Neutral Citation Number: [2019] EWFC 14

Case numbers omitted

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice
(In Open Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 March 2019

Before :

SIR JAMES MUNBY (SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

M	**Petitioner**
- and -	
P	**Respondent**
The Queen's Proctor Intervening	

- -
- -

Mr Simon P G Murray (instructed by **the Government Legal Department**) for the Queen's Proctor
Ms Janet Bazley QC and Ms Katherine Dunseath (instructed by Messrs Duncan Lewis) all acting pro bono for P
M appeared in person

Hearing date: 28 February 2019

- -

Approved Judgment

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

.....

SIR JAMES MUNBY (SITTING AS A JUDGE OF THE HIGH COURT)

This judgment was handed down in open court

WARNING: The Judge has made a reporting restriction order prohibiting the identification of M and of P; failure to comply with this order will be a contempt of court [see paras 114-115 below]

Sir James Munby, sitting as a Judge of the High Court :

1. This is an application by the Queen's Proctor to set aside a decree nisi of divorce granted in the Willesden County Court on 21 November 2013. The decree was made absolute on 24 February 2014. The Queen's Proctor asserts that both decrees are void – nullities – by reason of non-compliance with section 1(2)(d) of the Matrimonial Causes Act 1973. The application is of profound concern and worry to the parties, both of whom have since re-married on the faith of the decrees. The matter is also of very great public concern because the cause of the predicament in which the parties now find themselves was error on the part of the court, error not merely by the court staff but also, and fundamentally, error by judges.

2. Before turning to the facts of the case, it is convenient first to set out the relevant legislative framework and then to describe the background.

The legislative framework

3. Jurisdiction to entertain a divorce petition is conferred by section 5(2) of the Domicile and Matrimonial Proceedings Act 1973:

> "The court shall have jurisdiction to entertain proceedings for divorce … if (and only if) –
>
> (a) the court has jurisdiction under the Council Regulation; or
>
> (b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun."

The Council Regulation is defined in section 5(1A) as meaning:

> "Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility."

So far as is material for present purposes, Article 3 of the Council Regulation provides as follows:

> "1 In matters relating to divorce … jurisdiction shall lie with the courts of the Member State
>
> (a) in whose territory –
>
> – the spouses are habitually resident, or
>
> – the spouses were last habitually resident, insofar as one of them still resides there, or
>
> – the respondent is habitually resident, or

> – in the event of a joint application, either of the spouses is habitually resident, or
>
> – the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
>
> – the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;
>
> (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.
>
> 2 For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland."

4. Section 3(1) of the Matrimonial Causes Act 1973 provides that:

> "No petition for divorce shall be presented to the court before the expiration of the period of one year from the date of the marriage."

5. Jurisdiction to grant a decree, assuming that the English court has jurisdiction to entertain the petition, depends upon section 1 of the 1973 Act, which so far as material for present purposes provides as follows:

> "(1) … a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.
>
> (2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say –
>
> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

> (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition … and the respondent consents to a decree being granted;
>
> (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition …"

6. It will be noted that there is only one *ground* for divorce, namely "that the marriage has broken down irretrievably." Section 1(2) merely defines the *facts* on which alone a decree may be granted.

The background

7. Before setting out the facts of this particular case, I need to explain the background.

8. As President of the Family Division, I was first alerted to these problems on 26 March 2018 by Cobb J, the Family Division Liaison Judge for the North-Eastern Circuit, whose attention had been drawn to an issue affecting a decree absolute granted in the Family Court at Bradford. At my request he arranged for a copy of the court file to be sent to me. I was also sent a copy of a spreadsheet for March 2017 which included details of the Bradford case in question.

9. These spreadsheets, I discovered, are in a standard form. The court file in the present case contains a copy of the relevant page from the monthly spread sheet showing the data in relation to the case before me. The first column records the Court Code; the second column, arranged in alphabetical order, the Court Name; the third column the "Dissolution Type", eg, OSD for the type of petition I am here concerned with; the fourth column the Case Number; the next two columns the Date of Petition and Date of Dissolution; the next column the Grounds, here shown as DD; the next column the Date of Union; the next two columns the Petitioner Gender and the Respondent Gender; the next four columns the parties ages and status at Union; and the final column the "Error Type", eg, "Petition < 1 yr" or "Petition < 2 yr (desn/sepn)" or "Petition < 5 yr (separation)" or, as in the present case, "Petition < 2yr (consent)".

10. The page from the monthly spread sheet in the present case lists 27 cases from courts listed alphabetically from Manchester to York (so it is reasonable to assume that there was at least one previous page listing the courts from A to L). The final column includes 11 instances of "Petition < 1 yr"; 6 instances of "Petition < 2 yr (desn/sepn)"; 2 instances of "Petition < 5 yr (separation)"; and 1 instance (the present case) of "Petition < 2yr (consent)".

11. I return to the narrative. On 29 March 2018 I sent the following email to the Family Jurisdictional Operational Support Manager at HMCTS Headquarters:

> "A serious error in relation to a Bradford case [number] (shown highlighted on the March 2017 page of the attached spreadsheet) was brought to my attention earlier this week. Following inquiries, I was sent the spreadsheet this morning.

> I understand (but please correct me if I am wrong) that this spreadsheet is compiled by ONS [Office for National Statistics]. Please explain if the data used by ONS comes (a) from ONS examination of the decree absolutes or (b) from Familyman or (c) from somewhere else.
>
> I have seen a copy of the email … circulated to HMCTS staff on 7 March 2018 (0734). This seems to assume that the errors are with the logging of information on Familyman, rather than something more fundamental. In fact the errors in relation to the case referred to above (and I have read the entire court file) have nothing to do with the erroneous logging of information on Familyman; there was in fact a fundamental failure of the court process which led to the grant of a wholly defective DN, followed by an equally defective DA.
>
> This matter, of which I was previously completely unaware, is potentially exceedingly concerning. I need to get to the bottom of it as a matter of urgency. The central question is how many of the cases shown on the spreadsheet (and corresponding spreadsheets for earlier years) are merely the result of data-logging errors and how many reflect errors in the court process.
>
> I am sorry to have to raise this just before the Bank Holiday weekend but needs must.
>
> I look forward to receiving an urgent response."

12. I received the following response by email later the same afternoon:

> "The attached spreadsheet is the result of a data verification exercise that takes place with the ONS.
>
> Data on completed Divorce cases is pulled directly from FamilyMan (by HMCTS Performance) and sent to the ONS. The ONS respond to the DA Verification team (based within the Central Family Court) with a list of 'errors'. These are cases that are flagged by their system as being incorrect based on a pre-defined list of criteria (i.e. is the date of marriage less than one year from the date of issue).
>
> The CFC team check each one of the 'errors' – the majority of which are clerical. If they can clearly see from FamilyMan that the error is a clerical one, they will correct it, but if there is any uncertainty they will need the Court to conduct an investigation. The CFC compile a list of these cases (as per the attached) and send them out to Regional Support Units who liaise with the local Court directly to ensure an investigation takes place. (In this instance I have sent the email to RSU's on their behalf).

> The Courts check each case individually – in the majority of instances, they will either:
>
> A) be able to see from the data on the paper file that a clerical inputting error has occurred – in this circumstance they would amend FMan accordingly
>
> B) be able to see from the paper file that no error has been made (e.g. the case was entered onto FamilyMan in error and doesn't exist) in this instance the Court would make a note on the spreadsheet and return it to the CFC who will update ONS accordingly.
>
> Actual errors are rare as we have SoP's [standard operating procedures], job cards and validation within FamilyMan to prevent them from occurring, however, there could be an instance where the Court realises that an actual error has occurred which has not been picked up from our internal checks – in this instance the Court would highlight this to a Judge immediately and follow their instruction."

The email then gave details of where the data-checking exercises for 2016 and 2017 had got to.

13. The system explained in this email has been in place for a long time. It, or its ancestor, is referred to in passing by Sir Stephen Brown P in his judgment in *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, page 116.

14. I responded the same evening, seeking details of the cases in 2016 where there had been an error by the court rather a mere data logging error.

15. On 3 April 2018 I received an email confirming that "the vast majority of errors are related to data input errors by court staff which do not impact the actual divorce proceedings themselves." An attached list identified 11 cases in 2016 which "did impact the validity of the proceedings" and set out helpful details of what had happened and of the "action taken to resolve." One of the cases on this list was the case which is now before me. (A further case was added to the list the next day.)

16. I responded by email the same afternoon, observing that:

> "The numbers may be small but, for the individuals concerned and to me, the details are exceedingly concerning."

I asked for all the relevant files to be sent to me for me to examine.

17. Having examined all these files personally, I wrote officially to the Queen's Proctor on 17 April 2018:

> "Very recently a number of cases have been brought to my attention where decrees nisi and absolute have been granted notwithstanding that:

> (i) the petition, in breach of section 3 of the Matrimonial Causes Act 1973, had been issued within one year of the marriage, or
>
> (ii) although there had been no breach of section 3, the relevant period prior to the presentation of the petition specified in section 1(2)(d) or 1(2)(e) had not elapsed.
>
> I was first alerted to the problem on 26 March 2018 when the file in [the Bradford case] (see below) was brought to my attention. Following inquiries made with … HMCTS, a further 12 cases have been brought to my attention.
>
> I have examined the files in all 13 cases. In 8 cases, the matter appears to have been resolved satisfactorily and in a manner compliant with *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, [1990] FCR 336; I ought to add that in one of these 8 cases [number and name] the Queen's Proctor became involved and filed a Plea dated 26 January 2017 (your reference …).
>
> In the remaining 5 cases, which accordingly I need to bring to the attention of the Queen's Proctor, such remediable steps as have been taken appear, at least arguably, to conflict with *Butler v Butler*.
>
> I set out brief details of these 5 cases."

Having set out those details, one of the 5 cases being the one now before me, I concluded:

> "I shall be grateful if, after examining these files, you would be so good as to notify me of your conclusions and of such steps, if any, as the Queen's Proctor proposes to take."

18. On 23 April 2018 I issued President's Guidance (Interim): Defective Divorce Petitions / Decrees. It first set out the issues:

> "1 Section 3 of the Matrimonial Causes Act 1973 provides as follows:
>
> "Bar on petitions for divorce within one year of marriage.
>
> (1) No petition for divorce shall be presented to the court before the expiration of the period of one year from the date of the marriage.
>
> (2) Nothing in this section shall prohibit the presentation of a petition based on matters which occurred before the expiration of that period."

2 Included among the 'grounds' for divorce set out in section 1 of the 1973 Act are, as provided by section 1(2)(c):

> "that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;"

and, as provided by section 1(2)(d):

> "that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition ... and the respondent consents to a decree being granted;"

and, as provided by section 1(2)(e):

> "that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition."

3 Very recently a number of cases have been brought to my attention where decrees nisi and absolute have been granted notwithstanding that:

(i) the petition, in breach of section 3, had been issued within one year of the marriage, or

(ii) although there had been no breach of section 3, the relevant period prior to the presentation of the petition specified in section 1(2)(d) or 1(2)(e) had not elapsed.

In some of these cases it has been necessary for me to refer the file to the Queen's Proctor.

4 It appears from the decision of Sir Stephen Brown P in *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, [1990] FCR 336 (and see also the decision of Barnard J in *Woolfenden v Woolfenden* [1948] P 27) that:

(1) Where a petition has been issued in breach of section 3, it is null and void and the court has no jurisdiction to entertain it; with the consequence that any decree nisi or decree absolute purportedly granted is likewise null and void.

(2) The defect cannot be cured by amendment of the petition.

(3) The court has no power to grant discretionary relief.

(4) In consequence, if a party has subsequently remarried that marriage is invalid (see *Woolfenden*).

> 5 It would seem to follow (though there appears to be no reported case directly in point) that, even if there has been no breach of section 3, the same consequences will follow in a case where the relevant period specified in section 1(2)(c), 1(2)(d) or 1(2)(e), as the case may be, had not elapsed; except that in such a case it may be possible, if the facts warrant it, to amend the petition to plead one of the grounds set out in section 1(2)(a) or 1(2)(b)."

