Neutral Citation Number: [2020] EWCA Civ 1740

Case No: B6/2019/3022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
SITTING AT GUILDFORD
HIS HONOUR JUDGE NATHAN SITTING AS A DEPUTY HIGH COURT JUDGE
BV17D13109

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2020

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE SINGH
and
LORD JUSTICE POPPLEWELL

- -

Between:

Nadeem Shahzad	**Appellant**
- and -	
Nusrat Mazher	**Respondent**
The Queen's Proctor	**Intervenor**

- -
- -

Mr D Timson (instructed by **Advocate**) for the **Appellant Husband**
The **Respondent Wife** in person
Mr S P G Murray (instructed by the **Government Legal Department**) for the **Queen's Proctor**

Hearing date: 14th October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am Friday 18th December 2020.

Lord Justice Moylan:

1. The husband (as I will call him) appeals from the order made by His Honour Judge Nathan ("the judge") on 15 November 2019 by which he set aside the Decree Absolute; rescinded the Decree Nisi; and set aside the certificate of entitlement to a decree made in divorce proceedings between the husband, as Petitioner, and the wife, as Respondent. He also dismissed the Petition.

2. In his Petition, issued by the Bury St Edmunds Divorce Unit on 4 May 2017, the fact relied on by the husband, as establishing that the marriage had irretrievably broken down, was that the parties had been separated for five years having last lived together on 12 May 2006.

3. The substantive issue raised by this appeal is the circumstances in which a court has power to set aside a decree absolute and, in particular, whether the power exists when it is alleged that a petitioner advanced a false case, to establish one of the statutory facts under s.1(2) of the Matrimonial Causes Act 1973 ("the 1973 Act"), when obtaining a divorce under the special procedure (i.e. the process by which an undefended divorce is determined). A, very much, subsidiary issue is whether the judge was right in the circumstances of this case to rescind the Decree Nisi and set aside the certificate.

4. The judge's judgment on 15 November 2019 was given in two parts. The first dealt with an allegation of fraud, namely, as found by the judge, that the husband had falsely given the date of separation as 2006 when it was, in fact, 2016. The second dealt with an issue of procedural irregularity, namely that the decree had been made absolute despite the wife's application for the decree nisi to be rescinded not having been determined, contrary to r.7.32(2) of the Family Procedure Rules 2010 ("the FPR 2010").

5. The husband applied for permission to appeal when he was acting in person. He relied on a number of somewhat diffuse grounds. The sole ground of appeal on which I gave permission to appeal, as formulated by me in the order giving permission to appeal, was that, in summary, the judge should not have set the Decree Absolute aside because there was no legal basis for doing so in this case.

6. When I gave permission to appeal, I only had the first part of the judgment which, as referred to above, dealt with the issue of fraud. I did not have the second part which makes clear that the judge's decision was based, not only on the issue of fraud, but also because of procedural irregularity.

7. The only ground for divorce under s.1(1) of the MCA 1973 is that the marriage has irretrievably broken down. At present, by s.1(2), the court can only find this established if the petitioner proves one of the five "facts" set out in subsections (a) to (d); the last of these is that the parties have been separated for at least five years. It is appropriate to note that, under the Divorce, Dissolution and Separation Act 2020 ("the 2020 Act"), this will change and, as a result when it is in force, aspects of this judgment will become irrelevant. This is because irretrievable breakdown will not depend on one of the facts set out in s.1(2) of the 1973 Act being proved but will be conclusively proved by a statement to that effect: s.1(3) of the 1973 Act as substituted by the 2020 Act.

8. At the end of the hearing, we informed the parties that the appeal would be dismissed. This judgment sets out my reasons for agreeing with that decision.

Background and Procedural History

9. The parties married in Pakistan on 24 April 2003. They lived together in England following the husband's arrival here in August 2003. There is one child of the marriage.

10. In 2016 the wife filed a judicial separation petition. On 2 March 2017, the court granted a decree of judicial separation.

11. As referred to above, the husband's divorce Petition was issued on 4 May 2017. It is dated 8 March 2017 but had initially been returned by the court because it had not been adequately completed in respect of "the facts", namely the section dealing with the fact(s) relied on to establish irretrievable breakdown. The history of the proceedings thereafter appears to be as follows. This may not be complete and in some respects is based on assumptions.

12. In an email to the wife dated 8 February 2019, a court official at Bury St Edmunds said that a copy of the Petition and the Notice of Proceedings had been sent to her on 4 May 2017. There is no direct reference to the Acknowledgement of Service but the email did state that the "Notice of Proceedings instructs you to complete the form including whether you intend to defend the case and return it within 14 days". The "form" must be a reference to the Acknowledgement of Service.

13. The wife has contended that she did not receive these documents. This was not an issue which was addressed below, probably because the court later made an order for, what was described as, "deemed" service. However, it was briefly addressed during the course of the hearing before us and the point was made by Mr Timson that, when the wife did seek to file the Acknowledgment of Service out of time, she did so on a form which had the names of the parties, the case number and the details about the court (including who had produced the document) included in print, whereas the details filled in by the wife were by hand. This, he suggested, strongly supported the conclusion that the formal elements of the document had been completed by the court and that, accordingly, the Acknowledgement of Service had been served on the wife.

