees, but the waiver did not cover spouses". He characterised this as an "anomaly". He stated that he had informed the family by letter on 12 October 2019.

77. On 22 December 2019 the CPS announced that it had authorised NP to charge Mrs Sacoolas with causing death by dangerous driving, and it began extradition proceedings. The US State Department condemned the request as an "egregious abuse… that would establish a troubling precedent".

78. On 10 January 2020, the Home Office submitted an extradition request to the US. The State Department responded by saying that the request was "highly inappropriate" and insisted that Mrs Sacoolas' status at the time of the crash meant she had diplomatic immunity. A spokeswoman said "it is the position of the United States government that a request to extradite an individual under these circumstances would be an abuse".

79. Following pre-action correspondence, the Exchange of Notes and surrounding correspondence was disclosed to the Claimants, and the present claim for judicial review was issued on 28 November 2019.

80. An inquest has been opened by the Coroner into Harry's death but we understand it has been adjourned because of the pending potential criminal proceedings against Mrs Sacoolas.

81. Although not relevant to this claim, we should refer to the fact that following these events the Secretary of State commissioned a review of the immunity arrangements for US personnel and their families at RAF Croughton. Following that review, and discussions between the FCO and US officials, the US agreed (i) to extend the advance waiver of immunity from criminal jurisdiction both to all Embassy staff at RAF Croughton (in respect of acts performed outside the course of their official duties) and also to their family members; and (ii) to provide a new waiver of the personal inviolability both of such Embassy staff and of their family members, for the purposes of arrest/detention pending trial or following conviction. This waiver, which is said to have prospective effect only, is recorded in Diplomatic Notes dated 20 July 2020.

V. Ground 1: Immunity

82. The main issue in this claim is whether Mrs Sacoolas enjoyed immunity from criminal jurisdiction at the time of Harry's death. As pleaded in their Grounds (and as maintained in recent amendments) the Claimants' contention has been that Mrs Sacoolas did not have such immunity because the waiver in the Exchange of Notes also impliedly covered family members such as Mrs Sacoolas.

83. Indeed, the very premise of the Claimants' case until the hearing before us was that the VCDR did apply, but that the pre-waiver in the Exchange of Notes respect of Mr Sacoolas also applied to Mrs Sacoolas. We summarised the Claimants' case in these terms without any dispute in our judgment at the CMC: [2020] EWHC 1620 (Admin) at [10].

84. No doubt in recognition of the challenges posed to that case by the requirement under Article 32(1) of the VCDR that any waiver of Mrs Sacoolas' immunity had to be "express", the pleaded case was effectively abandoned in the skeleton argument of the Claimants and replaced by a new argument which we will summarise below.

85. The Claimants' new argument in relation to Ground 1 was attractively presented by Mr Wordsworth QC (who argued this ground) and is simply stated. It is no longer based on the submission that there was some form of "implied" waiver of any immunity enjoyed by Mrs Sacoolas. The submission is that Mrs Sacoolas enjoyed no relevant immunity because, on an application of the terms of the Exchange of Notes, she had at most no greater immunity than Mr Sacoolas (whose immunity had been pre-waived as regards criminal jurisdiction).

86. The Claimants argue that the question as to whether there was any immunity on the part of Mrs Sacoolas is determined by the interpretation and application of the Exchange of Notes and that it was plain that the Exchange of Notes was intended to establish binding obligations and amount to a freestanding agreement or treaty between the US and the UK.

87. In more detail, the essential stages in the Claimants' argument may be summarised as follows:

(a) Without the FCO's consent, the US personnel at the Croughton Facility and their families were not entitled to the immunities accorded to A&T staff and their families under Article 37(2) VCDR. They enjoyed no pre-existing immunities.

(b) The Exchange of Notes records the UK's "offer" of what the Claimants label a "conditional consent" and the US acceptance of that offer, creating an agreement to confer limited immunity from criminal jurisdiction on US personnel at the Croughton Facility, who were accepted as A&T staff. Insofar as this was some form of "waiver" it was not waiver within Article 32(1) but outside the VCDR waiver regime.