19. It then proceeded to set out the guidance:

> "6 Pending the outcome of the Queen's Proctor's investigations and the issue of further Guidance, the following practice should be followed in any case in which it is discovered that a decree has been granted notwithstanding a breach of section 3 or non-compliance with section 1(2)(c), 1(2)(d) or 1(2)(e):
>
> (1) The file must immediately be put before a salaried judge (a District Judge or a Circuit Judge, not a deputy or a legal adviser).
>
> (2) If the judge is uncertain how to proceed, or is minded to invite the intervention of the Queen's Proctor, the judge should first contact the President of the Family Division.
>
> (3) In a straightforward case where there has been a breach of section 3 but no decree has yet been granted, the judge can simply make an order dismissing the petition, ensuring that a suitable explanatory letter is sent to the parties indicating that, if desired, a further petition can be issued in due course.
>
> (4) In a straightforward case where, although there has been no breach of section 3, there has been non-compliance with section 1(2)(c), 1(2)(d) or 1(2)(e), but no decree has yet been granted, the judge should consider whether, if the facts warrant it, it may be possible and appropriate to permit the petition to be amended to plead one of the grounds set out in section 1(2)(a) or 1(2)(b).
>
> (5) In a case where there has been a breach of section 3 or non-compliance with section 1(2)(c), 1(2)(d) or 1(2)(e) and a decree (whether nisi or nisi and absolute) has been granted, the judge should not, however plain and obvious the case may appear, make an order without giving the parties an opportunity to be heard (i) on the question of whether the decree is null and void and (ii) on the question, in a case where there has been no breach of section 3 but non-compliance with section 1(2)(c), 1(2)(d) or 1(2)(e), whether, if the facts warrant it, it may be

> possible and appropriate to permit the petition to be amended to plead one of the grounds set out in section 1(2)(a) or 1(2)(b).
>
> 7 If a new petition is to be issued:
>
> (1) The petition should be sent to and issued in the court which dealt with the previous petition.
>
> (2) To avoid possible confusion, the new petition must be issued under its own number (not the number of the previous petition).
>
> (3) HMCTS will waive payment of the issue fee on the new petition.
>
> (4) The new petition should be processed and determined and (where appropriate) a new decree nisi should be granted as quickly as possible. In such cases it will generally be appropriate in accordance with section 1(5) to fix a very short period, measured in days not weeks, for the decree nisi to be made absolute: compare, albeit on very different facts, *Solovyev v Solovyeva* [2014] EWFC 20.
>
> 8 HMCTS and judges will wish to be alert to the potentially devastating impact on litigants of being informed that there is a 'problem' with their decree, especially if (and this is unlikely to be known to the court when the first communication is made) a litigant who believes that they have been validly divorced has remarried or is due very shortly to remarry. Communications should accordingly be expressed in appropriately sympathetic and apologetic language.
>
> 9 For the future, I am assured by HMCTS that the software will prevent errors of this kind occurring when the online divorce project is fully operational."

20. So much for the background.

The facts

21. I need to take the facts in some detail.

22. The parties were married in London on 19 September 2011. In June 2013, the husband, M, acting in person, submitted a divorce petition dated 14 June 2013 to the Willesden County Court. It was returned to M on three occasions before the Court was prepared to accept it: first, on 18 June 2013 because the front page needed to be completed and because of deficiencies in Parts 2 and 4; then on 27 June 2013 because the deficiency in Part 2 had still not been remedied; and finally on 3 July 2013 because with effect from 1 July 2013 the issue fee had increased from £340 to £410. It is to be noted that through all this to-ing and fro-ing no-one in the court office had

spotted the fundamental problem with the petition. After these delays, the petition was issued on 26 July 2013.

23. In Part 3, "Jurisdiction", M asserted jurisdiction in accordance with the Council Regulation, stating that he and his wife, P, were both habitually resident in England and Wales. Part 5, "The fact(s)", follows the structure of section 1 of the Matrimonial Causes Act 1973 and requires the petitioner to mark the relevant boxes. M put a cross in two boxes, one against the rubric "I apply for a divorce on the ground that the marriage had broken down irretrievably", the other against the rubric "The parties to the marriage/civil partnership have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the Respondent consents to a decree/order being granted." In Part 6, "Statement of case", M wrote: "The respondent has refused to share the same household as the petitioner since the marriage took place on the 19th September 2011."

24. The problem which has given rise to the present proceedings is immediately apparent: given that the marriage had taken place on 19 September 2011, the period of two years referred to in section 1(2)(d) of the 1973 Act had not elapsed by the date the petition was issued on 26 July 2013. Unhappily, even at this stage the problem was not identified by the staff at Willesden County Court, notwithstanding that the Automatic Event Record generated in the court office and dated 29 July 2013, accurately recorded under the heading Case Details that the Grounds for Divorce (sic) were "2yrs separation", that the date of marriage was 19 September 2011 and that the date of issue was 26 July 2013.

25. In her acknowledgment of service dated 12 August 2013, P, in answer to question 1C ("Do you agree with the statement of the petitioner as to the grounds of jurisdiction set out in the petition? If not, please state the grounds on which you disagree with the statement of the petitioner."), answered "I agree with the statement of the petitioner." In answer to question 4 she stated that she did not intend to defend the case and in answer to question 5 that she consented to a decree being granted. M's "Statement in support of divorce … – 2 years, consent" was dated 27 September 2013.

26. On 22 October 2013 the file was put before Deputy District Judge Quin. The Deputy District Judge completed the Form D30 ("Consideration of applications for Decree Nisi / Conditional order under FPR 7.20"), by ticking the relevant boxes and making the appropriate deletions so as to say "I certify that the Petitioner is entitled to a decree of divorce on the following ground(s): 2 years separation by consent."

27. On 21 November 2013, decree nisi was pronounced by District Judge Steel, the order stating, so far as material for present purposes: "The Judge held that the petitioner and respondent have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, and that the respondent consents to a decree being granted …" The decree was made absolute on 24 February 2014.

28. On 26 January 2015, M remarried in Brazil, his new wife being a Brazilian national.

29. On 12 October 2016, a member of the HMCTS Family Improvement Team at HMCTS headquarters emailed the delivery manager at what was now the Family Court at Willesden seeking "urgent information from a divorce file where the petition

should not have been issued." The delivery manager referred the matter to District Judge Middleton-Roy the same day, with this note:

> "It would appear that this petition was issued in error. It was issued under 2 yrs with consent but the parties were only married for 22 months. Directions/ comments please. DA has already been issued 24/2/14."

District Judge Middleton-Roy responded the same day. He ticked the "No action necessary" box on the referral form and commented: "I am not clear why the issue has arisen now – neither party appears to be applying to set aside the DA."

30. The next morning, 13 October 2016, the delivery manager emailed the HMCTS Family Improvement Team to report District Judge Middleton-Roy's comment. The response from the Family Improvement Team was an email to the delivery manager the same morning:

> "The issue has been raised as our data checking process returns has picked this case up as a case that should not have been issued, thereby possibly making the DA invalid. Can this be re-referred down to a judge for consideration of directions to be given in view of this …"

The delivery manager put the file back before District Judge Middleton-Roy the same day. On 17 October 2016 he directed that the matter be listed for directions with a time estimate of 30 minutes and instructed the court staff write to both parties as follows:

> "The Judge has considered that papers and directs that I write to you as follows: An error has been identified in the process giving rise to the Decree Absolute (final divorce) in these proceedings in 2014. The matter has been listed for a directions hearing when the court will identify what steps are necessary to restore the issue."

Letters in those terms were sent to both parties on 19 October 2016, enclosing notices, dated 17 October 2016, listing the directions hearing for 18 January 2017.

31. The hearing on 18 January 2017 took place before District Judge Middleton-Roy. M was present in person; P did not attend the hearing. The order made by District Judge Middleton-Roy "RECORDED" certain matters, including that "This hearing was listed of the Court's own motion and not on the application of either party"; that "The Court was informed that subsequent to the granting of the Decree Absolute in this action, the Petitioner has re-married"; that "The Court determined that the original petition … proceeded erroneously by not relying upon the correct facts in support, namely two years separation, when the parties had not been separated for a full period of two years at the time of presenting the petition"; that "The Court determined that the Petitioner shall be permitted to amend the petition, to rely upon the fact of the Respondent's behaviour"; and that "The court dispensed with the need for a formal written application to amend the petition and dispensed with the need for notice to be

served upon the Respondent, the petition having proceeded on an undefended basis and no answer having been filed." The order also "RECORDED" that:

> "The Court determined, declared and certified that the Petitioner is entitled to a decree and that the Decree Nisi dated 21.11.13 and Decree Absolute pronounced in public on 24.02.14 remain valid"

and that:

> "The Court declared that nothing in the terms of this Order has the effect of invalidating the Petitioner's subsequent marriage."

32. The order further ordered ("It is ordered that") that:

> "2.1 Permission to the Petitioner to amend the petition dated 14.06.2013 in the form of the amendment dated 18.02.2017.
>
> 2.2 Filing and service of an application to amend the petition is dispensed with.
>
> 2.3 The Decree Absolute pronounced on 24.04.2014 remains valid."

33. The court file contains a copy of the petition marked at the top of the first page, in what appears to be District Judge Middleton-Roy's handwriting, "AMENDED" and at the foot of the final page "18.01.2017", again in what appears to be his handwriting, although it appears that M also re-signed the petition. In Part 5 the cross against the rubric "The parties to the marriage/civil partnership have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the Respondent consents to a decree/order being granted" has been deleted and, in its place, a cross inserted against the rubric, which was underlined, "The Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent."

34. On 24 March 2017, in Brazil, P married a Brazilian national.

The proceedings

35. As I have already mentioned, this was one of the cases referred to me by HMCTS and which I then referred on to the Queen's Proctor by my letter of 17 April 2018.

36. By an order dated 11 September 2018 made following a hearing on 5 July 2018, I gave the Queen's Proctor permission to intervene. In accordance with directions I gave, the Queen's Proctor filed his plea. It is dated 13 September 2018, signed by Mr Simon P G Murray of counsel, and reads as follows:

> "The Queen's Proctor intervening in this petition says that:
>
> 1 Pursuant to section 8 Matrimonial Causes Act 1973 the Queen's Proctor has power to intervene in divorce proceedings

where there are or appear to be irregularities. Although the section might appear to limit the right of the Queen's Proctor to intervene up to the point at which the decree is made absolute, there is clear authority to the effect that the Queen's Proctor may intervene after a void decree absolute: *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336.

2 The Queen's Proctor seeks permission to intervene in this petition as it appears that the decrees have been granted contrary to the statutory provisions contained in section 1 of the Matrimonial Causes Act 1973.

Factual Background

3 The Petitioner and the Respondent were married on 19 September 2011 … [in] London.

4 The Petitioner presented a petition signed on 14 June 2013 to Willesden County Court sometime in June 2013. The petition was returned to … [him] on three separate occasions as the correct fee had not been paid and there were errors and omitted portions on the form.

5 The petition finally accepted was recorded as having been received on the 23 July 2013 and issued on 26 July 2013.

6 This petition, at part 5, sought a divorce on the grounds that the parties had lived apart for a continuous period of two years. At part 6, the Petitioner elaborates that "the Respondent has refused to share the same household as the petitioner since the marriage took place on 19 September 2011." On the face of the issued petition, only 22 months had in fact elapsed.

7 An acknowledgement of service was signed by the Respondent on 12 August 2013

8 Thereafter, the petition was dealt with under the special procedure and, in due course, a decree nisi was pronounced on 21 November 2013 and made absolute on 24 February 2014.

9 Sometime in October 2016, after the making of the decree absolute, it came to the attention of the court staff that the petition should not have been issued relying upon that ground as the period of two years separation relied on not having elapsed at the time of issue.

10 The matter was listed for a directions hearing on 18 January 2017. Both parties received notice of the hearing, but only the Petitioner was able to attend.

11 In the preamble to the Order arising from the hearing, the District Judge recorded that the original petition dated 14 June 2013 "*proceeded erroneously by not relying upon the correct facts in support, namely two years separation, when the parties had not been separated for a full period of two years at the time of presenting the petition*".

12 It is further recorded in that Order that permission was given to the Petitioner to amend the petition dated 16 June 2013 and that the Decree Nisi of 21 November 2013 and Decree Absolute of 24 February 2014 remained valid. It is also recorded that the Petitioner's subsequent marriage was not affected by this Order.

13 The Order then directs that permission is given to the Petitioner to amend the petition dated 14 June 2013 in the form of the amendment dated 18 February 2017 [sic] [this comment is in the original] and that the Decree Absolute pronounced on 24 April 2014 [sic] [this comment is in the original] remains valid.

14 In the Court file, there is a copy of the amended petition. At part 5, the ground previously relied on is struck out and the ground of unreasonable behaviour is checked instead and underlined. On the signature page, the Petitioner has signed again with the date 18 January 2017.

15 The Queen's Proctor avers that the District Judge erred in making the order that the decree absolute made on 24 February 2014 remained valid. At the time when that order was made it was founded on a finding of fact which was impossible – in that the period of separation prior to the issue of the petition cannot have been two years from the date of the marriage. The statutory condition precedent required for making a decree of divorce in section 1(2) of the 1974 Act was therefore not met. The District Judge's purported retrospective validation of the decrees of divorce in his order of 18 January 2017 was in error. Accordingly the decrees obtained on that basis were void and incapable of having enduring effect.