14. It is not necessary for us to determine this issue although I note that the judge referred to the wife as having "buried her head in the sand". However, given the subsequent history in this case, I would emphasise the importance of a respondent to a divorce petition, who has a legitimate reason for contesting the divorce, completing and returning the acknowledgement of service within the required time and filing an answer. I say this, emphatically not to encourage a respondent to defend a petition, but to draw attention to the fact that, if they do not respond to the petition as required under the FPR 2010, they are likely to find that they are unable later to contest the proceedings and the court will make a decree of divorce.

15. On 23 October 2017, the husband applied for an order for deemed service (I deal below with the fact that the rule as to deemed service does not apply to petitions). This was initially refused on the basis that there was "no evidence that the Respondent has received the petition". The petition had been sent by the husband to the wife's solicitors

but they had replied on 12 September 2017 that they were instructed solely in respect of the judicial separation proceedings and financial remedy proceedings.

16. On 3 April 2018, the husband informed the court that the petition had been served on the wife by a process server who had provided him with "proof" of this. He asked whether, as he had been advised by his legal adviser, because the petition had been served by the process server and the wife had "not acknowledged it", he could apply for a decree nisi or whether he had to apply again for an order for deemed service.

17. In an email dated 5 May 2018 an administrative officer at Bury St Edmunds replied stating that if the petition, notice of proceedings and acknowledgement of service form had all been personally served on the wife and "the process server has signed a statement confirming this", there was "no need to apply for deemed service". The husband could simply send the statement from the process server with his application for a decree nisi.

18. It may be that the husband did not receive the court's response until 24 May 2018 because the email of 5 May was then sent again in response to a further enquiry from him. However, in the meantime, on 17 April 2018 the husband again applied for an order for deemed service supported by a statement from a process server. This statement only refers to the petition as having been served (and only the petition was attached to the statement) and not the other documents required by r.7.8 of the FPR 2010, as referred to in the email from the court (the notice of proceedings and the acknowledgement of service form).

19. As a result of the wife's failure to file an acknowledgement of service indicating an intention to defend the petition and/or any answer, the petition proceeded as being undefended. On 8 June 2018 the husband applied for a decree nisi. He provided a statement as required by r.7.19.

20. On 18 June 2018 an order was made for "deemed service". It is not clear why this order was made because the husband appeared to be contending that the wife had been served. Further, the term "deemed service", as used in the FPR 2010, would not appear to apply in the circumstances of this case. I set out the provisions concerning service below because, although this is not an issue which arises directly in this appeal, it is clearly important that the rules as to service are correctly applied.

21. The court initially rejected the application for a decree nisi because of a discrepancy between the husband's name in the (translated) marriage certificate and the Petition and also because he needed to confirm the place where the parties were married. The husband was directed to file a new, "fully completed", Form D80 (statement in support of application for divorce) and Form D84 (application for decree nisi). These matters must have been addressed because, on 10 December 2018, the court issued a certificate of entitlement to a decree. The date fixed for the pronouncement of a decree was 11 February 2019.

22. It appears that receipt of the certificate of entitlement to a decree prompted the wife to engage with the proceedings. She wrote to the court on 17 January 2019 asking how she could "stop" the divorce because, contrary to the assertion in the Petition, she and the husband had only separated on 16 January 2016 and not in 2006. She also sent a completed Acknowledgement of Service dated 20 January 2019 in which she said that

she intended to defend the Petition. The latter was out of time and, as a result, had no effect on the progress of the proceedings.

23. On 8 February 2019 the court made an order stating that, in effect, the Acknowledgement of Service was too late; that the decree nisi would be pronounced on 11 February 2019, based on the certificate of entitlement; and that any application by the wife to rescind the decree nisi or set aside the certificate must be made on notice with the prescribed fee paid.

24. On 11 February 2019, a decree nisi was pronounced by the court at Bury St Edmunds.

25. On 15 March 2019 the wife made an application for the decree nisi to be rescinded and for the certificate of entitlement to be set aside. At the hearing of the appeal, it was rightly accepted by Mr Timson that this application had been properly made and issued prior to the decree being made absolute. In her application, the wife again asserted that the parties had only separated in January 2016.

26. On 26 March 2019, the husband applied for the decree nisi to be made absolute. The decree was made absolute on 27 March 2019. As explained below, this was contrary to the provisions of r.7.32(2) which require the court to be satisfied that "no application for rescission of the decree nisi ... is pending" before making the decree absolute.

27. On 1 April 2019, the proceedings were transferred to the Family Court sitting at Guildford and came before the judge. He wrote to the Queen's Proctor on 29 April 2019 asking for assistance and noting, among other matters, that the wife's application of 15 March 2019 "appears to have been ignored and the decree was nonetheless made absolute".

28. On 29 April 2019, the judge listed a hearing at which the court would consider the wife's application of 15 March 2019. At that hearing, on 1 May 2019, the judge gave a number of directions including an invitation to the Queen's Proctor to intervene. On 14 June 2019, the Queen's Proctor was given permission to intervene and further directions were given as to evidence and other matters.

29. The Queen's Proctor's plea is dated 9 August 2019. This refers to the court's "oversight" in making the decree absolute when the wife's application to rescind the decree nisi had not been determined. In addition, it was contended that, "if the (wife) is correct about the date of separation, it would appear that the decrees herein have been obtained improperly". An order was sought that the decrees be set aside.

30. The Queen's Proctor's plea and the wife's application of 15 March 2019 were determined by the judge on 15 November 2019. I now turn to his judgment.

