Neutral Citation Number: [2020] EWFC 63

Case No: ZC20P04055

IN THE FAMILY COURT
At the Royal Courts of Justice
In Open Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 September 2020

Before :

SIR JAMES MUNBY

- -

Between :

FS	**Applicant**
- and -	
(1) RS	**Respondents**
(2) JS	

- -
- -

Mr Tim Amos QC (instructed by Payne Hicks Beach) for the Applicant
Mr Justin Warshaw QC and Mr Joshua Viney (instructed by Clintons) for the Respondents

Hearing date: 12 August 2020 (by Zoom)

- -

Judgment Approved by the court for handing down

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and by placing it on BAILII. The date and time for hand-down will be deemed to be in Open Court at 12 noon on 30 September 2020 (at which time the judgment will be published on BAILII).

Sir James Munby :

1. This is a most unusual case. Indeed, so far as I am aware, and the very experienced counsel who appear before me do not dispute this, the case is unprecedented. Certainly, the researches of counsel have identified no decision directly in point. The applicant's own description is that his applications are "novel." I suspect that the initial reaction of most experienced family lawyers would be a robust disbelief that there is even arguable substance to any of it.

2. The cynic will recall the words of Diplock LJ in *Robson and another v Hallett* [1967] 2 QB 939, 953:

> "The points are so simple that the combined researches of counsel have not revealed any authority upon them. There is no authority because no one has thought it plausible up till now to question them."

But if at the end of the day the answer is clear, as in my judgment it is, the points are not so simple as one might at first suppose. Equally in point, is the observation of Thorpe LJ in *Moses-Taiga v Taiga* [2005] EWCA Civ 1013, [2006] 1 FLR 1074, para 21, that:

> "the absence of … authority … only illustrates the tendency for propositions of universal acceptance to be difficult to support by reference to authority."

But is the universal assumption correct? I leave the last word to Megarry J, who in *Hampstead & Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248, 259, said with grim humour:

> "It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is."

<u>The facts</u>

3. Put shortly, the applicant, who is the 41-year old son of the respondents, seeks financial relief against them: (i) pursuant to Section 27 of the Matrimonial Causes Act 1973; (ii) pursuant to Schedule 1 to the Children Act 1989; and (iii) pursuant to that branch of the recently rediscovered inherent jurisdiction which applies in relation to adults who, though not lacking capacity, are "vulnerable." Mr Justin Warshaw QC and Mr Joshua Viney, appearing for the respondents, dispute that the court has jurisdiction to give the applicant the relief he seeks under the 1973 Act or the 1989 Act and dispute that the inherent jurisdiction can ever be exercised as the applicant would wish. Mr Tim Amos QC, on behalf of the applicant, contends otherwise. In support of these claims, Mr Amos seeks to pray in aid the applicant's rights under each of Article 2, Article 6 and Article 8 of the Convention, taken on their own, and, in any event, his rights under each of those Articles read together with Article 14 (he expressly disavowed reliance on Article 3).

4. Since I am at present concerned entirely with matters of law, I can take the facts very shortly. Mr Warshaw and Mr Viney observe that, despite the limited scope of this hearing (see below), the applicant has chosen to have included in his counsel's skeleton arguments comments about himself and his parents which, they say, are

unnecessary, unpleasant, wholly unjustified and bordering on insulting. In the interests of fairness, as they put it, it is necessary to remind the court of some of the features of what they call the applicant's own egregious conduct. Mr Amos rejects these complaints.

5. I do not propose to go any further than is absolutely necessary into this unedifying and really rather sad dispute. As Thorpe LJ observed in *Harb v King Fahd Bin Abdul Aziz* [2005] EWCA Civ 1324, [2006] 1 WLR 578, [2006] 1 FLR 825, para 19, in response to submissions made by the claimant as to merits in a case where the Court of Appeal was dealing with a jurisdictional question, "what is before us is a pure point of law that does not admit of any inquiry as to where justice lies".

6. The respondents are and have at all material times been married. They have never divorced and live together in Dubai. The applicant, as I have said, is their son. He has several educational and professional qualifications: he has a first degree in Modern History; he is a qualified solicitor; he has a Masters in Taxation, for which he studied at the Institute of Advanced Legal Studies; and he is now studying for his Chartered Tax Advisory and Law School Admissions Test examinations. As against that, he has various difficulties and mental health disabilities which there is no need for me to elaborate at this stage, though their true extent is not clear; they will become highly material if the matter proceeds. Suffice it to say that his case is that they constitute "special circumstances" as that phrase is used in section 27(6B)(b) of the 1973 Act and paragraph 2(1)(b) of Schedule 1 to the 1989 Act. That is disputed, as a matter of both fact and law, by Mr Warshaw and Mr Viney. The applicant's case is that he is in any event "vulnerable" as that word is used in the authorities relating to the inherent jurisdiction. That also is in dispute, but for the purpose of deciding the preliminary issue I am prepared to assume, though I emphasise without deciding, that he is indeed vulnerable in that sense. He has been unemployed since 2011.