16 In these circumstances the District Judge had no power to the grant the discretionary relief which he sought to do in his order of 18 January 2017, by analogy with the situation which prevailed in *Butler v Butler (Queen's Proctor Intervening)* [1991] FLR 114. The defect was not capable of being cured by the amendment of the petition following the making of decrees.

And the Queen's Proctor prays that:-

> (1) The decree nisi pronounced on 21 November 2013 and the decree absolute made on 24 February 2014 be set aside as null and void; and
>
> (2) The petition dated 14 June 2013, as amended, be dismissed."

37. The matter was listed for hearing before me on 31 January 2019. The Queen's Proctor was represented by Mr Murray. Both M and P appeared in person. In addition to the Willesden Court file, and the Queen's Proctor's Plea, I had Mr Murray's skeleton argument on behalf of the Queen's Proctor dated 29 January 2019 and a statement by P dated 30 January 2019. It was obvious that this had been prepared with the benefit of skilled legal advice. Entirely appropriately in the circumstances it set out not merely various matters of fact but, in addition, an explanation of the legal basis of P's case that I should dismiss the Queen's Proctor's application. In answer to a question from me, P said that she had been unable to obtain professional representation. I did not think it appropriate to probe further but suspected that this was because of lack of means.

38. I adjourned the hearing until 28 February 2019. The recitals to my order explained why:

> "AND UPON the Respondent filing a witness statement on the day before the hearing setting out an objection to the Queen's Proctor's Plea – namely that her situation can be distinguished from that prevailing in *Butler v Butler* which, in the determination of the court, is properly arguable as a matter of law.
>
> AND UPON the Court noting that Respondent is currently unrepresented and given (i) the very significant personal consequences for the parties should the decrees of divorce be set aside and (ii) the significant public interest in resolving this legal issue as whether the court's inability to rectify void decrees of divorce applies in these circumstances warrants the Respondent requiring professional representation.
>
> AND UPON the court noting that the Respondent in this case has the strongest possible basis for being granted public funding on an exceptional basis by the Legal Aid Agency to pay for her representation at the forthcoming hearing on 28 February 2019."

39. After business hours on 27 February 2019 P was refused exceptional funding by the Legal Aid Agency, for reasons set out in a letter dated 28 February 2019. But when the hearing resumed before me that morning, P was not bereft of assistance, being represented *pro bono* by Ms Janet Bazley QC and Ms Katherine Dunseath, instructed by Ms Sundeep Budwal and Mr Paul Nuttall of Messrs Duncan Lewis. At very short notice (for they did not receive all the papers until 26 February 2019) Ms Bazley and Ms Dunseath were able to prepare by the morning of 27 February 2019 what, if I may say so, was a very impressive skeleton argument. Very properly, Ms Bazley

acknowledged that this was very much a 'team effort', the team including, as well as herself and Ms Dunseath, a pupil in chambers, Mr William Vaudry, whose contribution it is only right that I should publicly recognise. I am immensely grateful, as I sure P is, to all three of them as well, of course, to Ms Budwal and Mr Nuttall.

40. At the end of the hearing I reserved judgment. On 4 March 2019 I informed the parties of my decision: that the decrees are VOIDABLE, not void; that the decrees will NOT be set aside; and that the decree absolute accordingly remains valid and in force. I now (22 March 2019) hand down judgment.

The human realities

41. The focus of the hearing was, inevitably, on the difficult questions of law to which I must come in due course. But it must never be forgotten that, at the end of the day, this application affects four human beings – P, M and their new spouses – in a matter which is of transcendental importance to all of them. P, in her statement, puts the point in understandably emotive and powerful language:

> "I am an innocent party to these proceedings … My current husband and I married in Brazil in good faith after the amended petition … on 24/03/17 before God and our families … the idea that I have committed bigamy is convulsing and my mental health is now being affected … if it indeed the case that my former husband and I is not divorced that means I am a bigamist [Bigamy is illegal in Brazil] irrespective if it was a legal oversight, and I can be arrested, detained and prosecuted if I try to annul the divorce."

She then added this very important point:

> "In addition as my husband is a Brazilian national who travels to the UK as my spouse will no longer be able to enter the UK as he will no longer be my spouse and the Home Office don't allow partners visitation. This is going to affect my marriage severely."

42. Ms Bazley and Ms Dunseath make similar points in their skeleton argument:

> "In her statement [P] raises particular concerns about the fact that the setting aside of the decrees would seem to mean, amongst other things, that she had entered into a second marriage whilst already married – coming within the definition of the offence of bigamy, contrary to s.57 Offences Against the Person Act 1861 (and, it appears, a contravention of Article 1521(VI) of the Brazilian Civil Code – acting unlawfully by remarrying whilst still being married).
>
> [Her] concerns are both legal, she may have committed an offence, and moral/spiritual, in that she feels deeply disturbed by potentially having committed that offence. Further, it is enormously distressing to her to contemplate that her marriage

> may be invalidated, despite having taken place in good faith, in a ceremony witnessed by family and friends.
>
> The setting aside of the decrees would cause [her] emotional, psychological, and financial harm, and may disturb her new relationship."

43. The potential immigration problems in this kind of situation are all too real, as the reaction of the Home Office to the predicament in which the parties in *Solovyev v Solovyeva* found themselves, so clearly illustrates: see *Solovyev v Solovyeva* [2014] EWFC 1546, [2015] 1 FLR 734, para 4 and *Solovyev v Solovyeva* [2014] EWFC 20, para 7. The fact that the official policy of the "hostile environment" has recently been replaced with the semantically less challenging policy of the "compliant environment" is, one suspects, of little comfort to bewildered people like P and M.

44. To that I should add what may be obvious from what I have already said but nonetheless needs to be stated plainly and without equivocation: both M and P are the wholly innocent victims of serious mistakes by the court, mistakes not merely by court staff but, more importantly, *by judges* – Deputy District Judge Quin and District Judge Steel. True it is, that the original mistake was by M, when he made the mistake of marking the wrong box in Part 5 of the petition, and that if he had not made that mistake there would never have been any problem. But that is wholly beside the point. If M's mistake was the *causa sine qua non* – the 'but for' cause of what happened –, the *causa causans* – the real, primary, cause was the errors of the court, of the judges (compare, on this point, the observations of Sir John Donaldson MR. in *Walker v Walker* [1987] 1 FLR 31 quoted in paragraph 66 below).

The submissions in brief

45. Mr Murray's sheet anchor is the decision of Sir Stephen Brown P in *Butler v Butler (Queen's Proctor Intervening)* [1991] FLR 114. Although that was a case where there had been a non-compliance with section 3 of the Matrimonial Causes Act 1973, there is, he submits, no reason for distinguishing it, or for that matter, the decision of Barnard J in *Woolfenden v Woolfenden* [1948] P 27, in a case which is based on non-compliance with section 1(2)(d). Focusing on the words "The court … *shall not* hold the marriage to have broken down irretrievably *unless* the petitioner satisfies the court … that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (emphasis added)", his submission is short and simple: If two years have not elapsed prior to the presentation of the petition it is impossible for the court to hold that a marriage has irretrievably broken down on that ground. Any decree of divorce ostensibly based on this ground will therefore be contrary to the statutory scheme.

46. Ms Bazley and her team meet this head-on. Their central submissions can be summarised as follows:

    i) This case can and should be distinguished from those where the defect went to the *jurisdiction* of the court, for example where, as under section 3, there is a jurisdictional bar on a petition being presented before the expiration of one year from date of marriage. The case law, they say, illustrates that decrees are

found to be void where there has been failure of service of the petition or where, under the statute, the court does not have jurisdiction.

ii) In contrast, the court here *did* have jurisdiction to receive the petition, which contained the essential assertion that "that the marriage has broken down irretrievably", and to grant a decree on that "ground". The error in correctly identifying the relevant "fact" did not go to jurisdiction and made the decrees voidable rather than void.

iii) Moreover, unreasonable behaviour on the part of the respondent, another fact to support the ground of irretrievable breakdown, existed at the date of the original petition and the relevant evidence to establish that "fact" was actually set out in Part 6 of the petition. Thus, the defect in the petition was very simply curable by the petitioner putting a cross in the correct box in Part 5. In these circumstances the decrees were not void, merely voidable.

The authorities

47. At this point it is necessary for me to go through the authorities, unavoidably in some detail. It is convenient to take them in chronological order.

48. I start with the decision of Barnard J in *Woolfenden v Woolfenden* [1948] P 27, where there had been non-compliance with section 183(3) of the Supreme Court of Judicature (Consolidation) Act 1925, as inserted by Section 9 of the Matrimonial Causes Act 1937:

> "Where a decree nisi has been obtained, whether before or after the passing of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit."

To put this in modern context, the current equivalent is section 9(2) of the Matrimonial Causes Act 1973 (see below). The relevant application having been made *before* the expiration of that three months period, the question was whether the decree absolute which had subsequently been made was void or merely voidable. Barnard J, having referred to the two well-known cases of *McPherson v McPherson* [1936] AC 177 and *Craig v Kanssen* [1943] KB 256, held (page 32) that the decree absolute was a nullity:

> "In view of the fact that the husband has not complied with the statute, I have come to the conclusion that I cannot treat the making of this decree absolute as a mere irregularity, and I must treat it as a nullity. I regret having to come to this conclusion, because I am informed that [subsequently] the husband went through a ceremony of marriage with another

> woman. The certificate … to the effect that the decree was … made final and absolute must therefore be set aside."

49. The next case is *Everitt v Everitt* [1948] 2 All ER 545, where a decree nisi followed by a decree absolute had been made though it subsequently transpired that the respondent husband had never been served with the petition. Both decrees were set aside by the Court of Appeal, where the leading judgment was given by Lord Merriman P. He said (page 546):

> "It is well settled that a judgment obtained against a party in his absence owing to his not having been served with the process is not merely voidable for irregularity but is void as a nullity: see *Craig v Kanssen* [1943] KB 256, and the cases there cited. Manifestly, this general principle applies with full force to a judgment affecting the status of the party: *Marsh v Marsh* [1945] AC 271."

50. In *Wiseman v Wiseman* [1953] P 79, the husband had been granted a decree nisi and a decree absolute, having previously obtained an order for substituted service on the wife of his petition, relying for that purpose on evidence which was insufficiently candid. The Court of Appeal held that in the absence of fraud the decrees were voidable, not void, and that the court had jurisdiction (which it exercised) to set aside the decrees and order a retrial even though the husband had remarried and had a child. Somervell LJ said (page 87):

> "I do not think that the order was a nullity, as would be, for example, an order made without jurisdiction: *Woolfenden v. Woolfenden* [1948] P 27; *Craig v. Kanssen* [1943] KB 256."

Denning LJ said (page 92):

> "In the present case I do not think that the failure of the husband and his solicitor to do their duty made the proceedings absolutely void. Suppose, for instance, that the wife had seen the advertisement at the time and entered an appearance, the defect would have been waived and no court would set the proceedings aside. That shows that the order for substituted service was only voidable, but not void. So, also, the proceedings which followed it, down to and including the decree absolute, are only voidable and not void."

Hodson LJ made the same point (page 95):

> "I think it is clear from the authorities that although an order for substituted service may be irregular and accordingly voidable, yet a defendant may so act thereafter as to waive the irregularity … I do not think any question of waiver can be said to arise here. The wife, as soon as she learned of the decree, entered an appearance with a view to getting rid of the decree, which she has always maintained was pronounced against her contrary to the justice of the case. The order in this case was, I

> think, voidable and in the absence of waiver the question is whether it should be avoided."

51. *O'Connor v Isaacs and others* [1956] 2 QB 288 arose out of proceedings in which justices had purportedly exercised their powers under the Summary Jurisdiction (Separation and Maintenance) Acts 1895 to 1925. Section 4 of the Summary Jurisdiction (Married Women) Act 1895, read together with section 1 of the Summary Jurisdiction (Separation and Maintenance) Act 1925, provided that a married woman could apply to a court of summary jurisdiction for orders under the Acts in a number of specified circumstances, one being (see section 4 of the 1895 Act) that her "husband shall have been guilty of persistent cruelty to her." The applicant wife alleged that her husband had been guilty of persistent cruelty. The justices, although finding the allegation not proved, nonetheless ordered her husband to pay her maintenance. Their order was eventually (page 330) set aside on appeal by the Divisional Court of the Probate Divorce and Admiralty Division, which "discharged" the order. The husband then brought proceedings in the Queen's Bench Division claiming damages against the justices. His action was dismissed by Diplock J, as he then was, and his appeal was dismissed by the Court of Appeal.