(c) They rely on the fact that the Exchange of Notes makes no mention of family members and contains no express consent to confer immunities upon them. At most the intention of the US and the UK can only have been to accord to these family members what Mr Wordsworth QC called "derivative or implied immunity".

(d) In this regard, the Claimants rely on what they call the derivative nature of the entitlement to privileges and immunities of the families of A&T staff under Article 37(2) of the VCDR. They refer to various international law texts and case law in support of this submission (addressed at paragraph [112]-[115] below).

(e) Accordingly, since any immunities accorded to families are derivative, and exist in order to safeguard the independence of the given member of the mission, they cannot (and, under the VCDR, do not) exceed the immunities accorded to the A&T staff from whom those immunities are derived.

(f) They say that the effect of the Exchange of Notes is that, at all times, a member of US personnel accepted as A&T staff was entitled to nothing more than a limited immunity from criminal jurisdiction with respect to "*acts performed in the course of his duties*" only.

(g) Consistent with the recognised meaning of these same words in Article 37(2) VCDR, since family members are not members of the mission and they have no duties, Mrs Sacoolas was never entitled to any derivative or implied immunity from criminal jurisdiction.

(h) There could be no basis for any argument that HMG had silently consented to some greater, non-derivative, immunity for family members.

88. As will be clear by now, there is a threshold dispute between the Claimants and the FCO as to the precise relevance of the VCDR. The Claimants submit that the FCO wrongly presupposes that Article 32 VCDR is relevant and applicable to the condition to which the conferral of immunity was made subject in the Exchange of Notes. They say the FCO also wrongly presupposes that Mrs Sacoolas had a derivative or implied pre-existing immunity from criminal jurisdiction which could engage a need to be waived in accordance with Article 32.

89. As to the reliance by the FCO on the fact that the waiver in the Exchange of Notes did not expressly cover family members, the Claimants make three responses which we summarise as follows:

a. The flaw is that this wrongly presupposes that Mrs Sacoolas has a pre-existing entitlement to immunity from criminal jurisdiction when she can have derived no such immunity from Mr Sacoolas. The only correct conclusion could be that, since she performed no duties in relation to the mission, she enjoyed no immunity from criminal jurisdiction.

b. The fact that the family members had no entitlement to any immunity from criminal jurisdiction provides one explanation why the condition in the Exchange of Notes, which is solely concerned with this issue, makes no mention of such persons.

c. It is notable that the FCO is concerned with the absence of an express reference to family members only with respect to the "*pre-waiver*". Yet, as is plain from any reading of the Exchange of Notes, there is no reference to family members at all. If the correct approach were to focus solely on what is or is not express in the Exchange of Notes then, if family members are to be included by implication on one side of the balance (the conferral of immunity from criminal jurisdiction), they should likewise be taken to be included on the other (the condition on the conferral of that immunity).

90. The FCO submits that they have a complete answer to all of these submissions when one considers the governing instrument, the VCDR. They argue that by operation of Articles 37(2) and 39 thereof, Mr Sacoolas and his family members (including Mrs Sacoolas) enjoyed the privileges and immunities specified in Articles 29-35 VCDR on arrival in the UK. They rely upon the basic structure of the VCDR which we have summarised at Section II above.

91. As to the Exchange of Notes, the FCO argue that they proceeded entirely in accord with the operation of the VCDR. Specifically, Sir James Eadie QC, for the FCO, submitted that this exchange did not create some freestanding species of 'conditional' immunity standing outside the VCDR and the waiver as regards Mr Sacoolas did not extend to Mrs Sacoolas.

92. Sir James relied upon the evidence from Mr Shorter that, in certain circumstances, a sending State will enter into a dialogue with a receiving State with a view to reaching a mutual understanding as to how the VCDR will operate in a particular context. The FCO submits that the Exchanges of Notes between the UK and the US in 1995, 2001 and 2006 are the products of such a dialogue. Following detailed discussion and consideration about personnel working at the Department of State's diplomatic communications relay facilities at RAF Croughton, both States set out the diplomatic understanding of how the usual process, set out under the VCDR and operated by what is now the FCO's Protocol Directorate, would apply to personnel at RAF Croughton.