<u>15 November 2019 Judgment</u>

31. The judge's judgment, as referred to above, was given in two parts. In the first part he dealt only with the allegation of fraud. He found that the husband had falsely asserted that the parties had separated in 2006 when they had only separated in January 2016. He then heard submissions for the purposes of deciding what order to make. During these submissions, Mr Murray referred to the effect of the decree having been made absolute despite the wife's application for rescission not having been determined. This

no doubt prompted the judge to deal with the consequences of this procedural irregularity.

32. In the second part of his judgment, the judge dealt with "one important factor" which he had omitted to deal with previously, namely procedural irregularity. This, he said, provided an additional factor in "support of my ruling that the decrees should be set aside". The judge briefly summarised the history of the proceedings and set out his conclusions succinctly. The decree had been made absolute "notwithstanding the wife's application" to rescind the decree and he was "clear that if the court had been alive" to the application it would not have made the decree absolute. This was "another" reason "for setting aside".

Legal Framework

33. I start by referring to what was said in *Akhter v Khan (Attorney General and others intervening)* [2020] 2 WLR 1183 about the important role which a person's legal status, as married or unmarried, has in society because of the legal consequences dependent on this status, which include significant differences in tax and inheritance and state benefits. It is an issue which engages the public interest as well as private rights and interests.

34. The case of *Akhter* concerned the question of how a valid marriage could be contracted in England and Wales but a number of relevant observations were made in the judgment of the court, given by Sir Terence Etherton MR, King LJ and myself, including:

> "[9] A person's marital status is important for them and for the state. The status of marriage creates a variety of rights and obligations. It is that status alone, derived from a valid ceremony of marriage, which creates these specific rights and obligations and not any other form of relationship. It is, therefore, of considerable importance that when parties decide to marry in England and Wales that they, and the state, know whether what they have done creates a marriage which is recognised as legally valid. If they might not have done so, they risk being unable to participate in and benefit from the rights given to a married person."; and

> "[28] As referred to in para 9 above, marriage creates an important status, a status "of very great consequence", per Lord Merrivale P in *Kelly (orse. Hyams) v Kelly* (1932) 49 TLR 99, at p. 101. Its importance as a matter of law derives from the significant legal rights and obligations it creates. It engages both the private interests of the parties to the marriage and the interests of the state. It is clearly in the private interests of the parties that they can prove that they are legally married and that they are, therefore, entitled to the rights consequent on their being married. It is also in the interests of the state that the creation of the status is both clearly defined and protected. The protection of the status of marriage includes such issues as forced marriages and "sham" marriages."

The same importance clearly attaches to the change of status effected by the dissolution of a marriage as it does to the creation of a valid marriage and, in both respects, to the creation and dissolution of a civil partnership.

35. I give two further examples. In *Meier v Meier* [1948] P 89 the Court of Appeal had directed that the husband provide security for costs in respect of his appeal from a decree nisi and that, if he had not done so by a specified date, the appeal would stand dismissed. His solicitors, by mistake, failed to provide security by the required date with the result that the appeal "stood dismissed", following which the decree was made absolute. The Court of Appeal decided that it had no power to set the decree absolute aside. Scott LJ referred to s.31(1)(e) and s.184(1) of the Supreme Court of Judicature (Consolidation) Act 1925 ("the Judicature Act 1925") which respectively provided:

> "No appeal shall lie ... (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree"; and
>
> "(1) As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed."

Scott LJ then said, at p. 93,

> "In my view the policy of Parliament requires that a decree absolute should be protected unless there is some ground on which the court concerned can properly exercise its inherent jurisdiction to intervene in order that justice may be done."

36. This view was repeated by Sir Jocelyn Simon P in *F v F* [1971] P 1, which addressed the consequences of a failure to comply with s.33 of the Matrimonial Causes Act 1965 (the structure of which was the same as r.7.32 of the FPR 2010, as referred to below). He referred, at p. 13, to a number of "indications … of the importance that Parliament attaches to the certainty of the change of status arising out of a decree absolute", which included s.31 of the Judicature Act 1925. He concluded, accordingly, that failure to comply with s.33 rendered the decree absolute voidable rather than void. The Court of Appeal approved and applied this decision in *P v P* [1971] P 217.

37. The provisions of s.31(1)(e) of the Judicature Act 1925 are now contained in s.18(1) of the Senior Courts Act 1981 and, therefore, remain of some relevance. This section provides that:

> "No appeal shall lie to the Court of Appeal …
>
> (d) from a decree absolute of divorce or nullity of marriage, by a party who, having had time and opportunity to appeal from

> the decree nisi on which that decree was founded, has not appealed from the decree nisi;
>
> …
>
> (fa) from a dissolution order, nullity order or presumption of death order under Chapter 2 of Part 2 of the Civil Partnership Act 2004 that has been made final, by a party who, having had time and opportunity to appeal from the conditional order on which that final order was founded, has not appealed from the conditional order …"

38. Section 33 of the Matrimonial Causes Act 1965 provided as follows:

> "(1) … subject to the following subsection, the court shall not make absolute a decree of divorce … in any proceedings begun after December 31, 1958, … unless it is satisfied as respects every relevant child who is under 16 that - (a) arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances; or (b) it is impracticable for the party or parties appearing before the court to make any such arrangements.""