52. The husband's contention (pages 292, 361-362) was that the order of the justices was null and void. It was conceded before Diplock J (pages 292-293, 352) that the justices had had "no jurisdiction" to make the order, "it being a condition precedent to their right to make an order that the husband should be guilty of one of the matrimonial offences set out in section 4." But (page 295) it was argued on behalf of the justices, represented it may be noted by Mr G G Baker QC, later Sir George Baker P, that the order was only voidable and conclusive until set aside. The riposte on behalf of the husband (page 301) was that the order was bad on its face and therefore void. Diplock J said (page 307) that there was: "lack of jurisdiction because no matrimonial offence had been committed." He had earlier said (page 304):

> "where a magistrate … assumes jurisdiction where he has no jurisdiction as a result of a mistake of law, he is liable in trespass for acts done as a result of that erroneous assumption of jurisdiction, and if his mistake of law appears upon the face of the record itself, the setting aside of the order is not a condition precedent to the action at common law. In the present case it appears upon the face of the record that the magistrates made the order without jurisdiction."

53. In the Court of Appeal, Singleton LJ said (page 331):

> "The order of the justices of August 18, 1941 … is clearly bad on the face of it … It is clear that an order could not be made on the ground of persistent cruelty if the complaint of persistent cruelty was not found to be proved, as appears from the order of the justices … No one has questioned the fact that the order, being bad on the face of it, could not stand if the plaintiff was given leave to appeal out of time."

Morris LJ commented (pages 353-354):

> "The hearing of this appeal, and likewise the hearing before the judge, proceeded on the basis that it was not being challenged that the order made by the magistrates … was made without jurisdiction … We have not, therefore, been concerned in this case with any controversy as to jurisdiction and we have heard no argument on that subject."

54. Tantalisingly, so far as I can see, neither in the Divisional Court nor subsequently was there any explicit judicial statement as to whether the order was void or voidable.

55. The next case is the decision of Sir Jocelyn Simon P, as he then was, in *F v F* [1971] P 1, where there had been non-compliance with section 33(1) of the Matrimonial Causes Act 1965:

> "… 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."

Sir Jocelyn held that the decree absolute was voidable, not void. In coming to this conclusion he declined to follow the decision to the contrary of Cairns J in *P v P and J* [1970] P 161.

56. Sir Jocelyn's characteristically meticulous and illuminating judgment should be read in full. The following extracts, however, adequately reflect the essence of his reasoning:

> "When Parliament enjoins something to be done as a step towards some transaction of legal significance, it is frequently questionable what effect failure to comply with the statutory injunction has on the validity of the subsequent transaction. In some of the older authorities it seems to have been envisaged that there were only two possible outcomes – either the transaction was void or it was valid … it is now clear that there are not only two possible consequences of non-compliance with a statutory or other legal stipulation, but three – the subsequent transactions may be neither void nor valid but voidable.
>
> It is trite law that it is the duty of the court, in construing a statute, to ascertain and implement the intention of Parliament as expressed therein. Where Parliament has used in non-technical legislation words which, in their ordinary meaning, cover the situation before the court, the court will in general apply them literally, provided no injustice or absurdity results. In such a case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation. But in many cases (and the instant seems to be one) it will seem

> probable that Parliament and the draftsman have not envisaged the actual situation before the court; and the duty of the court in such circumstances will be to surmise, as best it can, what Parliament would, within the context of the words of the statute, have stipulated if it had done so. A number of rules, founded on common sense, have been evolved to assist the courts in this task – for example, Parliament will be presumed not to intend injustice or absurdity or anomaly. But the most useful approach was laid down as long ago as *Heydon's Case* (1584) 3 Co Rep 7a. The court will seek to ascertain what was the pre-existing "mischief" (that is to say, defect) which Parliament was endeavouring to remedy: this will often give a guide to what remedy Parliament has provided, and to its extent and its sanction (pages 11-12).
>
> Parliament … stipulated that no divorce was to be consummated unless the court were satisfied that adequate (or the best available) arrangements had been made for the children. In this respect it gave the interest of the children priority over that of their parent … [However] to treat the decree absolute as void will rarely promote the interest of the children of the family in question: and in some cases (for example, where a parent has "remarried" in reliance on an ostensibly valid decree absolute) it will actually do harm (pages 12-13).
>
> … to hold that non-compliance with section 33 renders the decree absolute void would sometimes cause hardship to innocent third parties: for example, a husband petitioner might without any fault be ignorant of the relevant child's birth; and if he has remarried on the faith of an apparently valid decree absolute his after-taken "wife" and their children might suffer. In my view, Parliament is to be presumed not to have intended such injustice, unless it is the consequence of the only reasonable meaning which suits the scope and object of the statute (page 13)."

57. Having referred to *McPherson v McPherson* [1936] AC 177, Sir Jocelyn then made this important observation (page 15):

> "It has sometimes been suggested that non-compliance with a rule of court renders a subsequent judgment voidable, whereas non-compliance with a statutory provision renders it void; see, for example, *Woolfenden v Woolfenden* [1948] P 27. Though this will sometimes be a useful distinction, as an exhaustive statement of the law it seems to me to be inconsistent with the authorities which I have cited above, and, after all, rules of court themselves have statutory force."

He then set out his conclusion as follows (citations omitted)

> "In my judgment, the failure to comply with section 33 in the instant case rendered the decree absolute voidable. But, innocent third parties having acquired rights and interests in pursuance of its ostensible validity, and no party having any superior equity, it is now too late to set it aside."

58. The next case is the decision of the Court of Appeal in *P v P* [1971] P 217 on appeal from the decision of Cairns J referred to above. This was another case where there had been non-compliance with section 33(1) of the Matrimonial Causes Act 1965. The Court of Appeal agreed, in terms, with both the decision and the reasoning of Sir Jocelyn in *F v F* [1971] P 1: see Davies LJ, page 222, Phillimore LJ, page 224, and Karminski LJ, page 225. Phillimore LJ said (page 225):

> "the real basis of the issue here is this, that, as Sir Arthur Irvine [QC for the Queen's Proctor] rightly says, a court ought not lightly to treat a decree absolute as void."

59. Next there is the decision of Sir George Baker P in *Dryden v Dryden* [1973] Fam 217, where because of a judicial error the wife lost her right to make an application under, and was thereby denied the protection of, section 6 of the Divorce Reform Act 1969 (the current equivalent is section 10 of the Matrimonial Causes Act 1973):

> "(1) The following provisions of this section shall have effect where – (a) the respondent to a petition for divorce … has applied to the court under this section for it to consider for the purposes of subsection (2) hereof the financial position of the respondent after the divorce; …
>
> (2) The court hearing an application by the respondent under this section shall consider all the circumstances, … and notwithstanding anything in the foregoing provisions of this Act but subject to subsection (3) of this section, the court shall not make absolute the decree of divorce unless it is satisfied – (a) that the petitioner should not be required to make any financial provision for the respondent, or (b) that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances.
>
> (3) The court may if it thinks fit proceed without observing the requirements of subsection (2) of this section if [etc]."

The question was whether the decree absolute subsequently made was void or voidable. I note at this point that the verbal formula in section 6(2) – "the court shall not make absolute the decree of divorce unless it is satisfied" – is essentially the same as that in section 1(2) of the Matrimonial Causes Act 1973.

60. Focusing on the wording of section 6(2), Sir George observed (page 232) that the words "the court shall not make absolute, a decree of divorce unless it is satisfied that" are identical with the words of section 33 of the Matrimonial Causes Act 1965

and went on to say (page 233) that, but for one point, he would be content to consider himself bound by the Court of Appeal's decision in *P v P*. That point was the argument "that whereas a void decree will rarely help children, it is enough if it is voidable, the protection of wives is very different and can be achieved only by a void decree which will take no account of remarriage and of rights and interest acquired in pursuance of its ostensible validity by innocent third parties having an equal equity with the wife."

61. Sir George considered a number of cases which there is no need for me to rehearse. During the course of this consideration, he commented wearily (page 234):

> "I find it impossible to discover any clear and logical principle from the decided cases. Whether a particular act or omission is a nullity rendering all that follows void or only an irregularity which can be waived, has frequently been discussed but with little guidance on how to reach a decision."

62. Sir George expressed his conclusions as follows (pages 236-237):

> "In my opinion, the court should strive to hold that a decree absolute is voidable rather than void, for this enables justice to be done to all parties. It must hold the decree void:
>
> (1) If the statute so provides …
>
> (2) When there has been a complete lack of jurisdiction, as, in *O'Connor v Isaacs* [1956] 2 QB 288, where justices made a matrimonial order which they had no power to make because no matrimonial offence had been committed …
>
> (3) Where the irregularity is such that it undermines the adversary procedure for the entire proceedings. And possibly (4) as stated in P E Joske's Matrimonial Causes and Marriage Law and Practice Australia and New Zealand, 5th ed (1969), p 798, where there has been "a failure to comply with statutory requirements which are conditions precedent to the right to a decree." This, of course, is controversial.
>
> I have come to the conclusion, after some doubt and hesitation that the present decree absolute is voidable, not void, if only on the narrow ground that there was no breach of section 6 of the Divorce Reform Act 1969 as no application had been made but there was a wrong exercise of discretion by the judge … I am fortified in my decision that this decree is only voidable by the knowledge that justice can thereby be done to all parties, and the protection of the decree absolute and of the remarriage balanced against any loss or disadvantage to the wife."

63. *Wright v Wright* [1976] Fam 114 was a case where there was non-compliance with section 6(2) of the Divorce Reform Act 1969 in circumstances where, in contrast to what had happened in *Dryden v Dryden*, the respondent wife *had* applied in

accordance with section 6(1)(a). Rees J held that the non-compliance with section 6(2) rendered the subsequent decree absolute voidable and not void. Recognising that the decision of the Court of Appeal in *P v P* [1971] P 217, being on a different statutory provision, was not of itself determinative, and that, in the final analysis, the decision of Sir George Baker P in *Dryden v Dryden* [1973] Fam 217 turned on a different point, because there had not there been any non-compliance with section 6(2), the wife never having issued an application under section 6(1)(a), Rees J was nonetheless impressed by the analyses both in *P v P*, which he described as "compelling", and in *Dryden v Dryden*. His conclusion (page 124) was that:

> "Because of the possibly severely damaging effects upon the adults and the children who may be involved, I am of opinion that a court should only hold a decree absolute to be void if driven by the terms of the relevant statute so to hold. I do not find the terms of section 6 of the Divorce Reform Act 1969 do drive me to that conclusion … I am impressed, as was Sir George Baker P in *Dryden v Dryden* [1973] Fam 217, by the argument that a wife's interests may be adversely affected in some cases if the decree absolute is not held to be void. Nevertheless, this possible disadvantage to the wife must be balanced against the far graver disadvantages which may flow from holding that in every case a decree absolute shall be void automatically if obtained without compliance with the provisions of section 6 of the Divorce Reform Act 1969 or its modern successor, section 10(3) of the Matrimonial Causes Act 1973. Furthermore, if the decree absolute be held voidable and not void, the court retains a discretion to decide whether to declare that the decree absolute shall be void or valid. This discretion will only be exercised after all the relevant circumstances have been considered, including the financial provision for the wife which the court has power to order or which is offered. In my opinion, the possibility of doing justice to all concerned, whether they be the wife, the husband, the children of the family, or third parties, is enhanced if the decree absolute is held to be voidable but diminished if it is held to be void in every case irrespective of the circumstances.
>
> For all these reasons I hold that the decree absolute in the instant case is voidable."

64. The next case is *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336, a decision of Sir John Arnold P. The decree nisi and decree absolute were made in circumstances where the petition had never been served on the respondent wife, the petitioner husband having filed an affidavit falsely stating that the signature on the acknowledgment of service was that of his wife. Sir John held that both decrees were void. Explaining why, he said (page 1338):

> "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 dispensed with validly. 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 Kanssen* [1943] KB 256, a decision of the Court of Appeal, in which such lack of service was described by Lord Greene MR as rendering the subsequent order void because of that, as he said, fundamental vice."

65. The next case, *Batchelor v Batchelor* [1984] FLR 188, was another decision of Sir John Arnold P. A decree absolute was made although there had been non-compliance with rule 66(2) of the Matrimonial Causes Rules 1977:

> "An application by a spouse for a decree nisi pronounced against him to be made absolute may be made to a judge or the registrar, and the summons by which the application is made . . . shall be served on the other spouse …"

Sir John held that the decree was voidable, not void. Having referred to *F v F* [1971] P 1, *P v P* [1971] P 217 and the judgment of Dunn LJ in *Bernstein v Jackson* [1982] 1 WLR 1082 (not a matrimonial case), he explained why (pages 190-191):

> "there was undoubtedly jurisdiction to make this decree absolute – there is no question about that. The only thing which was lacking was the summons. In fact no summons was filed or served because the registry thought it was not necessary. That may add to the merits of the case but it cannot found a new jurisdiction. But, undoubtedly, the registrar, when the application was made, could have done what judicial officers often do in such circumstances and say: 'If you undertake to issue a summons I will make the order.' The absence of the summons is, as it seems to me, the most technical defect that one could really imagine, and if one has to decide whether it falls on the side of – to requote [counsel] through the mouth of Dunn LJ – 'A mere technicality or slip or mistaken step in the litigation …', or whether it was a fundamental mistake in the proceedings not to issue a summons, it seems to me impossible to come to the conclusion that it was other than of the first character. My conclusion, therefore, is that this was a technicality which resulted in an imperfection in the resultant decree absolute, but an imperfection of voidability and not of voidness."