93. Accordingly, the FCO argues that the Exchange of Notes explains that the US would appoint a number of US personnel based at RAF Croughton as A&T Staff and Diplomatic agents, and that the UK would not raise any objection to those appointments (for example, by means of Article 9 VCDR), subject to the conditions set out in the Exchange of Notes. The Exchange of Notes did not confer any privileges or immunities.

94. The FCO concedes however that the effect of granting immunity to Mrs Sacoolas is "anomalous" when there was a waiver of her husband's immunity. Why such an anomaly arose is, it says, a matter of speculation.

Analysis

95. In our judgment, Mrs Sacoolas had immunity at the time of Harry's death.

96. The starting point is that we accept the FCO's submission that the issue of immunity needs to be approached in the context of the VCDR. Indeed, the authors of the Exchange of Notes make repeated and express reference to that instrument. The VCDR was the framework against which both the US and the UK were corresponding concerning the increase in staff members at RAF Croughton.

97. Without reference to the VCDR, the terms of the Exchange of Notes make little sense and it would be a surprising conclusion that the US and the UK were creating a wholly distinct and bespoke agreement when the field is covered by the VCDR which gives important rights to both the sending and the receiving State which are recognised by primary legislation.

98. Against that background, we summarise our broad reasons for reaching the conclusion that Mrs Sacoolas did enjoy immunity in six points as follows:

(1) Mr Sacoolas was appointed by the US as a member of A&T Staff, pursuant to the exercise of its right under Article 7 VCDR. On 5 August 2019, the US notified the FCO of the appointment, along with details of his family members. As we have noted above, the notification was made pursuant to Article 10 VCDR on the FCO's form for that specific purpose.

(2) By operation of Articles 37(2) and 39 VCDR, Mr Sacoolas and his family members (including Mrs Sacoolas) enjoyed the privileges and immunities specified in Articles 29-35 VCDR *on arrival* in the UK. These were a right she had acquired under primary domestic legislation.

(3) The privileges and immunities afforded to Mr and Mrs Sacoolas derived from the VCDR and the 1964 Act, not from the Exchange of Notes, and followed from the US's appointment of Mr Sacoolas.

(4) Those immunities were enjoyed in full by Mr Sacoolas and his family subject only to any valid waiver consistent with Article 32 of the VCDR.

(5) The only such valid VCDR compliant waiver is found in the Exchange of Notes which included limited pre-waiver of Mr Sacoolas' immunity from criminal jurisdiction.

(6) It is common ground that as regards Mrs Sacoolas there was no Article 32(1) compliant waiver.

99. We now set out our more detailed reasons for rejecting the Claimants' submissions and concluding that Mrs Sacoolas did benefit from immunity.

100. First, we reject the Claimants' submission that the FCO "*granted*" a "conditional" form of immunity to the family pursuant to the Exchange of Notes.

101. This submission is premised on two false assumptions: (i) that privileges and immunities could only be conferred with the UK's consent and (ii) that the privileges and immunities were conferred by the Exchange of Notes, rather than the VCDR.

102. Contrary to the first assumption, in our judgment under the scheme of the VCDR (see Section II above) the US was entitled freely to appoint individuals of its choosing and to designate them as A&T Staff to serve at RAF Croughton, subject only to the narrow (non-applicable) restrictions on that right. A&T Staff are a recognised category of official under the VCDR (Article 1(b), (f)) by whom immunities and privileges are enjoyed under Article 37(2) upon their entry into the territory of the receiving State under Article 39(1) . The same is true of their family members (Article 37(2)).

103. In our view, once the US Government had exercised its right of appointment under Article 7, and the A&T Staff and their families arrived in the UK (and having given an Article 10 notification), the UK was bound under international and domestic law to accord them the privileges and immunities specified in Articles 29-35 VCDR and the 1964 Act.

104. The UK could have declared the relevant staff *persona non grata* and/or not acceptable, in accordance with Article 9 of the VCDR. It was not however open to the UK to otherwise prevent the US from exercising its freedom to appoint A&T Staff as part of the mission to RAF Croughton. Nor, accordingly, to prevent those staff and their family members from becoming entitled to immunities and privileges under the VCDR.