39. I next turn to consider the role of the Queen's Proctor.

40. The Matrimonial Causes Act 1857 established a new court, "The Court for Divorce and Matrimonial Causes", which was given a new power, namely the power "to pronounce a decree declaring (the) marriage to be dissolved", s.31. This was somewhat controversial and, perhaps in part because of this, concerns quickly developed that divorces were being improperly obtained either because of collusion between the parties or because "material facts" were being withheld from the court. The concerns and the steps taken in response were explained in the *Royal Commission on Marriage and Divorce 1956 Report* (Cmnd. 9678) ("the *1956 Report*), at [947].

> "947. The Matrimonial Causes Act, 1857, provided for a single decree of dissolution of marriage, leaving the parties free to marry again as soon as it was clear that there would be no appeal from the court's decision. Shortly after the passing of the Act of 1857, some anxiety was felt that parties were obtaining divorce decrees either collusively or without presenting material facts to the court. It appears that the judge found it extremely difficult to carry out the requirement that he should satisfy himself of the absence of bars to relief, in particular collusion, in undefended cases, where only one side of the case was presented to the court. To meet this criticism, it was provided by the Matrimonial Causes Act, 1860, that the court should pronounce in the first place a decree nisi, which would be followed by a decree absolute if no objection was raised within a period of three months. At the same time the Act of 1860 provided:

> (1) that the court could require the Queen's Proctor to appear by counsel before it to argue any question relevant to the proceedings;
>
> (2) that, if the Queen's Proctor suspected that the proceedings were collusive, he could with leave of the court intervene and appear in the proceedings at any stage;
>
> (3) that, in addition, any person, including the Queen's Proctor, could intervene and appear in the proceedings to show cause why the decree nisi should not be made absolute on the ground that it had been obtained by collusion or by reason of material facts not having been brought before the court."

41. The principal concern which led to the provisions in the Matrimonial Causes Act 1860 ("the 1860 Act") was identified by Sir Cresswell Creswell, the first Judge Ordinary of the new court, in *Forster v Forster and Berridge (Graham intervening)* (1863) 3 Sw & Tr 151. He said, at pp. 156/157:

> "Soon after the Court was established it was suspected that attempts had been made to procure a dissolution of marriage by means of collusion, and there had been other instances in which both the party suing and the party sued were equally anxious to obtain a divorce, and without collusion the party sued abstained from setting up matter which might be set up in answer to the petition. It was in order to check these practices that the statute was passed …"

These historic concerns reflect the attitudes of the time perhaps further exemplified by the fact that the period of three months between decree nisi and decree absolute was increased to six months in 1866 (before being decreased to the current period of six weeks in 1946).

42. It can also be seen, from the summary set out in the *1956 Report*, that the functions given to the Queen's Proctor were to take steps *during* the proceedings and were also focused, principally, on collusion. Collusion meant, when "the initiation of a suit … is procured, or its conduct provided for by agreement or 'bargain' between the spouses, the petitioner and the co-respondent, or their agents": *Rayden on Divorce* 2nd Edition, 1926, p. 108.

43. The role of the Queen's Proctor is now set out in ss.8 and 9 of the 1973 Act. Both provisions remain directed towards the Queen's Proctor intervening *before* a decree is made absolute. Section 9 provides for this expressly and s.8 does by implication: *Callaghan v Hanson-Fox and Another* [1992] Fam 1, at p. 7A/B

> "It is further relevant to note that section 8 of the Matrimonial Causes Act 1973 restricts the power of the Queen's Proctor to intervene or to show cause against a decree nisi in any proceedings for divorce to a period before the decree is made

> absolute. Further while section 9 provides that any person excluding a party to the proceedings other than the Queen's Proctor may show cause why the decree should not be made absolute by reason of material facts not having been brought before the court, this is also restricted to the period before the decree is made absolute."

44. This limitation also appears in r.7.31 of the FPR 2010, which is the rule which deals with applications under these provisions (and the same provisions in the Civil Partnership Act 2004) and which refers only to applications "to prevent …. a decree nisi being made absolute". I set out both sections in full, in part because s.9 is relevant to when a decree nisi can be rescinded.

> "8 Intervention of Queen's Proctor.
>
> (1) In the case of a petition for divorce –
>
> > (a) the court may, if it thinks fit, direct all necessary papers in the matter to be sent to the Queen's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court considers it necessary or expedient to have fully argued;
> >
> > (b) any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to the Queen's Proctor on any matter material to the due decision of the case, and the Queen's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient.
>
> (2) Where the Queen's Proctor intervenes or shows cause against a decree nisi in any proceedings for divorce, the court may make such order as may be just as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of those parties by reason of his so doing.
>
> 9 Proceedings after decree nisi: general powers of court.
>
> (1) Where a decree of divorce has been granted but not made absolute, then, without prejudice to section 8 above, any person (excluding a party to the proceedings other than the Queen's Proctor) may show cause why the decree should not be made absolute by reason of material facts not having been brought before the court; and in such a case the court may –
>
> > (a) notwithstanding anything in section 1(5) above (but subject to section 10(2) to (4) below make the decree absolute; or

(b) rescind the decree; or

(c) require further inquiry; or

(d) otherwise deal with the case as it thinks fit."

45. The reason I have spent some time dealing with the early stages of the development of the decree of divorce and the changes introduced by the 1860 Act, is to demonstrate that the focus, including the focus of the Queen's Proctor's new functions, was on the process *prior* to the decree being made absolute. The purpose was to act to prevent, what was considered to be, procedural abuse during the course of the proceedings not to act once the court process had concluded with the decree being made absolute.