66. The next case is the decision of the Court of Appeal in *Walker v Walker* [1987] 1 FLR 31, a special procedure case where a decree nisi was made following the making by the registrar of a certificate under rule 48(1) of the Matrimonial Causes Rules 1977 but where there had been non-compliance with rule 48(2):

> "On the filing of a certificate under paragraph (1) a day shall be fixed for the pronouncement of a decree by a judge in open court at a court of trial and the registrar shall send to each party notice of the day and place so fixed and a copy of the certificate …"

None of the previous authorities were cited. Sir John Donaldson MR said this (pages 33-34):

> "it seems to me and, I believe, to my brethren that, merits or no merits, there can be no possible justification for a court granting a decree nisi without notice to the respondent, quite apart from the fact that the rules require notice. It is an affront to the rules of natural justice. Mr Hornby says that it all stems from the wife's failure to acknowledge service, but that, with respect, is not correct. It stems from three things. First, the wife's failure to acknowledge service; secondly, the husband's solicitors' failure to inform their professional colleagues of what was going on to a degree which might reasonably be considered by the wife's solicitors to amount to conduct which lulled them into a sense of false security; and, thirdly, and primarily, from the failure by the court to give the notice which the court is required to give."

Parker and Woolf LJJ agreed. The court (page 34) set aside the decree nisi and directed a re-hearing. So far as I can see there was no explicit judicial statement as to whether the decree was voidable or void.

67. Finally, for the moment, the decision of the Court of Appeal in *Nissim v Nissim* [1988] Fam Law 254 (the case is not otherwise reported but I was supplied with a copy of the Official Transcript). Following the transfer by the Peterborough County Court to the High Court of a divorce petition, the petition was purportedly transferred back to the County Court pursuant to rule 27 of the Matrimonial Causes Rules 1977. Subsequently a judge in the County Court granted a decree nisi. In fact, rule 27 had been revoked and due to a lacuna in the drafting of section 38(2) of the Matrimonial and Family Proceedings Act 1984 there was no power to transfer the case back to the County Court. May LJ, with whom Ewbank J agreed, said (I quote from the Transcript):

> "the order of the learned District Registrar … purporting to transfer the present suit back to the Peterborough County Court pursuant to rule 27 of the Matrimonial Causes Rules 1977 was made without jurisdiction and was a nullity. It follows that the suit remained in the High Court … [on the date when the decree nisi was made] the County Court had no jurisdiction over the suit. So in my judgment that decree nisi also was a nullity."

68. I pause at this point to take stock. In the preceding paragraphs I have considered twelve cases. In four cases – *Woolfenden v Woolfenden* [1948] P 27, *Everitt v Everitt*

[1948] 2 All ER 545, *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336 and *Nissim v Nissim* [1988] Fam Law 254 – the decree was held to be a nullity and void. In six cases – *Wiseman v Wiseman* [1953] P 79, *F v F* [1971] P 1, *P v P* [1971] P 217, *Dryden v Dryden* [1973] Fam 217, *Wright v Wright* [1976] Fam 114 and *Batchelor v Batchelor* [1984] FLR 188 – the decree was held voidable, not void. In the other two cases – *O'Connor v Isaacs and others* [1956] 2 QB 288 and *Walker v Walker* [1987] 1 FLR 31 – it was not made explicit whether the order was void or voidable.

69. It can be seen that the cases where the consequence of what had happened was that the decree was a nullity and void fall into three categories:

i) One case where the court had no jurisdiction to entertain the proceedings at all (*Nissim v Nissim* [1988] Fam Law 254).

ii) Two cases where the petition had not been served and the principle in *Craig v Kanssen* [1943] KB 256 was applied (*Everitt v Everitt* [1948] 2 All ER 545 and *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336).

iii) One case where there had been non-compliance with what is now section 9(2) of the Matrimonial Causes Act 1973 (*Woolfenden v Woolfenden* [1948] P 27).

70. Against this background, I come to the next case, the decision of Sir Stephen Brown P in *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, which is central to the issues I have to grapple with. This was a case where a decree nisi and decree absolute were granted although the petition had been presented less than one year after the marriage and therefore in non-compliance with section 3 of the Matrimonial Causes Act 1973. Sir Stephen held that the petition was a nullity, which the court had no jurisdiction to entertain, and that the decree nisi and decree absolute were null and void.

71. It is useful to see how Mr James Holman, as he then was, put the argument on behalf of the Queen's Proctor. Sir Stephen summarised it as follows (page 117):

> "Accordingly, submits Mr Holman, by operation of statute rather than as a consequence of the provisions of any rules of court, a petition presented before the expiration of one year from the date of the marriage is null and void and a court therefore has no jurisdiction to entertain it …
>
> By reference to a number of authorities, beginning with *Spawforth v Spawforth* [1946] P 131, *Woolfenden v Woolfenden* [1948] P 27 and to the decision in *Dryden v Dryden* [1973] Fam 217, Mr Holman has felt constrained to argue that in a case where the petition upon which the decree of divorce is founded is one which breaches the provisions of s. 3 of the Matrimonial Causes Act 1973, as amended, there is an inescapable statutory bar which prevents a court from exercising a discretion to alleviate a situation which might

> nevertheless appear to be one brought about by genuine and honest mistake.
>
> He has also referred to the case of *Nissim v Nissim* [1988] Fam. Law 254 which, whilst not dealing with the same situation, provides an example of a defect arising as a result of a breach of a statutory provision. This shows that although it may be looked upon as being highly technical, nevertheless a breach of a statutory provision is fundamental and, unhappily, has the effect of rendering decrees pronounced in apparent good faith null and void."

72. Sir Stephen continued (pages 117, 118):

> "I am satisfied that Mr Holman has correctly stated the position in law where there is a fundamental breach of the provisions of s. 3(1) of the Matrimonial Causes Act 1973, as amended …
>
> There is unfortunately, as is submitted by the Queen's Proctor, a situation which cannot be put right merely by an order of this court. It cannot render valid a decree which was in fact void by statute and not merely voidable."

73. In *Callaghan v Hanson-Fox and another* [1992] Fam 1, [1991] 2 FLR 519, a husband sought to set aside a decree absolute on the ground that the petitioner wife (since deceased) had sworn a false affidavit in support of the petition. The claim was dismissed by Sir Stephen Brown P. The applicant relied upon *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336 and *Wiseman v Wiseman* [1953] P 79. Again, Sir Stephen had the assistance of Mr Holman, by now Mr James Holman QC, as amicus curiae instructed by the Queen's Proctor. Again, it is convenient to go first to Mr Holman's submissions as summarised by Sir Stephen (page 8):

> "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 WLR 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 … In *Butler v Butler (Queen's Proctor intervening)* [1990] 1 FLR 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."

74. Sir Stephen then quoted passages from *Bater v Bater* [1906] P 209, *Kemp-Welch v Kemp-Welch* [1912] P 82 and *Crosland v Crosland* [1947] P 12 before continuing (page 10):

> "In my judgment those passages in the judgments to which I have referred although not directly relevant to the issue in this case emphasise the unimpeachable character of a decree absolute. 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.
>
> In this case the plaintiff was a full, consenting party to the divorce proceedings. There was no want of jurisdiction in the court which pronounced the decree and no procedural irregularity. Both the plaintiff himself by his action in consenting to the decree, and the world at large recognised the decree during all the subsequent years which passed until the death of the wife."

75. In *Manchanda v Manchanda* [1995] 2 FLR 590 a decree absolute had been granted in circumstances where there had been non-compliance with both section 9(2) of the Matrimonial Causes Act 1973 and rule 2.50(2) of the Family Proceedings Rules 1991. Section 9(2):

> "Where a decree of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such application, the party against whom it was granted may make an application to the court, and on that application the court may exercise any of the powers mentioned in paragraphs (a) to (d) of subsection (1) above."

The power mentioned in section 9(1)(a) was to make the decree absolute. Rule 2.50(2):

> "An application by a spouse for a decree nisi pronounced against him to be made absolute may be made to a judge or district judge, and the summons by which the application is

> made … shall be served on the other spouse not less than four clear days before the day on which the application is heard."

It will be appreciated that section 9(2) is the modern successor of section 183 (3) of the Supreme Court of Judicature (Consolidation) Act 1925, which had been considered in *Woolfenden v Woolfenden* [1948] P 27, while rule 2.50(2) was the successor of rule 66(2) of the Matrimonial Causes Rules 1977, considered in *Batchelor v Batchelor* [1984] FLR 188.

76. The question for the Court of Appeal was whether the decree absolute was a nullity and void, or merely voidable. It was common ground that the case was indistinguishable from *Woolfenden v Woolfenden* [1948] P 27, so the issue became (page 592) whether *Woolfenden v Woolfenden* was correctly decided. The Court of Appeal held that it was and followed the earlier case.

77. Leggatt LJ referred to eight cases in each of which the order was held voidable. The first three – *F v F* [1971] P 1, *P v P* [1971] P 217 and *Wright v Wright* [1976] Fam 114 – he identified (page 593) as being:

> "cases in which though the court enjoyed jurisdiction, it inadvertently failed to observe a statutory prohibition against the exercise of it."

The other five – *McPherson v McPherson* [1936] AC 177, *Wiseman v Wiseman* [1953] P 79, *Dryden v Dryden* [1973] Fam 217, *Batchelor v Batchelor* [1984] FLR 188 and an adoption case, *In re F (Infants) (Adoption Order: Validity)* [1977] Fam 165 (where adoption orders were held voidable by the Court of Appeal, citing *Woolfenden* as a case where there was 'a total failure' to comply with the rules relating to service and distinguishing it from *P v P* and *F v F*) – Leggatt LJ identified (page 594) as being cases:

> "in which the order was held voidable for procedural reasons."

78. Leggatt LJ continued (pages 594-595):

> "To be contrasted with these cases are eight further cases in each of which the order was held to be void. In the first two the court inescapably lacked jurisdiction. In *Re Pritchard, Pritchard v Deacon* [1963] Ch 502 this court held an originating summons under the Inheritance Act 1938, issued in a district registry which did not have jurisdiction, to be a nullity. Upjohn LJ specifically referred to non-service as giving rise to 'true nullity'. The other such case was *Nissim v Nissim* [1988] Fam Law 254 in which an order transferring divorce proceedings to the county court was held by this court to have been made without jurisdiction and was accordingly void. In *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114 Sir Stephen Brown P after referring to *Woolfenden*, *Dryden* and *Nissim* expressed himself satisfied that counsel for the Queen's Proctor had correctly stated the position in law when he submitted that by operation of statute a petition presented

> before the expiration of one year from the date of the marriage is null and void, and a court therefore has no jurisdiction to entertain it. *Woolfenden* was itself a case involving both a fundamental breach of a comparable statutory provision and a failure to serve, and so give notice of, proceedings. There remain four other cases in which through want of service orders subsequently made were held void, examples of what in *Re Pritchard* Upjohn LJ had called 'true nullity'. The first two such cases are *Craig v Kanssen* and *Everitt* … In *Ebrahim v Ali (Otherwise Ebrahim) and Queen's Proctor (Intervening)* [1984] FLR 95 once again the petition was not served, and Sir John Arnold P in reliance on *Woolfenden* held the resultant decree void. Finally, in *Walker v Walker* [1987] 1 FLR 31 a decree nisi was set aside in this court without citation of authority in another case in which a decree nisi had been pronounced without the respondent having been notified of the hearing."

79. He continued (page 595):

> "In my judgment a distinction has to be drawn between cases in which the court lacks jurisdiction because it has no power to grant a decree absolute in the circumstances in which it has purported to do so, and cases in which though the court enjoys jurisdiction, it has through the inadvertence of one of the parties failed to observe a statutory provision against the exercise of it, or there has been a procedural irregularity in the process of exercising it. This case falls within the former category, as is shown by *Callaghan v Hanson-Fox* …, in which Sir Stephen Brown P specifically approved *Woolfenden*. In addition, all the cases I have cited relating to service, save for *Batchelor* which is to be doubted, show that the failure to serve a summons on the wife in accordance with r 2.50 renders the decree absolute null and void, and the wife is entitled to have it set aside. The jurisdictional and fundamental procedural irregularities are both fatal. I would allow the appeal and set aside the decree absolute."

It will be noted that although Leggatt LJ expressed doubt about the decision in *Batchelor v Batchelor* [1984] FLR 188, he did not question the correctness of the decision in *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114. Thorpe J agreed that the appeal should be allowed for the reasons given by Leggatt LJ.