7. His parents have supported him financially down the years and continue, to some extent, to do so. They have permitted him to live in a flat in central London, of which they are the registered proprietors, and in relation to which they have until recently been paying the utility bills. Of late, and for reasons which again there is no need to explore at this stage, the relationship between the applicant and his parents, in particular, it would appear, his father, has deteriorated and the financial support they are prepared to offer has significantly reduced.

8. Mr Amos tells me that the applicant's parents are very wealthy and have more than enough comfortably to meet any order which the court might reasonably make, even taking the applicant's financial claims at their highest. He characterises their stance as seemingly being that, having in fact, whether wittingly or unwittingly, nurtured his dependency on them for the last 20 years or so – with the consequence that he is, so it is said, now completely dependent on them –, they now seek to cast that dependency onto the State. He characterises their stance as being that the British state should pick up whatever is the appropriate "tab" for their son, rather than that he should be supported by his non-resident parents. He submits that "this proposition imports an obvious disconnect and should be rejected by the court, inter alia as a matter of policy." He invites the court to say that it has both the jurisdiction and the duty to protect the applicant, rather than abandon him now to the capricious decisions of his parents. He submits that the nature and style of their attacks on their son is another reason why the court should not leave his future in his parents' discretion. They

cannot be trusted to look after him and the more they fight against the orders he seeks, the more, he says, the court should rightly be concerned for his future.

9. Needless to say, while making no comment as to their means, Mr Warshaw and Mr Viney vigorously challenge this characterisation of their clients.

10. In addition to the three claims I have already identified, the applicant has signalled his intention to bring TOLATA proceedings in relation to the flat, his claim being that it is held by his parents on trust for him as the absolute beneficial owner.

The proceedings

11. The papers were placed before Mostyn J on 18 July 2020 with a request from the applicant's solicitors for an urgent hearing within a week. On 20 July 2020 Mostyn J made an order allocating all four claims to me and directing a preliminary CMC (by Zoom) before me on 28 July 2020.

12. At that CMC the respondents confirmed that they took no point on service. I treated the application under the inherent jurisdiction as being before the court even though not issued. I adjourned generally further consideration of the unissued TOLATA claim. I directed that there be a further hearing before me on 12 August 2020 to determine jurisdiction in relation to the claims under the 1973 Act and the 1989 Act and under the inherent jurisdiction, on the assumption (without prejudice to the respondents' case as to whether he is) that the applicant is a "vulnerable person" as defined in the authorities.

13. During the CMC Mr Amos sought to persuade me to make an immediate order for interim maintenance (including costs-funding) on a *Moses-Taiga* basis. I declined to do so, taking the view that rather than become involved in a debate as to whether or not such an order could or should be made when the applicant was a child rather than a spouse (a debate which might itself delay matters), the appropriate way forward was to have the very early hearing that I directed.

14. In accordance with the directions I had given, the matter came on for hearing before me (again by Zoom) on 12 August 2020. Mr Amos again sought to persuade me to make an immediate order for interim maintenance (including costs-funding) on a *Moses-Taiga* basis. I declined to do so, for much the same reasons as before. At the end of the hearing, and in light of the way the arguments had proceeded, I asked Mr Amos whether further time was being sought to develop the Convention arguments. He told me it was not. I reserved judgment.

15. I subsequently received two further written submissions on behalf of the applicant, the first on 14 and the second on 24 August 2020. Although forwarded by his solicitors, they had in fact been prepared by the applicant himself. The first, seemingly, re-centred his case on Article 14; the second introduced a wholly new case based on Article 1 of Protocol 1. Mr Warshaw and Mr Viney replied with brief written responses on 16 and 26 August.

The statutory claims

16. Section 27 of the 1973 Act is headed "Financial provision in case of neglect to maintain." Section 27(1) provides as follows:

> "Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage (in this section referred to as the respondent) –
>
> (a) has failed to provide reasonable maintenance for the applicant, or
>
> (b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family."

17. Subsections (3) to (6) contain further provisions in relation to such an application which there is no need for me to set out. Subsections (6A) and (6B) provide as follows:

> "(6A) An application for the variation under section 31 of this Act of a periodical payments order or secured periodical payments order made under this section in favour of a child may, if the child has attained the age of sixteen, be made by the child himself.
>
> (6B) Where a periodical payments order made in favour of a child under this section ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, then if, on an application made to the court for an order under this subsection, it appears to the court that –
>
> (a) the child is, will be or (if an order were made under this subsection) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he also is, will be or would be in gainful employment; or
>
> (b) there are special circumstances which justify the making of an order under this subsection,
>
> the court shall have power by order to revive the first mentioned order from such date as the court may specify, not being earlier than the date of the making of the application, and to exercise its power under section 31 of this Act in relation to any order so revived."

18. To set section 27 in context I should also refer to sections 23, 26 and 29. Section 23(1), so far as material for present purposes, provides that:

> "On granting a decree of divorce … or at any time thereafter (whether, in the case of a decree of divorce … before or after the decree is made absolute), the court may make any one or more of the following orders …
>
> (d) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified; …

subject, however, in the case of an order under paragraph (d) … above, to the restrictions imposed by section 29 (1) and (3) below on the making of financial provision orders in favour of children who have attained the age of eighteen."