46. This was also why there was a question as to whether the Queen's Proctor could intervene at all after the decree had been made absolute. This was addressed by Sir John Arnold P in *Ebrahim v Ali (otherwise Ebrahim) (Queen's Proctor intervening)* [1983] 3 All ER 615. He determined that the Queen's Proctor could intervene under s. 8(1)(b) after the decree had been made absolute when the decree was void. In that case, it was void (as was the decree nisi) because the proceedings had never been served on the respondent. Sir John Arnold P said, at p. 616 e/f:

> "It is, in my judgment, quite plain that where there has been no service of process any order made in the litigation in which process should have been served must necessarily be void, unless service has been in some way validly dispensed with. This is a case in which orders were made: first the decree nisi, subsequently the making absolute of that decree, on the basis of a supposed service of a process which had never been served at all. I take that fundamental proposition as regards the law in general from *Craig v Kanseen* [1943] 1 All ER 108 at 113, [1943] KB 256 at 262–263, a decision of the Court of Appeal, in which such lack of service was described by Lord Greene MR as rendering the subsequent orders void because of that, as he said, fundamental vice."

Accordingly, at p. 617d/e, because the decree absolute was a "nullity", the proceedings remained in "progress", giving the Queen's Proctor the right to intervene under s.8(1)(b) of the 1973 Act.

47. It is also relevant to note that the critical event in the process, when the proceedings are undefended, is when the court certifies that the petitioner is entitled to a decree nisi. This was established by *Day v Day* [1980] Fam 29, a case relied on by Mr Timson, as set out in the Headnote:

> "(1) that under the special procedure the process of adjudication in undefended cases had been transferred from the judge to the registrar and the requirements of section 1 (4) of the Matrimonial Causes Act 1973 were complied with when the registrar issued his certificate and a decree had to be granted, that, accordingly, the judge should not have entertained the application by the husband for leave to file an answer out of time or granted any

> relief other than a short postponement of the pronouncement of the decree to give time for a proper application to be made to set aside the registrar's certificate."

In the course of his judgment, Ormrod LJ, at p. 33C/D, set out his conclusions in response to the submissions made on behalf of the Queen's Proctor by (the then) Nicholas Wilson:

> "Mr. Wilson made a valiant effort to maintain that the decision still remained in the judge, but in our view so to hold would be to create a legal fiction. The registrar certifies that the petitioner has proved the contents of the petition and is entitled to a decree. The requirements of section 1 (4) of the Matrimonial Causes Act 1973 therefore, have been complied with, and subject to sections 3 (3) and 5 of the Act, which do not apply, a decree must be granted. Subsection (4) refers to the "court" not to a "judge." It is, accordingly, impossible to regard the pronouncement of the decree by the judge as anything more than a formality, and it is difficult to see how he can have jurisdiction to do anything but make the pronouncement, save possibly to postpone it until a later date to give time for other steps to be taken, e.g., to apply to stay or set aside the registrar's certificate."

48. In the present appeal, the issue of whether the court below had power to rescind the decree nisi was raised briefly by Mr Timson. I propose also to address it only briefly because, as referred to above, the substantive issue raised by this appeal is when does a court have power to set aside a decree absolute and because it is clear that the judge below had power to set aside the decree nisi. I would add that it is also clear that, if the court can set the decree nisi aside, it can also set the certificate of entitlement aside because, following *Day v Day*, they are effectively the same thing.

49. Sections 9 and 10 of the 1973 Act and FPR r.7.28 set out the circumstances in which a decree nisi may be rescinded. It is clear, however, that these provisions are not exhaustive. For example, in *S v S (Rescission of Decree Nisi: Pension Sharing Provision)* [2002] 1 FLR 457, Singer J decided that there was power to set aside a decree nisi to enable the parties to take advantage of the new pension sharing provisions which did not apply retrospectively. In *Price v Price* [2015] 1 FLR 1202, the Court of Appeal (Black LJ, as she then was, giving the judgment) allowed the husband's appeal from the dismissal of his application to set aside the certificate and for permission to file an answer out of time even though the decree nisi had subsequently been pronounced. A rehearing of the husband's application was ordered, which, if granted, would necessarily have required the decree nisi to be set aside. In the course of her judgment, Black LJ referred to a number of earlier authorities in which the court had set aside a decree nisi, in particular *Nash v Nash* [1968] P 597, which Black LJ described, at [10], as "the source of the modern approach". That case had identified "three classes of case" in which "a decree nisi should be set aside to enable a spouse who had not filed an answer prior to the grant of the decree to defend the divorce". I do not propose to set these out because, as summarised by Black LJ at [18], the court does not apply "a rigid test" but determines whether, "express[ing] matters in layman's language (and emphatically not attempting to set up yet another test) … there [is] … a real look of injustice about the case".

50. I now turn to consider the court's power to set aside a decree absolute.

51. As referred to above, a decree absolute effects an important change of status. It is equivalent to a judgment in rem and, as a result, is an order which does not simply affect the personal rights of the parties to the decree but is an order which is conclusive as to a person's status and is, what is sometimes termed, "good against the world". Accordingly, everyone is entitled to rely on it as establishing that the parties are no longer married.