80. *Moynihan v Moynihan (Nos 1 and 2)* [1997] 1 FLR 59 was an application by the Queen's Proctor to set aside a decree absolute as null and void on the ground that it had been obtained by the petitioner's fraud. The details of the petitioner's many frauds are described by Sir Stephen Brown P in his judgment in *Moynihan (No 2)*, but the key point (page 66) was that:

> "In order to deceive the court into accepting jurisdiction in his divorce suit, he told quite deliberate lies. He persisted in and added to the lies when the registrar at Tunbridge Wells County Court required confirmation and further elucidation of the domicile position. Those lies enabled the court to accept jurisdiction and to proceed to deal with the divorce suit. However, this was not his only deceit of the court. I am satisfied on the balance of probability that neither the respondent wife nor the co-respondent was served with the petition. Lord Moynihan arranged for false acknowledgements of service to be returned to the court, and yet a further deception related to the child of the family, A."

81. Explaining why the decree absolute was a nullity, Sir Stephen said this (pages 67-68):

> "A decree absolute is generally considered to be good against all the world. It is an order 'in rem'. However, if it has been obtained by fraud, there is a fundamental defect. In this case, I have no doubt that Lord Moynihan's divorce petition was deliberately framed in a way which was calculated to deceive the court. All the subsequent representations and submissions which were made to the court were vitiated by fraud. He wished to obtain a divorce. He wished to do so even if his wife objected to it, as I believe she did or would have objected, if only on financial grounds. He quite deliberately set out to deceive the court. His affidavit verifying the petition was false, and in swearing it he committed perjury. He perverted the course of justice and succeeded in obtaining a decree. It is a gross case. The inevitable consequences to all are serious. I have no doubt that I should set aside and declare null and void the decree absolute and the decree nisi and dismiss the petition."

82. In the next case, *Krenge v Krenge* [1999] 1 FLR 969, a husband sought to have a decree absolute set aside as a nullity in a situation where there had been, as Holman J put it (page 973), "a catalogue of errors, misjudgments or delays at different stages by almost everyone involved in this case." For present purposes, I need refer only to three matters:

    i) The court *had* sent the husband, in accordance with rule 2.36(2) of the Family Proceedings Rules 1991, a 'Certificate of Entitlement to a Decree' containing formal notice of the date fixed for pronouncement of a decree nisi.

    ii) On the other hand, the court did *not* send the husband a copy of the decree nisi, as required by rule 10.16(1) of the Family Proceedings Rules 1991, until after the decree absolute had been granted.

    iii) Furthermore, the search of the records required by rule 2.49 of the Family Proceedings Rules 1991 to be carried out by the court before the decree is made absolute, if it took place, failed to reveal, as it should, the fact that the

husband had sought a stay of the proceedings, which application was still outstanding.

83. In relation to the first of these failures, Holman J, having considered *Dryden v Dryden* [1973] Fam 217 and *Manchanda v Manchanda* [1995] 2 FLR 590, said this (pages 977-978):

> "Mr Scott submits that if failure to serve on a petitioner an application by a respondent to make the decree absolute (as required by r 2.50) renders the decree absolute null and void, then so must a failure to serve the decree nisi itself. He submits that it is, in the phrase used in *Walker v Walker* [1987] 1 FLR 31, 34A, 'an affront to the rules of natural justice'.
>
> I do not agree. Certainly there was a serious irregularity since r 10.16(1) of the Family Proceedings Rules 1991 requires that 'a copy of every decree shall be sent by the proper officer to every party to the cause' …
>
> If the court had failed to send to the respondent or (once they were on the record) his solicitors *both* the certificate of entitlement to a decree *and* the decree nisi, then, in my view, the decree absolute would necessarily be void and bound to be set aside. But the failure alone to send the decree nisi, although serious, is, in my judgment, on the other side of the line. It does not fall within any of Sir George Baker's categories in *Dryden*. It is not truly analogous with the failure to serve an application as in *Woolfenden* or *Manchanda* In those cases the other party was not told, as he or she should have been, that something was being applied for. In the present case the husband did not receive confirmation that something had happened (viz the grant of the decree nisi) which he had already been told would happen on a stated date. It is not 'an affront to natural justice'. As Sir George Baker said in *Dryden*, I 'should strive to hold that a decree absolute is voidable rather than void'. In my judgment, the failure renders the decree voidable but not void."

84. In relation to the second failure, Holman J said (page 979):

> "However, r 2.49(2) requires a search to be made and the district judge to be satisfied as to the matters listed in paras (a) to (g) of that rule. I have no reason to assume that a search was not made in this case. The rule does not provide, nor in my judgment require, that if the search is inadequately made, or if the searcher, or the district judge himself, makes a mistake, the resulting decree absolute is void. In my judgment this irregularity, too, renders the decree absolute in this case voidable but not void."

85. In *Dennis v Dennis* [2000] 2 FLR 231, a sustained attack was mounted before Wall J to the effect that *Manchanda v Manchanda* [1995] 2 FLR 590 had been wrongly

decided or, alternatively, that it could not survive the Human Rights Act 1998. Essentially, the error, as in *Manchanda v Manchanda*, was that the decree absolute had been granted on the application of the respondent *before* the date permitted by section 9(2) of the Matrimonial Causes Act 1973. Wall J held that the case was indistinguishable from *Woolfenden v Woolfenden* and *Manchanda v Manchanda*; that he was bound by *Manchanda v Manchanda*; and that there was nothing in the Human Rights Act 1998 which required or enabled the court to treat the decree absolute as voidable rather than void. As he said (page 249):

> "The fact that the decree absolute is void under the principles set out in *Manchanda v Manchanda* (as I find it to be) does not give rise to any breach of the respondent's right under the Human Rights Act 1998."

86. Finally, I should refer to my own judgment in *Rapisarda v Colladon: Re 180 Irregular Divorces* [2014] EWFC 35, [2015] 1 FLR 597. That was what I described (para 1) as "a conspiracy to pervert the course of justice on an almost industrial scale," there being no fewer than 180 divorces in relation to which the Queen's Proctor applied to dismiss the petitions and also, in many of the cases, to set aside decrees of divorce (some nisi, some absolute) on the ground of fraud. In each of the cases before me jurisdiction was sought to be founded in accordance with, in most of the cases, the fifth or, in a small minority of the cases, the third limb of Article 3(1)(a) of the Council Regulation. So, in every case it was being asserted that either the petitioner or the respondent was habitually resident in England and Wales at a property called Flat 201. In fact, in every case that was a lie, supported by false and in some cases perjured statements. None of the parties was even resident in England. Flat 201 was not a residential property; it was a mail box. The Queen's Proctor's case (para 16) was essentially that in each of the cases the proceedings were fraudulent from beginning to end and, in particular, that each of the decrees, whether a decree nisi or a decree absolute, was procured by fraud.

87. So far as material for present purposes, I can start with this (para 7):

> "For reasons which will become apparent in due course, it is important to distinguish two different senses in which the word jurisdiction is used. The first, what I will call 'jurisdiction to entertain the petition', goes to the logically prior question of whether the English court has any jurisdiction at all to receive, hear and consider the petition. The other, what I will call 'jurisdiction to grant a decree', goes to the question of whether the English court, assuming that it has jurisdiction to entertain the petition, has jurisdiction to grant a decree of divorce."

I then posed the questions (para 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?"

To answer these questions, I then turned to examine in some detail the decisions of Sir Stephen Brown P in *Callaghan v Hanson-Fox and another* [1992] Fam 1, [1991] 2 FLR 519, and *Moynihan v Moynihan (Nos 1 and 2)* [1997] 1 FLR 59.

88. In relation to *Callaghan v Hanson-Fox* I said this (para 23):

> "On the assumed facts on which Sir Stephen Brown P decided the case, the fraud relied on was perjury. Going back to the distinction I drew … between 'jurisdiction to entertain the petition' and 'jurisdiction to grant a decree', the perjury in *Callaghan v Hanson-Fox* went only to the latter, for it concerned the facts required to satisfy the requirements of section 1 of the Matrimonial Causes Act 1973. From this I can, I think, properly draw two conclusions as to what it was that Sir Stephen decided in *Callaghan v Hanson-Fox*: first, that perjury without more does not suffice to make a decree absolute void on the ground of fraud; and, secondly, that 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."

89. In relation to *Moynihan v Moynihan* I said this (para 28):

> "There is in my judgment no inconsistency between Sir Stephen Brown P's two judgments. As one would expect they are entirely compatible. In *Moynihan* there was systematic perjury throughout the proceedings, indeed perjury infecting almost every matter of significance. But – and this, in my judgment, is the important point, and in the final analysis the basis of Sir Stephen's decision – there was perjury and fraud on the court in relation to the question of the court's jurisdiction to entertain the petition. That is the crucial distinction between the two cases. When Sir Stephen … spoke of the petitioner having 'deceive[d] the court into accepting jurisdiction in his divorce suit', he was plainly referring to jurisdiction in the sense of jurisdiction to entertain the petition. Moreover, and in this respect again the two cases are clearly distinguishable, there was in *Moynihan* what Sir Stephen in *Callaghan v Hanson-Fox* had described as procedural irregularity, indeed, procedural irregularity on a massive scale, not least in relation to the gross fraud and deception practised by the petitioner not merely on the court but also on the respondent."

90. My conclusion, therefore, was (para 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.
>
> As will become apparent, it is the third of these propositions which is determinative in this case."

91. My conclusion on the facts was (para 79) that:

> "In each of these cases the assertion that the English court had jurisdiction to entertain the petition was founded on a lie, the lie that either the petitioner or, in some cases the respondent, resided at Flat 201. The English court was deceived; it was induced by fraud to accept that it had jurisdiction to entertain the petition."

My conclusion on the law was (paras 80-81):

> "80 It is quite clear that in each of these cases the English court was being deceived. Importantly, that deception went not just to what I have called the court's jurisdiction to grant a decree; more fundamentally it went also to the court's jurisdiction to entertain the petition.
>
> 81 There is no need for me to go any further. On the authority of *Callaghan v Hanson-Fox* … and *Moynihan v Moynihan* …, these findings alone suffice to establish fraud rendering both the decree nisi and the decree absolute void."

92. In *Grasso v Naik and Bhatoo (Twenty One Irregular Divorces)* [2017] EWHC 2789, [2018] 1 FLR 753, a case analytically indistinguishable from *Rapisarda v Colladon*, I merely followed my own previous decision. In *Hermens v Hermens, The Queen's Proctor Intervenor* [2017] EWHC 3742 (Fam), Baker J, as he then was, followed my two decisions. So *Grasso v Naik* and *Hermens v Hermens* do not add to the jurisprudence.

Analysis

93. Pausing again to take stock, there are now, leaving *Grasso v Naik and Bhatoo (Twenty One Irregular Divorces)* [2017] EWHC 2789, [2018] 1 FLR 753, and *Hermens v*

Hermens, The Queen's Proctor Intervenor [2017] EWHC 3742 (Fam), out of account, eight cases in which the decree was held to be a nullity and void: *Woolfenden v Woolfenden* [1948] P 27, *Everitt v Everitt* [1948] 2 All ER 545, *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336, *Nissim v Nissim* [1988] Fam Law 254, *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, *Manchanda v Manchanda* [1995] 2 FLR 590, *Moynihan v Moynihan (Nos 1 and 2)* [1997] 1 FLR 59 and *Rapisarda v Colladon: Re 180 Irregular Divorces* [2014] EWFC 35, [2015] 1 FLR 597.

94. It can be seen that the cases where the consequence of what had happened was that the decree was a nullity and void fall into four categories:

i) Two cases where the court had no jurisdiction to entertain the proceedings at all (*Nissim v Nissim* and *Butler v Butler*).

ii) Two cases where the court was persuaded to accept jurisdiction by fraud (*Moynihan v Moynihan* and *Rapisarda v Colladon*).

iii) Two cases where the petition had not been served and the principle in *Craig v Kanssen* [1943] KB 256 was applied (*Everitt v Everitt* and *Ali Ebrahim v Ali Ebrahim*).

iv) Two cases where there had been non-compliance with what is now section 9(2) of the Matrimonial Causes Act 1973 (*Woolfenden v Woolfenden* and *Manchanda v Manchanda*).

95. Leaving on one side the cases in categories (ii) and (iii), where the outcome was determined by the application of some general principle of law and not on any question of non-compliance with some particular statutory requirement, and adopting the distinction between 'jurisdiction to entertain the petition' (ie, whether the court has any jurisdiction at all to receive, hear and consider the petition) and 'jurisdiction to grant a decree' (ie, whether the court, assuming that it has jurisdiction to entertain the petition, has jurisdiction to grant a decree of divorce) which I drew in *Rapisarda v Colladon: Re 180 Irregular Divorces* [2014] EWFC 35, [2015] 1 FLR 597, para 7, one difference between the cases in categories (i) and (iv) is that the former relate to instances where the court had no jurisdiction to entertain the petition, whereas the latter were cases where the court *did* have jurisdiction to entertain the petition.