19. Section 26 provides so far as material that:

"(1) Where a petition for divorce, nullity of marriage or judicial separation has been presented, then, subject to subsection (2) below, proceedings … for a financial provision order under section 23 above … may be begun, subject to and in accordance with rules of court, at any time after the presentation of the petition.

(2) Rules of court may provide, in such cases as may be prescribed by the rules –

(a) that applications for any such relief as is mentioned in subsection (1) above shall be made in the petition or answer; and

(b) that applications for any such relief which are not so made, or are not made until after the expiration of such period following the presentation of the petition or filing of the answer as may be so prescribed, shall be made only with the leave of the court."

20. Section 29 provides as follows:

"(1) Subject to subsection (3) below, no financial provision order … shall be made in favour of a child who has attained the age of eighteen. …

(3) Subsection (1) above … shall not apply in the case of a child, if it appears to the court that –

(a) the child is, or will be, or if an order were made without complying with either or both of those provisions would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of an order without complying with either or both of those provisions."

21. Paragraph 2 of Schedule 1 to the 1989 Act, headed "Orders for financial relief for persons over eighteen," provides so far as material as follows:

"(1) If, on an application by a person who has reached the age of eighteen, it appears to the court –

(a) that the applicant is, will be or (if an order were made under this paragraph) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) that there are special circumstances which justify the making of an order under this paragraph,

the court may make one or both of the orders mentioned in sub-paragraph (2).

(2) The orders are –

(a) an order requiring either or both of the applicant's parents to pay to the applicant such periodical payments, for such term, as may be specified in the order;

(b) an order requiring either or both of the applicant's parents to pay to the applicant such lump sum as may be so specified.

(3) An application may not be made under this paragraph by any person if, immediately before he reached the age of sixteen, a periodical payments order was in force with respect to him.

(4) No order shall be made under this paragraph at a time when the parents of the applicant are living with each other in the same household.

…

(7) The powers conferred by this paragraph shall be exercisable at any time."

22. It will be noted that sections 27(6A) and (6B) of the 1973 Act pre-suppose a previous periodical payments order while paragraph 2(3) of Schedule 1 to the 1989 Act prevents an application where there has been a previous periodical payments order.

23. The problems facing the applicant are immediately apparent. On the face of it:

i) In relation to section 27 of the 1973 Act, he is not a person entitled to make an application under subsection (1), and he cannot bring himself within either subsection 6(A) or 6(B) because there never was a periodical payments order in his favour.

ii) In relation to Schedule 1 to the 1989 Act, he is barred by paragraph 2(4), because his parents "are living with each other in the same household."

24. Mr Amos seeks to overcome these difficulties by inviting me:

i) To construe section 27(1) as if the words "or, in the case of subsection (b) below, a child of the family who has attained the age of sixteen" appeared after "party to a marriage" and before "may apply."

ii) To construe paragraph 2(4) as if the words "as the applicant" appeared after "in the same household."

He argues that the outcomes for which he contends can properly be arrived at both by a traditional approach to statutory construction and, if that is wrong, by a process of 'reading down' in accordance with section 3 of the Human Rights Act 1998.

<u>The legislative history</u>

25. Before proceeding further, it will be convenient to examine the legislative history of section 27 and of Schedule 1. It has been helpfully traced out for me by Mr Warshaw and Mr Viney in their skeleton argument.

26. I begin with section 27. The roots of this, as Mr Warshaw and Mr Viney show, go back at least to the nineteenth century but there is no need to go further back than the Matrimonial Proceedings and Property Act 1970. Before then, as they point out, there was neither power to make an order in relation to an adult child nor, indeed, power to make any order on the application of the husband (only the wife could apply).

27. As is well known, the origins of Part II of the 1973 Act, including section 27, are to be found in the epoch-making work of the Law Commission under its first Chairman, that great family lawyer Sir Leslie Scarman, which saw its fruition in the Commission's 1969 Report (Law Com No 25) *Family Law: Report on Financial Provision in Matrimonial Proceedings*. The very point with which I am here concerned was considered by the Commission in para 42:

> "In the Working Paper we drew attention to the somewhat confused position regarding the power for persons other than the spouses to apply for orders concerning provision for the children … In future there will be many cases where orders will be obtainable in respect of children over 18 but still being educated … We … recommend that rule 69 [of the Matrimonial Causes Rules 1968] should be amended so as to entitle a child of the family over the age of 18 to apply if he has obtained leave to intervene for that purpose. We think leave should be required so as to avoid the possibility of capricious interventions by children in their parents' matrimonial proceedings. *We should make it clear that we do not recommend that such a child should be entitled to apply except in a suit between the parents. In other words, all he should be entitled to do is to intervene with leave in his parent's suit for divorce, nullity or judicial separation in order to apply for financial provision. We do not think that it would be desirable to give a child (particularly an adult child) a power to take his parents to court to obtain finance because, for example, he wants to embark on a scheme of training which they are not prepared to support* (emphasis added)."

28. Thus clause 6 of the draft Bill (Report, page 72), which became section 6 of the 1970 Act and, in due course, section 27 of the 1973 Act as originally enacted – that is, before the insertion of subsections 6A and 6B – permitted applications to be made only by a party to the marriage. In other words, Parliament expressly limited the right of application under what is now section 27 to the parties to the marriage. Only with the insertion of subsection 6A by the Domestic Proceedings and Magistrates' Courts Act 1978, followed by the insertion of subsection 6B by the Family Law Reform Act 1987, was a child enabled to apply, and even then only in very specific and very limited circumstances.