52. In *Bater v Bater* [1906] P 209 the Court of Appeal decided, as set out in the Headnote, that:

> "A divorce granted by a foreign Court, being a judgment affecting the status of the parties, stands on the same footing as a judgment in rem, and therefore cannot be set aside in this country, even on the ground of fraud, by a person who was no party to the proceedings in which the judgment was pronounced."

At first instance, Sir Gorell Barnes P analysed some of the authorities relied on by the petitioner in that case, who was the wife's second husband and who sought a declaration that their marriage was void because the wife was still married to her first husband. The wife and her first husband had been divorced in New York. The authorities were relied on in support of the proposition that the court would not recognise "the decree of a foreign tribunal where it has been obtained by collusion or fraud of the parties"; p. 218. Sir Gorell Barnes P responded as follows, p. 218:

> "But I think when those cases are examined that the collusion or fraud which was being referred to was in every case, so far as I have had time to examine the matter, collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the Court."

It is clear from what he went on to say that he was dealing with the court's jurisdiction to entertain the divorce proceedings.

53. On appeal, the petitioner again submitted that the decree had been obtained by fraud because of the "suppression" by the wife of "her own adultery" and that, as a result, it "cannot stand"; p. 222. This argument was rejected. The judgments expressed the reasons for rejecting this argument in different terms. These included that: "if there was fraud in obtaining the judgment in rem, it could not be availed of in proceedings in this Court having for their object the impeaching of that judgment", Sir Richard Collins MR p. 229; that the alleged fraud did "not go to the question of the jurisdiction of the [New York] court", Romer LJ, p. 236; and, Cozens-Hardy LJ at p. 239:

> "The suppression of evidence does not go to the point of jurisdiction, and it would be dangerous to countenance the idea that a final decree of divorce, changing the status of the parties, can be reopened or questioned in this country when it could not be questioned in the Court which granted the divorce. The result is that, in my opinion, the appeal fails."

54. The next authority is *Callaghan v Hanson-Fox* [1992] Fam 1, an important decision which analysed all the previous cases dealing with the circumstances in which the court might set aside a decree absolute. In that case, the husband sought the rescission of a decree absolute on the basis that the fact relied on in the petition, namely two years' separation, had been false as the parties remained living together. It was, therefore, as in the present appeal, a case of alleged fraud in relation to the fact relied on under s.1(2) of the MCA 1973 to establish irretrievable breakdown.

55. Sir Stephen Brown P's conclusion is set out in the Headnote:

> "… a decree absolute granted by a court with competent jurisdiction and after compliance with the correct procedural requirements was unimpeachable; that it was in the public interest that a decree absolute which affected status should be unimpeachable; and that, since there had been no procedural irregularity, the decree absolute was not only binding on the parties but should stand against all the world."

In the course of his judgment, Sir Stephen Brown P summarised, at p. 8D/G, the effect of the authorities to which he had been referred by (the then) James Holman QC, instructed by the Queen's Proctor:

> "Mr. Holman as amicus curiae has taken the court to all the reported cases in which a decree absolute has been held to be void. They are all cases where a decree has been held to be void because of a fundamental procedural irregularity. In *Woolfenden v. Woolfenden* [1948] P. 27 the application for decree absolute was made before the statutory time had elapsed. In *Ali Ebrahim v. Ali Ebrahim* [1983] 1 W.L.R. 1336 there had been total non-service of the petition. In *Nissim v. Nissim* (1988) 18 Fam. Law 254 there was a statutory defect because the case had purportedly been re-transferred to a county court from the High Court in circumstances where there was no statutory power so to do. It is to be noted in passing that subsequently Parliament hurriedly passed a statute to remedy the anomaly. In *Butler v. Butler (Queen's Proctor intervening)* [1990] 1 F.L.R. 114 the defect arose from the fact that the petition for dissolution of marriage had in effect been presented within one year of marriage.
>
> Mr. Holman pointed out that in the cases where a decree has been held to be voidable they also turned upon procedural irregularity. He accordingly submits that there is no known case where a decree absolute has been set aside after it has been granted in circumstances of complete jurisdictional and procedural regularity. Furthermore, there is no reported case of a decree absolute having been set aside in circumstances of complete procedural regularity even where an allegation of fraud has been made."

56. Sir Stephen Brown P then referred to *Bater v Bater, Kemp-Welch v Kemp-Welch* [1912] P 82 and *Crosland v Crosland* [1947] P 12. It is relevant to note that in each of those

cases the person seeking the rescission of the decree absolute had alleged that the court's decision had been obtained by fraud. Sir Stephen Brown P quoted passages from those cases which, in his view at p. 10D, "emphasise the unimpeachable character of a decree absolute". He then set out his conclusion, at p. 10D/E:

> "As was pointed out in *Bater v Bater* [1906] P 209 a decree absolute affects status and is equivalent to a judgment "in rem". It is in the public interest that a decree absolute should be unimpeachable where no question arises as to the jurisdiction of the court pronouncing it or as to the procedural regularity which led to its being made"

57. In order to deal with Mr Murray's submission as to the meaning of this passage, in my view it is clear that, when Sir Stephen Brown P referred to "the jurisdiction of the court", he was referring to the court's jurisdiction to *entertain* a petition and not, as Mr Murray submitted, its jurisdiction to grant a decree. I consider this to be clear from the whole structure of his judgment. Further, it is supported by his observation in the next paragraph, at p. 10E, that there had been "no want of jurisdiction in the court which pronounced the decree and no procedural irregularity" in that case.