96. I therefore conclude that the answer to the central issue I have to determine:

i) is *not* to be determined by the distinction I drew in between *Rapisarda v Colladon: Re 180 Irregular Divorces* [2014] EWFC 35, [2015] 1 FLR 597, para 7 – that is a distinction important in cases which may fall within category (ii), but it does not assist in determining whether or not a case falls within category (iv);

ii) is *not* to be determined by a mechanical application of Barnard J's test in *Woolfenden v Woolfenden* [1948] P 27 (has the litigant "complied with the statute"?) – there is, as we have seen, a long line of cases where, despite non-compliance with some statutory requirement, the consequence has been that the decree is voidable, not void.

97. What then is the true distinction between, on the one hand, *Woolfenden v Woolfenden* [1948] P 27 and *Manchanda v Manchanda* [1995] 2 FLR 590, and, on the other hand, all the other cases? Leggatt LJ, as we have seen, drew a distinction between:

> "cases in which the court lacks jurisdiction because it has no power to grant a decree absolute in the circumstances in which it has purported to do so"

and

> "cases in which though the court enjoys jurisdiction, it has through the inadvertence of one of the parties failed to observe a statutory provision against the exercise of it."

In other words, Leggatt LJ saw the relevant distinction as being between cases where the court *did* and cases where the court did *not* have jurisdiction.

98. What were the features of *Woolfenden v Woolfenden* and *Manchanda v Manchanda* which meant that the court did not, in Leggatt LJ's sense of the word, have jurisdiction? Although he did not go on to reason it out explicitly, there are, as it seems to me, three aspects of section 183, now section 9(2), which, taken together, point to the answer:

i) First, the section confers power on the court to grant a decree absolute on the application of *respondent*, in circumstances where, for whatever reason, the *petitioner* has not sought to do so.

ii) Secondly, the power is expressly conferred on the court where, and only where, the respondent has made the appropriate application.

iii) Thirdly, the application can be made only after the expiration of the specified period of three months.

One can well see why, given the fact that the court is being invited to make an order, which, if made, will bind the petitioner, on the application of the respondent, and given the very precise statutory procedure which has to be complied with before the court can make the order, non-compliance with the statutory procedure should be treated as going to jurisdiction in Leggatt LJ's sense of the word. These are not features one sees in the other cases.

'Void' and 'voidable'

99. The central issue is this case is whether, as Mr Murray asserts, the decrees are nullities and void or whether, as Ms Bazley asserts, they are merely voidable. There is no doubt that, short of the Supreme Court, the distinction is embedded in this area of law: compare the decisions of the Court of Appeal in *P v P* [1971] P 217 (decrees voidable) and in *Manchanda v Manchanda* [1995] 2 FLR 590 (decrees void). I can see no basis for any assertion – and this has not been suggested before me – that, for the purposes of the doctrine of precedent, either of these decisions of the Court of Appeal was 'wrong' or decided *per incuriam*. It follows that it is the duty of a judge a first instance, and, indeed, on this premise, of the Court of Appeal, to follow them

both. I should add that, for reasons I will shortly be explaining, there is not in fact, in my judgment, any conflict let alone inconsistency between what was decided by the Court of Appeal in these two cases, nor between the lines of reasoning which underpin them. That said, I suspect that most judges would associate themselves with Sir George Baker P's weary observation in *Dryden v Dryden* [1973] Fam 217, page 234, that "I find it impossible to discover any clear and logical principle from the decided cases."

100. That apart, there are, I think, three general conclusions to be drawn from this survey of the jurisprudence:

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. That is something one finds sometimes stated in terms – as by Phillimore LJ in *P v P* [1971] P 217, page 225, by Sir George Baker P in *Dryden v Dryden* [1973] Fam 217, page 236, by Rees J in *Wright v Wright* [1976] Fam 114, page 124, and by Holman J (who, as we have seen, knows a lot about these things) in *Krenge v Krenge* [1999] 1 FLR 969, page 978 – and it is, in truth, implicit in much of the analysis which underpins all these cases. And the language used is typically robust. If Phillimore LJ confined himself to the proposition that a court "ought not lightly to treat a decree absolute as void", Sir George Baker P, followed by Holman J, said that the court "should strive to hold that a decree absolute is voidable rather than void", while Rees J said that the court "should only hold a decree absolute to be void if driven by the terms of the relevant statute so to hold."

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. This, as Ms Bazley points out, is a general principle extending across matrimonial law and including such matters as the recognition in this jurisdiction of foreign divorces. In addition to the authorities I have already cited, Ms Bazley helpfully referred me to others, including, for example, the dicta of Scott LJ in *Meier v Meier* [1948] P 89, page 93, quoted by Sir Jocelyn Simon P in *F v F* [1971] P 1, page 13; of Sir Jocelyn himself on the same page ("the importance that Parliament attaches to the certainty of the change of status arising out of a decree absolute"); of Hughes J in *El Fadl v El Fadl* [2000] 1 FLR 175, page 191; of Stephen Wildblood QC in *H v H (The Queen's Proctor Intervening) (Validity of Japanese Divorce)* [2006] EWHC 2989 (Fam), [2007] 1 FLR 1318, para 183; and of Parker J in *NP v KRP (Recognition of Foreign Divorce)* [2013] EWHC 694 (Fam), [2014] 2 FLR 1, para 131.

101. Putting the issue in its wider context, Mr Murray helpfully took me to the discussion, in the eighth edition of *De Smith's Judicial Review*, paras 4-058 to 4-074, of current thinking about the distinction in public law (that is, public law as the expression would be understood by administrative lawyers, rather than as it might be understood

by family lawyers) between acts or decisions which are void and those which are voidable. It is reassuring to see that family lawyers are not the only ones who struggle with the distinction, for the authors observe (para 4-058) that "Behind the simple dichotomy … lurk terminological and conceptual problems of excruciating complexity" and go on to cite (para 4-070) a dispute within the Academy where the view of one corner is denounced by the other as "a tissue of pseudo-conceptualism behind which lurks what is in reality a *pragmatic* conclusion." Grateful though I am to Mr Murray, it is neither necessary nor appropriate for me to chart these difficult waters, though I note the view of the authors (para 4-062) that in the public law context the distinction has been "eroded" by the courts, which "have become increasingly impatient with the distinction."

Discussion: void or voidable

102. At the end of this long analysis of the jurisprudence, I have come to the clear conclusion that the consequence of what happened in this case is that the decrees are voidable, not void.

103. I can set out my reasoning as follows, taking the points in no particular order:

i) First, there is no previous case directly in point. The present case turns on statutory provisions linguistically and analytically different from those in play both in *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, and in *Manchanda v Manchanda* [1995] 2 FLR 590.

ii) Secondly, I should lean against holding the decrees void unless driven to that conclusion by the language and context of the relevant statute, here section 1(2) of the Matrimonial Causes Act 1973.

iii) Thirdly, and applying the approach articulated by Sir Jocelyn Simon P in *F v F* [1971] P 1, I need to ask myself whether Parliament can really have intended that the consequence here should be that the decrees are nullities and void. My answer is that Parliament surely cannot have intended the injustice which will inevitably flow, not just to M and P but also to their new spouses, if the decrees are void.

iv) Fourthly, and as I have already explained, the fact that there has been non-compliance with the statute is not determinative.

v) Fifthly, although recognising that the statutory context is different, the fact is that the structure of section 1(2) of the Matrimonial Causes Act 1973 – "the court … shall not … unless the petitioner satisfies the court" – is indistinguishable from that in both section 33(1) of the Matrimonial Causes Act 1965 and section 6 of the Divorce Reform Act 1969 (now section 10 of the 1973 Act) – "the court shall not … unless it is satisfied" – and the case-law is all at one that in those cases the consequence of non-compliance is not that the decree is void but rather that it is voidable.

vi) Sixthly, both the statutory context and the structure and language of section 1(2) of the 1973 Act are markedly different from the context, structure and language of section 9(2).

vii) Seventhly, it is quite clear that there was here no non-compliance with section 3 of the 1973 Act, so that, in contrast to the situation in *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, the court here *did* have jurisdiction to entertain the petition.

viii) Eighthly, the petition correctly pleaded the only relevant *ground*, namely that "the marriage has broken down irretrievably".

ix) Ninthly, the error in correctly identifying the relevant *fact* did not prevent the court entertaining the petitioner's subsequent application for a decree: in Leggatt LJ's sense of the word, District Judge Steel had jurisdiction to hear the petitioner's application for a decree nisi. The District Judge's error was, to adopt Leggatt LJ's words, an inadvertent failure to observe a statutory provision – section 1(2) of the 1973 Act – against the exercise of it.

x) Tenthly, there was in the present case another *fact* in existence at the date of the petition which if properly pleaded – by an amendment of the petition – would undoubtedly have justified the court granting a decree nisi and thereafter making the decree absolute.

xi) Finally, although this is not, I emphasise, a necessary pre-requisite to my conclusion, in the present case the evidence to establish that *fact* was actually set out in Part 6 of the petition. So, in this particular case, the defect in the petition came down to this: that the cross had been put in the wrong box in Part 5 – a defect simply curably by putting the cross in the correct box. It is sometimes said that Roger Casement was hanged by a comma, but, whatever the truth of that, one has to ask what conceivable principle of justice or public policy could possibly be served by treating as nullities decrees where the parties were the innocent victims of failure by the court itself, and where their subsequent marriages, entered into in complete good faith and in reliance upon the court's own orders, would thereby be treated as bigamous, when the entire problem derives from the fact that a cross was placed in the wrong box. We are no longer in the days of Parke B. Surely the modern judicial conscience would revolt if compelled to come to such a conclusion.

Discussion: discretion

104. I can take this very shortly. There is nothing to be gained in exploring how discretion was exercised in the various cases to which I have referred. This must always depend, in the final analysis, upon the circumstances of the particular case, and the present case, happily, is most unusual.

105. The simple reality, in my judgment, is that there is only one way in which discretion can possibly be exercised here. M and P, to repeat yet again, are victims of the justice system; neither of them wishes the decrees to be disturbed; both have remarried on the faith of the decrees; both they and their new spouses would suffer grave hardship, emotional and social, were the decrees to be disturbed; and both they and their new spouses would face a possibility which cannot be ignored of disadvantageous treatment by State actors both here and in Brazil were the decrees to be disturbed: in this country because of the possible actions of the Home Office and in Brazil in the form of criminal proceedings for bigamy. (Happily, there could be no prospect of that

in this country: see the discussion in *Archbold Criminal Pleading Evidence and Practice 2019*, para 31-9 of *R v Tolson* (1889) 23 QBD 168 and, more particularly, *R v Gould* [1968] 2 QB 65.) In these circumstances there can be no question of avoiding these decrees. To do so would be to add insult to the injury already inflicted on these innocent people by the State's blunderings. Every principle of justice and public policy demands that, as I do, I exercise discretion in their favour. There is, as it seems to me, irresistible force in the point made by Ms Bazley and Ms Dunseath that people are entitled to plan their lives in accordance with judgments of the court; that in this case the parties have, essentially, twice been granted relief by the courts (first when the decrees were originally granted; secondly, when the decrees were upheld by District Judge Middleton-Roy); and that it would be unjust to both parties to determine that they have been living their lives under the auspices of a status twice vindicated by the courts, but which, nevertheless, turns out to be false. I should add that the Queen's Proctor entirely concurred with the parties, in the event that the decrees were found to be voidable, on the question of the exercise of discretion in their favour in these circumstances.

Discussion: amendment of the decree nisi

106. It follows that, in principle, District Judge Middleton-Roy was entirely right in the course he took, including by amending the petition in the way he did. There was, of course, no need to amend the decree absolute to reflect the amendment of the petition, because a decree absolute does not set out the facts on which, in accordance with section 1(2) of the Matrimonial Causes Act 1973, the decree has been granted. In contrast, a decree nisi does (see paragraph 27 above). The question has therefore been raised as to whether I can, and, if I can, whether I should, amend the decree nisi to reflect the amendment of the petition.

107. Ms Bazley and Ms Dunseath identify two possibly relevant powers referred to in the Family Procedure Rules 2010: first, the power under rule 29.16(1) (the 'slip rule') "at any time [to] correct an accidental slip or omission in a judgment or order"; and, secondly, the general power under rule 4.1(6) – which is in the same terms as CPR rule 3.1(7) – to "vary or revoke" an order.