105. Contrary to the second assumption, the Exchange of Notes did not grant or confer diplomatic privileges and immunities. The background facts summarised above demonstrate that they served a much more limited function. The rationale behind the US Government's initial proposal was its intended change of personnel at RAF Croughton from Department of Defense to Department of State personnel, to whom the VCDR typically applied on missions abroad, and the establishment of a mission facility outside London. Upon receipt of this request, the UK Government, for its part, was concerned about the large number of such personnel enjoying privileges and immunities so far from the US Embassy in London, as both the Ministerial Submission and the 15 August 1995 letter reflect.

106. In that context, the UK Government sought the US Government's agreement to a pre-waiver for the A&T staff at RAF Croughton, which the US Government, in the event, was willing to provide. It was agreed that that pre-waiver would be set out in an Exchange of Notes.

107. That the two States negotiated in this manner in respect of the large cohort of new personnel at RAF Croughton is contemplated by Articles 11(1) and 12 VCDR. That is why we consider that the Exchange of Notes proceeded entirely in accord with the operation of the VCDR, rather than as purporting to create some freestanding species of 'conditional immunity' standing outside the VCDR.

108. As we noted above, the language of the Exchange of Notes makes express and repeated reference to the VCDR. The UK Government's 15 August 1995 Note refers to the

VCDR in the context of the US Government's request regarding diplomatic agents at RAF Croughton. It refers specifically to Article 37(2) of the VCDR when dealing with the immunities and privileges of A&T Staff. The US Government's 17 August 1995 reply also refers to the VCDR. References are also made to the VCDR in the 2000-1 and 2006 correspondence which we have summarised in Section III above.

109. These references to the VCDR undermine the Claimants' argument that the Exchange of Notes was some form of legal creature existing in isolation from the VCDR.

110. Although we do not have to decide this issue (because nothing turns on it), there is force in the FCO's submission that it is difficult to understand how the Exchange of Notes could have functioned as a standalone treaty/agreement in practice, given that they contained none of the content necessary for the functioning of diplomatic privileges and immunities.

111. For example, the Exchange of Notes do not specify whether the A&T Staff are entitled to immunity in civil proceedings, or whether they are entitled to inviolability or to any other privileges which ordinarily attach to A&T Staff under the VCDR. They are incomplete and inadequate as a standalone treaty/agreement. The Exchange of Notes has much more of a flavour of memoranda of understanding in the context of a wider diplomatic framework governed by the VCDR. We note that it tracked the language of such memoranda as set out in the FCDO Legal Directorate, Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures.

112. This is not however to conclude that the Exchange of Notes had no legal effect. To the contrary, they contained a legally binding and formal express Article 32(1) VCDR waiver of A&T staff members' immunity from criminal jurisdiction.

113. In conclusion, we consider that in order for there to have been a waiver of Mrs Sacoolas' immunity (an entitlement she had on arrival), the machinery of Article 32 of the VCDR had to be employed, and that required an express advance or later waiver. It is common ground that there was no such waiver.

114. Creative though they are, the Claimants' arguments under Ground 1 ultimately amount to playing with language in order to address the weakness in the case arising from the lack of an express waiver. This play is easily identified: they seek to avoid the effect of the VCDR by re-classifying the advance waiver of Mr Sacoolas' immunity as a new creature ("limited immunity") and then arguing that this limited immunity, by implication, has also silently attached to the family members (whose full immunity has never been in fact waived expressly in accordance with the mandatory language of Article 32).

115. For completeness we should record that there was nothing in the case law and textbooks relied upon by the Claimants in relation to the so-called "derivative" nature of a family member's immunity which affects this conclusion.

116. In this regard, we were referred to Hardy, *Modern Diplomatic Law* (1968) at p. 78, and O'Keefe, "*Privileges and Immunities of the Diplomatic Family"* (1976) 25(2) ICLQ 329 at p. 350. Those texts however do not concern the issue in the present case which is the immunity from criminal proceedings of family members, and whether the

advance waiver of the principal's immunity will (in and of itself) amount to a like waiver of their immunity.