58. The next authority is *Rapisarda v Colladon; Re 180 Irregular Divorces* [2015] 1 FLR 597. In that case, Sir James Munby P set out the legal issues he had to determine:

> "[17] I have said that the Queen's Proctor's case is based on an allegation of fraud and that, if fraud is established, any decree, whether nisi or absolute, will be void. What is meant by fraud in this context? What has to be established if a decree is to be held void?

His conclusions were as follows:

> "[29] So far as material for present purposes I can summarise my conclusions on the law as follows:
>
> (i) perjury without more does not suffice to make a decree absolute void on the ground of fraud;"
>
> (ii) perjury which goes only to jurisdiction to grant a decree and *not* to jurisdiction to entertain the petition, likewise does not without more suffice to make a decree absolute void on the ground of fraud;
>
> (iii) a decree, whether nisi or absolute, will be void on the ground of fraud if the court has been materially deceived, by perjury, forgery or otherwise, into accepting that it has jurisdiction to entertain the petition;
>
> (iv) a decree, whether nisi or absolute, may, depending on the circumstances, be void on the ground of fraud if there has been serious procedural irregularity, for example, if the petitioner has concealed the proceedings from the respondent.

Again, having regard to Mr Murray's submission as to the effect of these conclusions, it is clear to me that, when Sir James Munby P used the expression "without more", he meant *alone*. In other words, by his conclusion at (i), he meant that perjury alone is not sufficient to make a decree absolute void on the ground of fraud. This is further made clear by his conclusions at (ii), (iii) and (iv) which together make clear that perjury as to any fact or facts relevant to the court's power to *grant* a decree does not make it void; the fraud has to have "materially deceived" the court in respect of its jurisdiction to entertain a petition or there has to have been a "serious procedural irregularity". These latter categories match the categories of case referred to in *Callaghan v Hanson-Fox*. It is a conclusion which is also supported by what Sir James Munby said in the case to which I refer next.

59. In *M v P (Queen's Proctor Intervening)* [2019] Fam 431, Sir James Munby, sitting as a High Court Judge, addressed in detail the circumstances in which a decree absolute is voidable. However, in the course of his judgment, at [95], he referred to the "distinction" he had drawn in *Rapisarda v Colladon* between

> "jurisdiction to entertain the petition" (i e, whether the court has any jurisdiction at all to receive, hear and consider the petition) and "jurisdiction to grant a decree" (i e, whether the court, assuming that it has jurisdiction to entertain the petition, has jurisdiction to grant a decree of divorce) ..."

The issue in that case, at [1], was whether decrees were void "by reason of *non-compliance* with section 1(2)(d)" (my emphasis) of the MCA 1973, namely that the parties had not been separated for at least two years. The parties had, in fact, only been married for 22 months at the date of the petition for divorce. I have emphasised the words "non-compliance" because the case was concerned with procedural irregularity and was not concerned with fraud (or a false case in support of one of the statutory "facts").

60. After analysing a number of authorities which dealt with non-compliance with a statutory requirement, including *F v F* referred to above, Sir James Munby, at [100], drew the following "three general conclusions":

> "(i) First, a general lack of appetite to find that the consequence of "irregularity" - I use the word in a loose general sense and not as a term of art - is that a decree is void rather than voidable …
>
> (ii) Secondly, a general recognition that only if the decree is held to be voidable, and not void, will the court be able to do justice to all those whose interests are affected and having regard to the particular circumstances of the case.
>
> (iii) Thirdly, recognition of the public interest, where matters of personal *status* are concerned, in not disturbing the apparent status quo flowing from the decree and the certainty which normally attaches to it."

He then concluded, at [102], that the decrees in that case were voidable and not void.

61. The final authority to which I propose to refer is *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 in which Denning LJ (as he then was) said, at p.712, the often-quoted words: "Fraud unravels everything". This was relied on by Mr Murray. They are words which carry great authority and demonstrate a principle which will, no doubt, be applicable in a variety of circumstances. However, as can also often be the case, words stating a proposition in broad terms have to be relevant to the legal circumstances being addressed in the particular case. In my view, they do not add to or undermine the effect of the authorities to which I have referred above which clearly establish that fraud alone, in the sense explained above, does not make a decree absolute void or voidable.

62. The final legal issue I deal with briefly because it does not directly arise. However, there are a number of features in respect of the manner in which service was addressed which suggest that the process required by the FPR 2010 may not be being applied correctly. It is perhaps obvious to state that service is a critical step in the process. It is critical because the absence of service will undermine the whole process. One consequence, as referred to above, is that any order, including a decree absolute, is likely to be void.

63. Part 6 of the FPR deals with service. Deemed service is addressed in r.6.15 and r.6.16. They provide as follows:

> "6.15
>
> (1) Subject to paragraph (2), an application is deemed to be served if the acknowledgment of service, signed by the party served or the solicitor acting on that party's behalf, is returned to the court office.
>
> (2) Where the signature on the acknowledgment of service purports to be that of the other party to the marriage or civil partnership, the applicant must prove that it is the signature of that party by –
>
> (a) giving oral evidence to that effect at the hearing; or
>
> (b) if the application is undefended, confirming it to be so in the statement the applicant files under rule 7.19(4)"; and
>
> "6.16
>
> (1) Subject to paragraph (2), if –
>
> (a) an application has been served on a respondent by post or other service which provides for delivery on the next business day;
>
> (b) no acknowledgment of service has been returned to the court office; and
>
> (c) the court is satisfied that the respondent has received the application,

> the court may direct that the application is deemed to be served.
>
> (2) Where –
>
> (a) the application alleges 2 years' separation and the respondent consents to a matrimonial or civil partnership order being granted; and
>
> (b) none of the other facts mentioned in section 1(2) of the 1973 Act[2] or section 44(5) of the 2004 Act, as the case may be, is alleged,
>
> paragraph (1) applies only if –
>
> (i) the court is satisfied that the respondent has received notice of the proceedings; and
>
> (ii) the applicant produces a written statement, signed by the respondent, containing the respondent's consent to the grant of an order."