108. This is not the occasion, nor is there any need for me, to explore the proper ambit of the 'slip rule'. However far it may or may not extend, it does not, in my judgment, enable the decree nisi here to be amended in the way which is required. District Judge Steel may have been mistaken as to the true basis upon which the petition was, or, more accurately, should have been, proceeding, but the fact is that the decree nisi as drawn accurately reflected the basis upon which he believed he was proceeding and, more to the point, the basis upon which he intended to proceed – namely to grant the decree on the footing that the petition was brought under section 1(2)(d) of the Matrimonial Causes Act 1973. I decline, therefore, to make an order under the slip rule.

109. There is much authority, both in the family and more particularly in the civil jurisdictions, as to how and in what circumstances the powers under FPR 4.1(7) and CPR 3.1(7) should be exercised. Ms Bazley and Ms Dunseath have helpfully taken me to a number of well-known authorities, including *Roult v North West Strategic Health Authority* [2009] EWCA Civ 444, [2010] 1 WLR 487, *Tibbles v SIG Plc (t/a*

Asphaltic Roofing Supplies) [2012] EWCA Civ 518, [2012] 1 WLR 2591, and *Arif v Zar and anor* [2012] EWCA Civ 986, [2012] WLR(D) 239. The present case is very far removed indeed from any of those cases and, indeed, from the other cases in which FPR 4.1(7) and CPR 3.1(7) have been considered.

110. I readily acknowledge that, despite the seemingly unrestricted language of the rule, the court does not have unlimited power and that, in many circumstances the proper way of challenging an order is by way of appeal. That said, however, it would be a denial of justice in the most unusual circumstances with which I am here faced if I were to refuse to exercise a power which, in my judgment, I plainly have. Quite apart from anything else, the matter comes before me, quite properly at first instance, at the behest of the Queen's Proctor. How can justice properly be done if I decline to exercise my powers and send that part of the case off to the Court of Appeal – even assuming that anyone would be willing to bring an appeal. I have power under FPR rule 4.1(6) to make the order which is, in my judgment, necessary to bring the decree nisi into accord with the amended petition and the justice of the case.

111. I shall therefore order that the decree nisi granted by District Judge Steel on 21 November 2013 be varied by substituting for the words "held that the petitioner and respondent have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, and that the respondent consents to a decree being granted" the words "held that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent." The following rubric will be added to the decree nisi: "Varied in accordance with FPR 2010 rule 4.1(6) with effect from 18 January 2017 by order of Sir James Munby dated 22 March 2019."

Conclusion

112. For all these reasons I have concluded (i) that the decree nisi and the decree absolute are voidable, not void; (ii) that neither decree will be set aside – with the consequence that the decree absolute remains valid and in force; and (iii) that the decree nisi should be varied in accordance with FPR 4.1(6) in the terms set out in paragraph 111 above.

New petition

113. In order to preserve her position, as best she might, were the decrees to be held nullities and void, P issued a new petition for divorce on 10 October 2018. Given my decision, there is no need for P to proceed with that petition. I shall accordingly strike it out.

RRO

114. At the outset of the hearing on 28 February 2019 I made an order pursuant to section 1(4) of the Judicial Proceedings (Regulation of Reports) Act 1926 permitting unrestricted reporting of the proceedings before me, subject only to a reporting restriction order (RRO) I made at the same time prohibiting, initially on a temporary basis, the identification of either M or P: see *Rapisarda v Colladon* [2014] EWFC 1406, [2015] 1 FLR 584, [2014] EMLR 26, paras 41-43, and *Grasso v Naik and Bhatoo (Twenty One Irregular Divorces)* [2017] EWHC 2789 (Fam), [2018] 1 FLR

753, para 21. The question is whether that RRO should now be continued indefinitely. I have decided that it should.

115. Usually, in matters of divorce, the parties can expect to be named. After all, divorce goes to status and the public at large has an interest in knowing whether or not someone's marriage has been dissolved and what that person's status is. In the present case, in contrast, it seems to me that there is no public interest in knowing the identities of P and M, while there are at the same time powerful reasons why they should not be publicly identified. Put shortly:

i) The decrees have not been disturbed, so there has been no change in their status: contrast the outcome in cases such as *Rapisarda v Colladon: Re 180 Irregular Divorces* [2014] EWFC 35, [2015] 1 FLR 597, and *Grasso v Naik and Bhatoo (Twenty One Irregular Divorces)* [2017] EWHC 2789 (Fam), [2018] 1 FLR 753, where the decrees were set aside.

ii) P and M are the innocent victims of failure by the court system: contrast again cases such as *Rapisarda v Colladon* and *Grasso v Naik*, where serious frauds had been practised on the court by the litigants or those representing them.

iii) In order to argue their case, M, and more particularly P, have had to disclose personal matters in circumstances where the linking of those matters to named individuals would understandably cause them distress. Why should the price they have to pay to escape the adverse consequences of errors *by the court* include the additional burden of what they may well see as public embarrassment and even humiliation? This would surely be to add insult to injury.

iv) What the public needs, and is entitled, to know, not least because what this judgment reveals are serious failings by the court and by judges, is how these problems arose and how the court has now decided to deal with them. That is why I have set out the history in such painful detail. The public, in order to understand this, does not need to know who P and M are.

In saying this I am, of course, acutely aware of Lord Roger of Earlsferry's famous answer to his question in *In re Guardian News and Media Ltd and others* [2010] UKSC 1, [2010] 2 AC 697, para 63, "What's in a name?" – ""A lot", the press would answer." But on this occasion, and in these most unusual circumstances, the public interest must, to this very limited extent, give way to the private interests of P and M which, in my judgment, heavily outweigh the claims of the public and the media.

Legal aid

116. As I have already mentioned, P sought and was refused exceptional funding by the Legal Aid Agency. This was because, as it was put in the decision letter dated 28 February 2019, her disposable income had been assessed at an amount which made her ineligible for legal aid. In her application for legal aid, she had set out her aggregate monthly income as £2,674.70, the relevant deductions as £2,233.57 and her disposable monthly income (aggregate income *less* such items as PAYE and NI, housing costs and various expenses) as £441.13. These figures were re-assessed by the Legal Aid Agency as, respectively, £2,694.13, £1,113.26 and £1,580.87. The

major alteration, the reduction in the assessed amount of the relevant deductions, was the result of the Legal Aid Agency capping in the sum of £545 her actual housing costs of £1,500, on the basis that she has no dependants. The upper limit for aggregate income is £2,657 and the upper limit for disposable income is £733. An applicant for legal aid becomes financially ineligible for legal aid if *either* limit is exceeded. So P would in any event have been ineligible because her aggregate income exceeded the upper limit by, on the Legal Aid Agency's figures, £37.13. I should add that her disposable capital of £30.17 fell very significantly short of the upper capital limit of £8,000.

117. I do not criticise the Legal Aid Agency which was, no doubt, operating within the confines of a system imposed on it by others. But the idea that someone with an available net monthly income of £625.87 (the amount if one takes the actual rather than the notional amount of her rent: £1,580.87 – (1,500 – 545) = £625.87) and, for all practical purposes, no capital has the means to fund litigation of this kind is, to adopt a phrase used by Frankfurter J in *United States v Dege* (1960) 364 US 51, page 53, "unnourished by sense." Nor is it immediately obvious why someone whose disposable income is so low should be denied legal aid because their aggregate income exceeds some artificial limit, let alone when it does so by a sum as trivial as £37.17. After all, P, like all of us, has to live on what is left after payment of PAYE and NI (deducted, of course, at source) and the costs of housing.

118. What ought also to be obvious to anyone with an ounce of common sense and understanding of forensic realities is that no lay person in the position of either P, or for that matter M, could possibly be expected to argue a case of this legal complexity, and this even if English was their native tongue.

119. What I was faced with here was the profoundly disturbing fact that P does not qualify for legal aid but manifestly lacks the financial resources to pay for legal representation in circumstances where, to speak plainly, it was unthinkable that she should have to face the Queen's Proctor's application without proper representation. The State has simply washed its hands of the problem, leaving the solution to the problem which the State itself has created to the goodwill, the charity, of the legal profession. For what brought this matter to court was, to repeat, failures, mistakes, by the State, by the court system, and, specifically by judges. Moreover, the application has been mounted by an officer of the State, the Queen's Proctor. Yet the State has declined all responsibility for ensuring that P is able to participate effectively in the proceedings. I make as clear as possible that in saying this I intend not the slightest criticism of the Queen's Proctor, who has acted throughout with complete propriety and, moreover, with conspicuous concern for the predicament in which P and M find themselves. Indeed, the Queen's Proctor, having discussed the point with the court, very properly took the highly unusual step of writing to Messrs Duncan Lewis a letter to assist with P's application for legal aid in this case. Yet the situation is, it might be thought, both unprincipled and unconscionable. Why should the State leave it to private individuals to ensure that hapless individuals like P and M, victims of the State's failings, are able to obtain justice? Or is society in the twenty-first century content with the thought, excoriated well over a century ago by Matthew LJ, that justice, like the Ritz, is open to all? It is deeply wrong and potentially most unfair that legal representation in a case like this, where it is a vital necessity, is available only if the lawyers, as here, agree to work for nothing.

120. Were I to cite all the cases in which similar comments have been made by judges in recent years, I fear that this already lengthy judgment would be unduly lengthened. I confine myself to a reference to what Williams J has very recently said in *Re R (A Child: Appeal: Termination of Contact)* [2019] EWHC 132 (Fam), para 13:

> "I would like to extend my thanks to counsel and to the team who assisted the mother at court. That counsel for the father and for the mother should appear pro bono in such a complex case as this is in the finest traditions of the legal profession. Up and down the country, counsel, solicitors and legal executives fill the gaping holes in the fabric of legal aid in private law cases because of their commitment to the delivery of justice. Without such public-spirited lawyers how would those such as the father and mother in this case navigate the process and present their cases? How judges manage to deliver justice to the parties and an appropriate judgment for the child without such assistance in cases like this begs the question. It is a blight on the current legal aid system that cases such as this do not attract public funding. So far removed from the stereotyped 'fat-cat,' the legal profession in cases such as this are more akin to Boxer in George Orwell's 'Animal Farm' always telling themselves "I will work harder.""

I respectfully agree with every word of that.

121. The ultimate safeguard for someone faced with the might of the State remains today, as traditionally, the fearless advocate bringing to bear in the sole interests of the lay client all the advocate's skill, experience, expertise, dedication, tenacity and commitment. So the role of specialist family counsel, and of the specialist family solicitors who instruct them, is vital in ensuring that justice is done and that so far as possible miscarriages of justice are prevented. May there never be wanting an adequate supply of skilled and determined lawyers, barristers and solicitors, willing and able to undertake this vitally important work. There can be no higher call on the honour of the Bar than when one of its members is asked to act on behalf of a client facing the might of the State. The Bar, I am sure, will never fail in its obligation to stand between Crown and subject. And the same of course goes for the solicitors' profession. But there is something profoundly distasteful when society, when Government, relies upon this as an excuse for doing nothing, trusting to the professions to do the right thing which the State is so conspicuously unwilling to do or to provide for.

122. In the circumstances the least I can do is to acknowledge with my thanks the professional dedication, commitment and sense of duty so conspicuously shown by Ms Budwal and Mr Nuttall of Messrs Duncan Lewis, and by Ms Bazley and Ms Dunseath. Too often in these circumstances the work of the solicitors, barely visible behind the scenes, is overlooked. P paid the firm a modest fee for their help in preparing her statement of 30 January 2019. But thereafter the firm worked for her *pro bono* Here it is important to record that, quite apart from all their work in instructing Ms Bazley and Ms Dunseath, Ms Budwal and Mr Nuttall worked *pro bono* in the fruitless attempt to obtain public funding.

The future

123. There remain two final matters.

124. It is, of course, entirely a matter for him, but the President of the Family Division may wish to consider the extent to which the Guidance referred to in paragraphs 18-19 above needs to be reconsidered in the light of this judgment.

125. The circumstances as set out in this judgment surely serve to emphasise the pressing need to bring the online divorce project as soon as possible to a finality where it is fully operational. I understand that very considerable strides have been made since I issued the Guidance in April 2018 – and, I should make clear, made very successfully – but there is still some way to go.

126. During the hearing on 28 February 2019, I mentioned the fact that I had discovered certain problems with an early version of the software. This, I should emphasise, was well before it was first made available to the public. The fact that I, as an elderly judge, had been able to identify such gremlins seemed to surprise the media: a report of the hearing in the *Daily Telegraph* of 1 March 2019 carried the headline "Online divorce service glitch revealed by senior judge, 70", faithfully reflecting the story beneath.

127. I am assured by HMCTS that the gremlins have all been identified and removed and that the software now in use on the online divorce system makes it impossible, if one uses the online system, to file a petition in the circumstances referred to in the Guidance and in this judgment. This is very welcome news, not least because it demonstrates how the introduction of modern digital technology – a vital part of the current court modernisation process – can not merely speed up but also *improve* the administration of justice.