117. The Claimants also relied on In re B (A Child) [2003] 2 WLR 168, [17]. That was a care proceedings case in which Dame Elizabeth Butler Sloss P noted that the father, a member of the A&T Staff, did not have immunity in civil proceedings relating to matters outside his functions, and that his family members (the mother and the children) likewise did not have immunity in civil proceedings concerning entirely private matters. That follows from Article 37(2) of the VCDR (because A&T Staff and their families have limited immunity in civil proceedings). It did not follow from a waiver of the father's immunity or because the family members' immunity was 'derivative'. It would not have followed from a waiver of the father's immunity from criminal jurisdiction that the family members' immunity from criminal jurisdiction was also waived. The case does not assist the Claimants' submission.

118. Reliance was also placed on A Local Authority v X [2019] 2 WLR 202, at [23] and Swarna v Al-Awadi (United States Court of Appeals for the Second Circuit) 622 F 3d 123 (2d Cir 2010) at [28]. Those cases are concerned with Article 39(2) and do not assist.

119. Our conclusion is that Mrs Sacoolas enjoyed immunity from UK criminal jurisdiction at the time of Harry's death. We do not come to this conclusion with any enthusiasm for the result, but it is compelled by the operation of the VCDR.

120. We grant permission to apply for judicial review in relation to Ground 1, but we dismiss that ground on the merits.

VI. Ground 2: unlawful advice/obstruction

121. By this ground (as amended), the Claimants contend that it was unlawful for the FCO to "obstruct a criminal investigation" by NP, and/or to confirm to and/or advise NP that Mrs Sacoolas and her husband had diplomatic immunity, alternatively that it was an "abuse of power" for the FCO to have done anything other than inform the US that if its assertion of immunity was maintained that would have to be tested in the Courts.

122. This ground has been reformulated since the original pleading but its precise parameters remain somewhat unclear. In original form, it was pleaded that the Secretary of State "acted unlawfully and ultra vires by usurping the role of the police and obstructing their enquiries into a serious criminal offence". As we identified at the CMC, that is a serious allegation, which on its face implies and entails deliberate obstruction. Mr Robertson QC (who argued Grounds 2 and 3 for the Claimants) stated, in terms, that it was not contended that the Secretary of State acted "in bad faith" (and thus necessarily in our view it is not contended that any "obstruction" was deliberate). He argued however that the *consequence* of the FCO's acts or failures to act was an obstruction of NP's investigation.

123. We observed at the CMC that if Ground 1 failed, Ground 2 would also necessarily fail. If in fact there was immunity in law on the part of Mrs Sacoolas, this ground leads

nowhere. That remains our view but was not accepted by Mr Robertson QC. We will address below his arguments as pleaded and then as developed before us.

124. As pleaded (and not amended), Ground 2 of the Claimants' case rests on the foundation that, but for the conduct of the FCO, Mrs Sacoolas "would have been arrested and charged" with causing death by dangerous driving, and "any claim to immunity would have been decided…by her court of trial". That is an unsound foundation:

(a) Having now reviewed all the relevant material, NP agree with the FCO's conclusion that Mrs Sacoolas enjoyed diplomatic immunity. There is no reason to think that NP would have concluded otherwise had the FCO not acted in the ways that the Claimants contend to be unlawful. So, even if there was some form of legal duty to disclose "grounds for investigation of the immunity issue" (as it was put on behalf of the Claimants), such disclosure would not have led to any different result.

(b) In any event, whether or not Mrs Sacoolas had immunity from criminal jurisdiction, it is now common ground that she enjoyed inviolability of the person by operation of the VCDR and NP could not lawfully have arrested her or otherwise prevented her from leaving the UK. The suggestion made in oral submissions on behalf of the Claimants that if NP had charged Mrs Sacoolas she would not have left the UK or delayed departure is purely speculative. The correspondence we have set out in Section IV above is clear to the effect that the US had firmly stated she had immunity, that they had refused to concede the point or grant a waiver. It is most unlikely the US would have kept Mrs Sacoolas in the UK simply because she had been charged (a step which they would have regarded in itself as a violation of her immunity and a breach of the VCDR). The FCO was right to submit that a more appropriate inference is that had she been charged, the US would have removed Mrs Sacoolas more quickly than they in fact did (as opposed to asking her to remain in the UK for a longer period).