29. The roots of Schedule 1 to the 1989 Act are ancient, but for present purposes I can start with the Law Commission's 1982 Report (Law Com No 118), *Family Law: Illegitimacy*, which led to the enactment of the 1987 Act, re-enacted in this respect as Schedule 1. Amongst the Commissioners who signed the Report was another great family lawyer, Stephen Cretney. The Commission's "central recommendation" (see para 6.3) was that (para 6.2):

"So far as the law is concerned, all children will have equal rights to financial provision from both their parents … What the law can and, in our view should, do is to remove the wholly distinct procedure relating to illegitimate children, tainted as it is by its historical association with the Poor Law and its overtones of criminality."

30. They went on (para 6.6):

"It seems to us … that if unmarried parents separate it is only right that the court should be able to make any appropriate order in favour of a child of theirs, just as it could make an order if the child's parents were in the process of divorce or judicial separation."

31. Elaborating this, they said (para 6.30):

"*We think that the inability of a non-marital child (and only a nonmarital child) to obtain a new financial provision order in any circumstances once he has attained the age of 18 would conflict with the basic policy of assimilating the legal position of marital and non-marital children*. Although the precise method for application varies, the principle of the present law so far as marital children are concerned is reasonably clear, namely that a child of 18 and over should be able, in specified circumstances, to obtain financial provision from his parents where their relationship has manifestly broken down. We therefore recommend that the Guardianship of Minors Act 1971 should be amended to allow a child who has attained the age of 18 to apply to the court in certain circumstances for an order for periodical payments or a lump sum. The result will be to confer on all children of 18 and over, not just those born outside marriage, a new right to apply at their own instance for financial provision if they are undergoing education or training or if there are special circumstances. The children of divorced or divorcing parents already in effect have rights to apply for financial orders by virtue of the decision in *Downing v Downing (Downing intervening)* [1976] Fam 288 and we can see no sufficient reason why this right should not be shared by other children whose parents' relationship has broken down (emphasis added)."

32. For present purposes, what is crucial is what followed (para 6.31):

"*We have said that the powers to make orders on the application of an adult child should only be available if the parents' relationship has broken down. This seems to be the policy of the present law; and we do not think it would be right, in the context of reforms primarily concerned to remove the legal disadvantages of illegitimacy, to seek to introduce a fundamental change*. What method is to be adopted to achieve this result? … It seems to us that the best evidence of the breakdown of both married and unmarried relationships is provided by the parties separating; and *we accordingly recommend that an adult child should only have a right to apply to the court for financial relief if at the time of the application his parents are not living with each other. Moreover, the court should not be empowered to make orders at a time when the parents of the applicant are living with each other* (emphasis added)."

33. Accordingly, clause 8 of the draft Bill attached to the Report, providing for the insertion as section 11B of the Guardianship of Minors Act 1971 of a new provision for "Orders for financial relief for persons over eighteen," included this as sections 11B(1) and 11B(4) (Report, pages 216, 218):

> "(1) Any person who has attained the age of eighteen (whether or not his parents have at any time been married to each other) may apply … for an order under this section if at the time of the application his parents are not living with each other.
>
> (4) No order shall be made under this section at a time when the parents of the applicant are living with each other."

34. This crucial limitation was well understood by those promoting the Parliamentary passage of the Bill. Thus, the Lord Chancellor, on Second Reading in the Lords on 27 November 1986 (Hansard, Vol 482, Col 651), said that:

> "provision is made for applications by children over the age of 18 whose parents are separated and who are undergoing further education or training, or who have special needs, such as would arise from some form of physical handicap."

The Solicitor General, on Second Reading in the Commons on 7 April 1987 (Hansard, Vol 114, Col 257) used identical language.

35. Albeit with some slight, but for present purposes immaterial, drafting alterations, the Commission's draft was carried forward as section 14 of the 1987 Act, where subsections (1) and (4) of what was now inserted as section 11D in the 1971 Act provided that:

> "(1) If, on an application by a person who has attained the age of eighteen and whose parents are not living with each other in the same household, [etc].
>
> (4) No order shall be made under this section at a time when the parents of the applicant are living with each other in the same household."

For present purposes, the addition of the words "in the same household" seems to me wholly immaterial.

36. Sections 11D(1) and 11D(4) were later incorporated by way of consolidation as paragraphs 2(1) and 2(4) of Schedule 1 to 1989 Act. With the exception of the substitution of the word "paragraph" for the word "section," paragraph 2(4) replicates section 11D(4) precisely. In paragraph 2(1) the words "and whose parents are not living with each other in the same household" have been omitted, but this has no bearing on the meaning of paragraph 2(4).

37. In *J v C (Child: Financial Provision)* [1999] 1 FLR 152, 155, Hale J said this of the Law Commission's report:

> "The object … was to remove the differences in the legal positions of children. The underlying principle was that children should not suffer just because their parents had, for whatever reason, not been married to one another."