64. The expression, deemed service, is limited to the circumstances set out in rr.6.15 and 6.16 and is, therefore, relatively limited in its scope. It did not apply in the circumstances of this case which are addressed in r.6.17.

65. Rule 6.17, which is headed, "Proof of personal service where no acknowledgement of service filed", provides as follows:

> "6.17
>
> (1) This rule applies where –
>
> (a) an application has been served on a respondent personally; and
>
> (b) no acknowledgment of service has been returned to the court office.
>
> (2) The person serving the application must file a certificate of service stating the date and time of personal service.
>
> (Practice Direction 6A makes provision for a certificate of service by a bailiff.)
>
> (3) If the respondent served was the other party to the marriage or civil partnership, the certificate of service must show the means by which the person serving the application knows the identity of the party served."

The Notes in the Family Court Practice 2020 (the Red Book) refer to Form FP6 which is the pro forma certificate provided by HMCTS. The rules do not appear to require that the certificate required under r.6.17 is in this form but it would clearly be better if

it was because the form sets out what is required which *includes* a statement of truth (by r.17.2) and makes clear that the document(s) being served must be attached to the certificate. The other required details are as set out in r. 6.37.

Determination

66. I do not propose to set out the parties' submissions but I have, of course, taken into account all the points raised in support of their respective cases.

67. I have set out above the key authorities which have considered the circumstances in which a decree absolute can be set aside. It is clear from these authorities that these circumstances are limited. They are limited because a decree absolute is a declaratory judgment which conclusively determines a person's marital status. In addition to the parties, all public authorities and all other individuals are entitled to rely on the declaratory effect of the decree. This can have significant consequences across a wide range of issues including, for example, the right to marry. To take that example, if a prior decree absolute were set aside, any subsequent marriage would be void under s.11(b) of the MCA 1973.

68. Mr Murray submitted that the court has power to set aside a decree absolute when the court had jurisdiction to entertain the petition but the evidence in support of one of the required facts under s.1(2) of the MCA 1973 was false. I have no doubt that the court's power to set aside a decree absolute does not include such a situation and, I would add, that ss.8 and 9 of the MCA 1973 do not provide any basis for the Queen's Proctor intervening in such circumstances.

69. The authorities make clear that, as stated by Sir Stephen Brown P in *Callaghan v Hanson-Fox*, a decree absolute is "unimpeachable where no question arises as to the jurisdiction of the court pronouncing it or as to the procedural regularity which led to it being made". As set out above, he was plainly referring to the court's jurisdiction to entertain a petition and not the court's power under s.1 of the MCA 1973 to grant a decree of divorce. This is consistent with the decision of *Bater v Bater* and the submissions made by the Queen's Proctor in *Callaghan v Hanson-Fox* as to the circumstances in which a decree absolute had been held to be either void or voidable, which Sir Stephen Brown P accepted. It is further supported by the decision of *Rapisarda v Colladon*.

70. It is a conclusion which is also supported by the statutory framework. Section 18(1) of the Senior Courts Act provides, as set out above, that a party cannot appeal from a decree absolute when they "had time and opportunity to appeal from the decree nisi". This makes clear that a party's ability to challenge a decree is *prior* to its being made absolute. Sections 8 and 9 of the MCA 1973, as referred to above, are "restricted to the period before the decree is made absolute": *Callaghan v Hanson-Fox and Another*, at p. 7B. These provisions, as was said by Sir Jocelyn Simon P in *F v F*, point to "the importance Parliament attaches to the certainty of the change of status arising out of a decree absolute".

71. I turn finally to my determination on the facts of this case which I can also set out briefly.

72. If the judge had set aside the decree absolute on the basis only of fraud as to the date of separation, this appeal might have taken a different course. However, the second part of his judgment made clear that he also set the decree aside because of procedural irregularity, namely that the decree had been made absolute in breach of r.7.32(2) because the wife's application to rescind the decree nisi was pending. This, as Mr Timson rightly accepted, made the decree absolute voidable. The judge was plainly entitled to decide to set the decree aside and, although he expressed his reasons very briefly, Mr Timson has not persuaded me that the judge's decision was wrong or that there was any other flaw which would entitle this court to interfere with that decision.

73. In respect of the decree nisi and certificate, the judge was also plainly entitled to rescind the decree nisi, set aside the certificate of entitlement and dismiss the Petition. Having concluded that the husband's case in support of his petition was false, there was no reason to permit the Petition or the orders to stand. The judge was well placed to determine the wife's application which remained "pending" and the orders which he made were justified by his factual conclusions.

74. In conclusion, for the reasons set out above, in my view this appeal must be dismissed.

LORD JUSTICE SINGH:

75. I agree.

LORD JUSTICE POPPLEWELL:

76. I also agree.