125. As further developed before us, the Claimants' additional arguments under Ground 2 have two limbs: (a) the giving of alleged "unlawful" advice to NP and (b) a failure to fulfil a duty to disclose to NP the diplomatic correspondence (including the Exchange of Notes) and the claimed uncertainty within the FCO (we will call this "Non-Disclosure"). We will address each limb in turn.

"Unlawful" advice

126. It is common ground that in a criminal investigation the police and CPS are the decision-makers in relation to issues of immunity and other legal issues relating to prosecution: see the CPS document, "Diplomatic Immunity and Diplomatic Premises" 15 January 2019, and the well-known judgment of Lord Denning MR in R v Commissioner of Police for the Metropolis, ex parte Blackburn [1968] 2 QB 118, as to the independence of the police from the Executive. It is also not in dispute that police decisions about immunity are subject to final adjudication by the courts: R (Freedom and Justice Party) v SSFCA [2016] EWHC 2010 (Admin) at [48].

127. The Claimants argue that the FCO "wrongly advised [NP] that [Mrs] Sacoolas had immunity from criminal jurisdiction" (JR Grounds §76); alternatively, that the position

was unclear and it was, for that reason, an abuse of power for the FCO to have done anything other than to inform the US that, if they asserted immunity, this would have to be tested in the courts (JR Grounds §96).

128. We reject this limb of Ground 2 for the following reasons:

(1) Mrs Sacoolas did have immunity, and that immunity had not been expressly waived. That was and is clear for the reasons already set out. If "advice" was given it was correct.

(2) On the evidence the FCO did not advise NP as to the legal position in relation to Mrs Sacoolas' immunity, or that of any member of her family. No view from or statement to NP from the FCO about immunity could or would represent anything other than an expression of opinion not properly subject to judicial review. In our view, giving that opinion does not in some way involve substituting the FCO for the police as the relevant decision maker and actor in the context of a criminal investigation. We refer to the delineation of the respective roles of the Executive and the police set out in Blackburn cited above. It was for NP to decide what steps to take in the criminal investigation, taking formal advice as necessary from the Director of Public Prosecutions or their own legal advisers. The FCO did nothing to prevent that. The principle in R (Freedom and Justice Party) at [42] is applicable:

> "In any event, the relevant or legally operative decisions in this domain were made not by the FCO, or by any Government department, but by the MPS acting, where appropriate, on advice from the DPP given under section 3(2)(e) of the 1985 Act. Strictly speaking, the Deputy Head of the Egypt team did not explicitly state that Lt. General Hegazy enjoyed an immunity, but even if he did (and we entirely accept that one or more police officers reasonably interpreted his email in that way, either directly or at second-hand), this would amount to no more than an informal expression of opinion not properly the subject-matter of judicial review."

(3) Overall, in our judgment, the FCO was not obliged to proceed on the basis that any doubt about immunity had to be in some way referred to the courts (whether by the FCO, or by NP or by anyone else); and the Claimants have not identified the nature or source of any such obligation on the FCO. That is *a fortiori* the position if the US had been invited to waive any immunity and had not yet reached a decision; and *a fortiori* the position if, having considered the matter, the FCO were to conclude that it was clear that immunity had not been waived in accordance with Article 32(2) VCDR.

(4) That approach did not involve the violation of any constitutional principle as argued by Mr Robertson QC. Nothing done by the FCO amounted to their usurping the role of the police or the CPS.

Non-Disclosure

129. This limb of Ground 2 is advanced relying upon a number of factual assertions: (a) the failure to disclose the Exchange of Notes to NP; (b) the failure to advise NP that FCO's

initial analysis was that Mrs Sacoolas did not have immunity; (c) the FCO's decision to accept the U.S. assertion of immunity, irrespective of its own analysis; and (d) the decision to accept the U.S. assertion of immunity notwithstanding the constitutional position that the matter is for NP to investigate. It is said that these matters establish some form of unlawfulness in public law but by the end of the hearing it remained unclear to us what species of public law wrong was being invoked.