That of course was correct, so far as it went. But equally important, as we have seen, was the disavowal of any more fundamental change and the consequential policy restricting provision to adults whose parents had separated or, as the legislation expressed the concept, were not "living with each other." Indeed, as Hale J continued:

> "Equally of course they should not get more. There is a long line of authority, beginning with *Chamberlain v Chamberlain* [1973] 1 WLR 1557, and continuing with *Lilford (Lord) v Glynn* [1979] 1 WLR 78, (1978) FLR Rep 427 and *Kiely v Kiely* [1988] 1 FLR 248, that children are entitled to provision during their dependency and for their education, but they are not entitled to a settlement beyond that, unless there are exceptional circumstances such as a disability, however rich their parents may be."

38. Hale J's reference to "disability" will be noted. This is not the occasion for any extended discussion of what is meant by the statutory phrase "special circumstances" as it appears in section 27(6B)(b) of the 1973 Act and paragraph 2(1)(b) of Schedule 1 to the 1989 Act, and indeed this is not something on which I have heard any submissions, but it is clear that "disability" can be and, indeed, is probably the most obvious example of, a special circumstance: see *C v F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1.

Construction

39. I return to the questions of construction.

40. So far as concerns section 27, there is in my judgment no legitimate process of construction by which, adopting an appropriately purposive approach though leaving aside 'reading down', it can be read as Mr Amos would have me agree. The statutory language is clear and means what it says. And if, which there is not, there was any ambiguity or other room for doubt, that would inexorably be determined against him by the Law Commission's Report. The simple fact, as Mr Warshaw and Mr Viney say, is that a child may apply for relief under section 27 only where there has already been an order in the child's favour applied for by one of the parties to the marriage. More generally, as they correctly put it, there is no free-standing jurisdiction under the 1973 Act for a child to bring a claim for maintenance against a party to a subsisting marriage.

41. In relation to section 27, Mr Amos referred to *Harb v King Fahd Bin Abdul Aziz* [2005] EWCA Civ 1324, [2006] 1 WLR 578, [2006] 1 FLR 825, and to *Villiers v Villiers* [2020] UKSC 30, [2020] 3 WLR 171. But neither is in point and neither assists. He relies heavily upon *Downing v Downing (Downing intervening)* [1976] Fam 288, a decision of Payne J in relation to section 23(1) of the 1973 Act. In my judgment, it does not assist. The point arose in the following way. Her parents were divorced in 1966 when the intervenor was 10 years old. She was now aged 20 and at university. She had fallen out with her parents, neither of whom was prepared to make an application under section 23 to provide for the funding of the parental contribution to the applicant's LEA grant. She now sought relief against both parents under section 23.

42. Having set out the relevant parts of sections 23 and 29, Payne J said (at p 293):

> "The effect of subsections (1) and (3) must surely be that a financial provisions order may be made in favour of a child who has attained the age of 18 if the child is receiving instruction at an educational establishment. That is precisely this case, and it seems to me to follow that there is jurisdiction to hear such an application.
>
> Two important questions, however, remain: (1) by whom can the application be made; and (2) should a financial provision order be made in the circumstances of this case.
>
> As to (1) either parent could ask for an order against the other that financial provision be made for the child. This is the effect of section 23 of the Act of 1973 and rule 68 of the Matrimonial Causes Rules 1973. But it would be necessary for the applicant's father or mother to obtain the leave of the court under rule 68 (2). Since neither parent wishes to make such an application and since the child's right to financial provision is sanctioned by the Act a procedure must be found. The answer seems to be provided by rule 72 (2) [quoted] that is to direct that the children be separately represented on the application, either by a solicitor or by a solicitor and counsel."

43. What did Payne J have in mind when he said of the intervenor's claim that her "right to financial provision" was "sanctioned by the Act"? It can only have been, as indeed he made clear, sections 29(1) and 29(3), read in the context of and in conjunction with section 23(1). But – and this is the important point – jurisdiction under section 23(1), in contrast to section 27(1), which itself specifies who may apply for relief under the section, is conferred not, as in the case of section 27(1), because someone has made an application but rather upon the happening of a defined event. This, as Mr Warshaw and Mr Viney point out, is why section 26 is needed in relation to section 23 but has no relevance in relation to section 27. Section 23, in contrast to section 27, does not address the manner in which applications are to be made or who can apply; that is governed by section 26. Accordingly, in my judgment, sections 23, 26 and 29 throw no light upon the true meaning and effect of section 27.

44. Nor, with respect to Mr Amos, does FPR 2010 Rule 9.10, supplementing section 26, assist. True it is that orders made under section 27 are a type of financial remedy, but it does not follow that Rule 9.10 can affect, let alone amplify, the jurisdiction conferred by section 27. Section 27 is clear and restricts the circumstances in which a child may apply to those set out in subsections (6A) and (6B). Rule 9.10 cannot operate to extend the clear ambit of the primary legislation.

45. In relation to paragraph 2(4), the matter, in my judgment, is equally clear. The statutory phrase "living with each other in the same household" means what it says, nothing less and nothing more. One can test it this way. Who is, or are, the persons embraced in the words "each other" in the statutory language "living with each other"? The answer is supplied by the immediately preceding words "the parents of the applicant." So, by adding in a reference, as Mr Amos would have it, to someone else - "the applicant" - one is not construing the statutory language; one is adding words so as to change its meaning.