130. Even taking these factual allegations made by the Claimants at their highest, we do not consider they raise an arguable claim of unlawfulness in public law. The FCO officials at all times acted in good faith (as is now accepted); did not deliberately obstruct the NP investigation (as is also now accepted); and, on the contrary, sought to assist rather than obstruct NP in their investigation, including by seeking a waiver of Mrs Sacoolas' diplomatic immunity and objecting in strong terms when the US stated its intention to withdraw her from the UK.

131. At their highest, the substance of the Claimants' allegations as now advanced may be that the FCO did not take certain actions which the Claimants suggest would have assisted NP in their investigation. In our judgment, that does not provide the basis for a finding of public law unlawfulness. It is in any event the duty of the police, not the FCO, to investigate possible criminal offences.

132. The FCO is under no legal duty (in the absence of a production order) to provide documents to the police (and particularly not diplomatic correspondence), and not doing so does not give rise to unlawfulness.

133. For completeness we have also specifically considered each of the factual matters relied upon above (see paragraph [126]) and for the reasons we set out below, we do not consider, there was any even arguable unlawfulness or breach of duty:

(a) It is correct that the FCO did not inform NP that a Protocol Directorate official initially assumed that the advance waiver would apply to Mrs Sacoolas. This was not improper since (i) that initial assumption was not a concluded view; (ii) the FCO's concluded view (arrived at speedily following archival research) accorded with that of the US and was that Mrs Sacoolas' immunity had not been waived; and (iii) the FCO's internal discussions prior to reaching that concluded view were irrelevant.

(b) It is correct that the FCO did not provide the Exchange of Notes to NP. On the basis of the evidence, FCO officials acted in accordance with standard practice by not providing the Exchange of Notes to NP, since diplomatic correspondence (including that relating to waivers of immunity) is regarded as confidential to the States concerned, and is therefore not routinely disclosed outside Government. We note however that the FCO did inform the PaDP that "unusual arrangements" applied to the immunity of Embassy staff and their families based at RAF Croughton, including an advance waiver, and that further work was being done to clarify the position. The FCO did nothing to prevent NP or the PaDP further probing this issue.

(c) As to the complaint that the FCO did not immediately notify NP on Friday 13 September 2019 that the US Embassy intended to withdraw the Sacoolas family from the UK, the evidence is that the meeting at which the US Embassy informed the FCO of its intentions ended late in the afternoon on 13 September 2019, after which time

it was necessary for FCO officials to discuss next steps. The FCO notified NP on Monday 16 September 2019, shortly after the FCO was notified by the US Embassy that the Sacoolas family had left the UK. FCO officials were aware that, even if NP had been informed of the US Embassy's intentions on Friday 13 September 2019, they would not have been able to do anything to prevent the Sacoolas family from departing, given that each member of the family enjoyed inviolability of the person and could not lawfully have been arrested.

134. Before leaving this ground it is significant that prior to discontinuing their claims against NP one of the central complaints made by the Claimants was that NP had effectively ceded its constitutional powers and duties (in respect of investigation and prosecution) to the FCO by accepting the FCO's position in relation to the immunity of Mrs Sacoolas. That case was rightly not pursued, but its abandonment against NP reflects the fact that in reality the FCO's actions did not involve the usurpation of these constitutional powers of the police and the CPS.

135. No arguable error has been identified under Ground 2 in its various forms, and we refuse permission.

VII. Ground 3: Article 2 ECHR

136. As we observed at the CMC, this ground is, like Ground 2, parasitic on Ground 1. As pleaded, it is alleged that there had been a breach of Article 2, specifically of the duty to have a proper inquiry into Harry's death, as a result of the FCO and NP proceeding on the basis of the error of law that Mrs Sacoolas had immunity. We explained that if there was no error of law in relation to whether Mrs Sacoolas had immunity then it was difficult to see how this ground could run: see [2020] EWHC 1620 (Admin) at [13].

137. That remains our view. The Claimants do not accept this ground is parasitic and we will address the argument as it was developed orally. There were two main points made and we will take them in turn.