46. As Mr Warshaw and Mr Viney put it, the wording of paragraph 2(4) is explicit. There is no ambiguity. It is accepted by everyone that the respondents live in the same

household. So, they say, the court has no power to make any award in the applicant's favour. That is the end of the matter. I agree.

47. So, with paragraph 2(4) as with section 27, the statutory language is clear and means what it says. And if, which there is not, there was any ambiguity or other room for doubt, that would again, as with section 27, inexorably be determined against the applicant by the Law Commission's Report.

Reading down

48. Mr Amos submits that, construed in this way, both section 27 and paragraph 2(4) are inconsistent with the applicant's rights under each of Article 2, Article 6 and Article 8 of the Convention taken on their own and, in any event, inconsistent with his rights under each of those Articles read together with Article 14. Since then, as I have mentioned, the applicant on his own initiative has added similar claims based on Article 1 of Protocol 1. Mr Amos submits that any breach of those rights can, and should, be prevented by what he says is a permissible reading down of the two provisions in accordance with section 3 of the 1998 Act, to be achieved, he submits, by inserting the words identified above. He does not seek a declaration of incompatibility in accordance with section 4 of the 1998 Act.

49. So, what about reading down in accordance with section 3 of the 1998 Act?

50. I propose in the first instance to assume in the applicant's favour that without the reading down for which he contends there will be a breach of his rights on one or other of the grounds relied on. Can I read down? In my judgment I cannot.

51. In relation to 'reading down', family practitioners will be familiar with the speech of Lord Nicholls of Birkenhead in *In Re S (Care Order Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, but the leading authority remains the decision of the House of Lords in the later case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. This explains the extremely wide function that section 3 performs (reiterated by the Supreme Court in *Gilham v Ministry of Justice (Protect intervening)* [2019] UKSC 44, [2019] 1 WLR 5905, para 39). That, of course, I readily acknowledge, but it also marks the boundary of what is permissible. Where that boundary runs was explained in particular by Lord Nicholls of Birkenhead and Lord Rodger of Earlsferry. I start with Lord Nicholls (para 33):

> "Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation … The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation"."

52. In a number of passages in his speech, Lord Rodger indicated the boundaries of what is permissible. In para 111, he said that section 3(1) gives the court no power to "change black into white" or to remove "the very core and essence" or "pith and substance" of what Parliament has enacted. In para 116 he said that it was not open to the court to depart substantially from a "cardinal principle" of the legislation. He elaborated (paras 121-122):

"121 … If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.

122 … the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendment. Nevertheless, what matters is not the number of words but their effect."

53. In relation to 'reading down,' Counsel referred me to the recent trilogy of decisions about various provisions in section 54 of the Human Fertilisation and Embryology Act 2008: *In re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135, [2015] Fam 186, [2015] 1 FLR 349, *In re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73, [2015] 1 WLR 4993, [2017] 1 FLR 472 (together with the related judgment in *In re Z (A Child) (Surrogate Father: Parental Order) (No 2)* [2016] EWHC 1191 (Fam), [2017] Fam 25, [2016] 2 FLR 327) and, very recently, *Re X, Y v Z* [2020] EWFC 39. Of these, the two most important decisions for present purposes are *In re Z* and *Re X, Y v Z.*

54. In *In re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73, [2015] 1 WLR 4993, [2017] 1 FLR 472, I declined to read down the relevant provision. Explaining why it was simply not possible to do so, I said (paras 36-37):

"36 The principle that only two people – a couple – can apply for a parental order has been a clear and prominent feature of the legislation throughout. Although the concept of who are a couple for this purpose has changed down the years, section 54 of the 2008 Act, like section 30 of the 1990 Act, is clear that one person cannot apply. Section 54(1) could not be clearer, and the contrast in this respect – obvious to any knowledgeable critic – between adoption orders and parental orders, which is a fundamental difference of obvious significance, is both very striking and, in my judgment, very telling. Surely, it betokens a very clear difference of policy which Parliament, for whatever reasons, thought it appropriate to draw both in 1990 and again in 2008. And, as it happens, this is not a matter of mere speculation or surmise, because we know from what the Minister

of State said in 2008 that this was seen as a necessary distinction based on what were thought to be important points of principle.

37 Given that a parental order is a creature of statute, given that this part of the statutory scheme goes to the core question, the crucially important question, of who, for this purpose, can be a parent, this consistent statutory limitation on the ambit of the statutory scheme always has been, and remains, in my judgment, a "fundamental feature", a "cardinal" or "essential" principle of the legislation, to adopt the language of, respectively, Lord Nicholls and Lord Rodger. Putting the same point the other way round, to construe section 54(1) as [counsel] would have me read it would not be "compatible with the underlying thrust of the legislation", nor would it "go with the grain of the legislation." On the contrary, it would be to ignore what is, as it has always been, a key feature of the scheme and scope of the legislation."