138. First, the Claimants submit Ground 3 is not parasitic because if Mrs Sacoolas did have diplomatic immunity, there was no sound basis in customary international law for according that immunity because it was "anomalous".

139. Whether or not it was "anomalous" (presumably because Mr Sacoolas did not enjoy a like immunity), this does not mean that Mrs Sacoolas' immunity was not an immunity recognised in international law. The immunity was enjoyed by operation of the VCDR and it is no function of any State (or indeed its courts) to go behind the fact that it is enjoyed and then to somehow denude it of application or force. That would subvert the operation of the VCDR and it will lead one into precisely the type of error which Lord Sumption cautioned against in Al-Malki.

140. Insofar as the operation of the VCDR and the recognition of an immunity under that treaty is said by the Claimants to inhibit an Article 2 ECHR investigation (for example by precluding interviews of a witness or holding to account a claimed wrongdoer) that is merely a result of international law against which Article 2 ECHR falls to be applied.

The VCDR reflects long-standing reciprocal arrangements between States. We note that the Claimants rightly did not dispute that it is an established principle of Strasbourg case law that States' ECHR obligations (including in relation to the nature and scope of the duty to investigate deaths), are to be interpreted consistently with international law, particularly customary international law.

141. In short, Article 2 has to accommodate the VCDR and a complaint that this treaty obstructs an effective investigation is not tenable as a matter of either domestic law or Strasbourg jurisprudence.

142. The Claimants' second main point was that the investigation into Harry's death has been inadequate and that the FCO bears (at least partial) responsibility for that inadequacy. It was argued that there was some form of procedural failing on the FCO's part which hindered investigation of the immunity issue. It is established that Article 2 includes a procedural obligation on the state to effectively and meaningfully investigate deaths. There was no dispute as to the relevant principles which were reviewed by Lord Bingham in R (Amin) v Secretary of State for the Home Department [2003] UKHL 51; [2004] 1 AC 653 at [18]-[23].

143. Dealing first with the claimed hindrance of the investigation, on the facts the FCO did not do anything to hinder NP. As we have set out above, they examined the immunity issue and ultimately came to the conclusion that there was immunity. NP also came to that conclusion and we consider it to be correct. Further, the FCO also went to substantial diplomatic lengths to obtain a waiver.

144. As to the claims that the FCO somehow violated the procedural guarantees of Article 2:

(1) For the purposes of Article 2, any duty of investigation into Harry's death lay on the police and the Coroner, not the FCO. It is for the police to make whatever decisions and take whatever steps they consider appropriate in the pursuit of a criminal investigation (steps they have undertaken and which have led to charges); and it is for the Coroner to undertake an inquest pursuant to the Coroners and Justice Act 2009, which is in progress. In oral submissions the Claimants' representatives did not explain why the investigative duty will not be satisfied by the ordinary criminal and coronial processes. There is no independent duty on the FCO as a matter of our constitutional law to undertake that investigation.

(2) Specifically, the Claimants can point to no authority in support of the submission that Article 2 ECHR required, for example, the FCO to disclose to them the basis for the immunity or the correspondence and Exchange of Notes. The Article 2 case law does not support the submission that there was a need for some form of family involvement in the investigation, including being kept informed of all developments in the investigation.

(3) At points the complaint was to the effect that Mrs Sacoolas has not been brought to justice. That submission however involves a misunderstanding of the nature and scope of the Article 2 investigative obligation. Article 2 requires an effective and independent investigation into a death. Article 2 does not entail a

right for an applicant to have an individual prosecuted or sentenced for a criminal offence: see Öneryildiz v Turkey (2005) 41 EHRR 20, at [96].

(4) In any event, the criminal and coronial processes are ongoing, and on that basis alone it is premature to suggest that events thus far have put the UK in breach of Article 2.

145. We refuse permission in relation to Ground 3.

VIII. Conclusion

146. Permission to apply for judicial review in relation to Grounds 2 and 3 is refused on the basis that they are not arguable.

147. We grant permission to apply for judicial review in relation to Ground 1, but dismiss the claim.