55. In contrast, in *Re X, Y v Z* [2020] EWFC 39 Theis J was able to read down. She explained the essential distinction between *In re Z* and *Re X, Y v Z* when summarising the argument of counsel, which in the event she accepted:

"61 They submit the argument for reading down in *Re Z* failed because it was clear Parliament had taken a deliberate policy decision to exclude single parents, as was demonstrated by what Munby P set out … when he detailed the course of the Bill in 2008, at the Committee stage and during its passage through Parliament. Consequently, the requirement for two applicants was a key feature of the 'pith and substance' of the legislation.

62 The situation in this case, they submit, is different. There is no evidence that Parliament has ever considered the possibility of an intended parent dying during a surrogacy pregnancy, or that such a category of person should be excluded from obtaining a parental order."

56. I have no difficulty at all with Theis J's decision in *Re X, Y v Z* which was, in my judgment, if I may say so, clearly correct and is entirely consistent with my decision in *In re Z*. There is nothing in *Re X, Y v Z* to cast any doubt on either the outcome or the reasoning in *In re Z*. The usefulness of the two decisions, as it happens on provisions in the same statute where the outcomes differed, is that they neatly illustrate the operation of the guiding principles and the kind of differences which in the one case will drive the court to find that 'reading down' is impossible while in the other will enable the court to find that reading down is permissible.

57. Mr Amos points out that the relevant statutes and the Law Commission reports are elderly. So they are – at least in terms of a family law perspective – but that, as I read the authorities, does not affect the principles governing 'reading down.' In my judgment it is quite impossible to read down either section 27(1) or paragraph 2(4) in the way suggested by Mr Amos. Mutatis mutandis, the reasons are the same in both cases.

58. In each case it is clear that there was a very precise Parliamentary purpose or objective: in the case of section 27 that a child (particularly an adult child) should not be able to take his parents to court to obtain finance, and that accordingly applications could be made only by a party to the marriage; in the case of paragraph 2(4), that the

legislation was to remove discrimination against the illegitimate but no more – any more fundamental change was explicitly disavowed and the policy explicitly adopted in consequence restricted provision to adults whose parents had separated or, as the legislation expressed the concept, were not "living with each other."

59. In each case, as Mr Warshaw and Mr Viney correctly submit, what Mr Amos and the applicant contend for is flatly contrary to the scheme clearly laid down by Parliament and contradicts the will of Parliament. I agree. I make clear, lest it be thought I have overlooked the point, that nothing turns on the fact that Parliament has subsequently amended section 27 by inserting subsections (6A) and (6B). These are very narrow and very focused provisions which, evidently as a matter of policy, limit a child's right to apply to cases where there has already been an order in the child's favour applied for by one of the parties to the marriage.

60. In the circumstances it would be fundamentally wrong and inconsistent with principle to read the proposed language into either statute. Reverting to the language of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, both in relation to section 27 and in relation to paragraph 2(4) to do as Mr Amos would have me do would be to fly in the face of a "fundamental feature", a "cardinal" or "essential" principle of the legislation. Putting the same point the other way round, it would not be "compatible with the underlying thrust of the legislation", nor would it "go with the grain of the legislation." On the contrary, it would be to ignore what is, as it has always been, a key feature of the scheme and scope of the legislation. Mr Amos submits that "grain" of Schedule 1, as it now is, is the illegitimacy point, and nothing else. For reasons which will be apparent I do not agree.

Incompatibility

61. It is therefore not necessary for me to deal with the contention that, construed in the way in which I have construed them, both section 27 and paragraph 2(4) are inconsistent with the applicant's rights under Article 2, Article 6, Article 8 and Article 14 of the Convention and Article 1 of Protocol 1. If Mr Amos and the applicant are right in their contentions, the applicant's only remedy in the circumstances is a declaration of incompatibility under section 4, and that he has not sought. Nevertheless, as I have heard much argument on the point, it is right that I deal with it. I have to say that nothing I have yet heard begins to persuade me that the applicant has any case.

62. Mr Amos correctly describes the Convention as a living and organic instrument whose interpretation is never static; rather, as he says, its interpretation and application must always move with the times. He accepts that Article 14 is not freestanding and that it requires to be engaged in conjunction with another Article. But, as he correctly submits, this does not require that there be a breach of the other Article in question.

63. He points to *Deaconu v Romania (Application no. 66299/12)* (2019), para 21:

> "it suffices that the facts of the case fall "within the ambit" of another substantive provision of the Convention or its Protocols."

He points also to para 22:

> "In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. However, only differences in treatment based on a personal characteristic (or "status") by which persons or groups of persons are distinguishable from each other are capable of triggering the application of Article 14."

64. Mr Warshaw and Mr Viney do not dispute any of this. So far, so good. But how does Mr Amos seek to make good his case?

65. Article 2: Mr Amos cites no authority. His case, as set out in his skeleton argument, is that the course on which the applicant's parents embarked in October 2019 threatens and infringes the applicant's right to life for it is, he submits, "in both its intent and its effect, pretty obviously/deliberately one of 'starving' him into submission, not just metaphorically in intent but also literally in effect." That intent and effect, he submits is "particularly aggravated" by the fact, he says, that, on any view, the applicant must properly be viewed as a vulnerable adult, bearing in mind that the applicant is "(a) very ill; (b) a danger to himself in terms of inter alia neglect; and (c) wholly unlikely to be able to get, far less maintain, any employment position at all, still less one commensurate with either his high intellect or the level of his education and educational attainment." Article 2 is engaged, he says, on the basis that, to apply the legislation in the restrictive way contended for by the respondents, would, or might well, where maximum state allowances represent only a small fraction of a severely disabled child's true and reasonable needs, result in a very substantial and serious risk to a/this disabled child's life.

66. Mr Warshaw and Mr Viney express disappointment that such a grave and serious allegation is being deployed so lightly and in such an unfocused manner. Be that as it may, their short, and in my judgment irrefutable, point is that for Article 2 to be engaged the bar is high, and much higher than can here possibly be made out: they refer to cases such as *Osman v UK (Case 87/1997/871/1083)* [1999] 1 FLR 193, *Venables v News Group Newspapers Ltd and others, Thompson v News Group Newspapers Ltd and others* [2001] Fam 430 and *Van Colle v Chief Constable of Hertfordshire Police (Secretary of State for the Home Department and others intervening), Smith v Chief Constable of Sussex Police (Secretary of State for the Home Department and others intervening)* [2008] UKHL 50, [2009] 1 AC 225, as showing that what must be established is a "real and immediate risk" or a "specific and serious" threat to life. There is here, as they correctly submit, no such risk or threat to the applicant's life, and any suggestion otherwise is risible. On the applicant's own case as set out above (which they do not accept) it is quite impossible, they say, for the facts relied upon to engage let alone breach Article 2. I agree.

67. Article 6: Mr Amos submits that if the respondents are correct the applicant not only has no remedy but also no means of seeking a remedy in his assumed situation. He prays in aid the fundamental right of access to justice and points to cases such as *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] ICR 1037. That case, with great respect, is simply not in point.

68. Much more to the point, Mr Warshaw and Mr Viney submit, is *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] 1 AC 42, where the applicant mother was seeking child support from the respondent father. The mother argued that the provisions of the Child Support Act 1991, which purported to deny

parents a power of direct enforcement, were incompatible with the right to access to a court under Article 6. The government argued that the mother's inability to apply to the court for orders enforcing payments due to her under the maintenance assessments did not involve a 'determination of civil rights' within Article 6(1). The House of Lords agreed and dismissed the mother's appeal. As Lord Bingham on behalf of the majority said, para 43:

> "… Mrs Kehoe's argument that the system which prevents her from playing any part in the enforcement process is incompatible with Art 6(1) fails at the first stage. This is because she has no substantive right to do this in domestic law which is capable in European Convention law of engaging the guarantees that are afforded with regard to 'civil rights and obligations' by that Article."

The Strasbourg court said the same when dismissing her claim: *Kehoe v United Kingdom (Application no. 2010/06)* [2008] 2 FLR 1014, para 47:

> "the court would note that the issue before it is whether the applicant has access to court to obtain payment of child support owing to her, not whether she has any enforceable 'civil right' to obtain damages from the authorities for their shortcomings in that respect, in which connection it would recall that Art 6 does not impose any requirements as to the content of domestic law."

69. That is fatal to the applicant's claim under Article 6. As Mr Warshaw and Mr Viney correctly submit, nothing within the Convention requires contracting states to legislate for specific categories of claim, for example, as here, the maintenance of adult children. The applicant has made an application to court. He is appearing before the court and is represented by leading counsel and expert matrimonial solicitors. He makes no complaint about the fairness of the proceedings. He takes no issue with the time it has taken for his application to be heard; in fact, he expresses thanks for the speed with which the case is being heard. He takes no issue with the impartiality and independence of the tribunal; in fact, he expresses great admiration for the court. In my judgment it is quite impossible for the facts relied upon to engage Article 6 let alone to breach it.

70. Article 8: Again, Mr Amos cites no authority. His argument is that the applicant has lived in the flat for some 20 years. He says (I quote his skeleton argument):

> "It is no exaggeration to say that it … has been and remains his metaphorical umbilical cord to his family … The flat represents the security and continuity of relationship even when the human relations are strained and/or the family members estranged. But in addition, the flat also represents the only bulwark between [the applicant] and very real possible destitution. And as such it is also the key to his privacy and indeed his only aspect of privacy. Any move to interfere with his occupation of [the flat], or any move which has the effect of endangering his occupation – such as stopping the payment of the utilities … – is an action which directly threatens [his] private and family life; and as such is an interference which the Court as a public authority should be at pains to stop/prohibit."

71. He submits that Article 8 is engaged on the basis that the 1973 Act and 1989 Act both provide positive financial relief measures to assist one's children and family.

72. Mr Warshaw and Mr Viney are briskly dismissive, saying that the points made in the passage set out above are completely irrelevant and pointing out that not a single authority is produced in support of the proposition that such facts constitute an engagement of Article 8 let alone a breach. They also point out that there is a disconnect between the remedies the applicant seeks and the facts relied on in support of the allegation that Article 8 is engaged. His claim for periodical payments and/or a lump sum will not address his occupation of this property (the factual basis of his allegation that Article 8 has been breached), for there is no power under either section 27 or Schedule 1 to make a transfer of property order. I agree.

73. If authority is required, then reference can usefully be made to the discussion in *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, paras 31-36, of Article 8 and of *Niemietz v Germany* (1993) 16 EHRR 97, para 29. To this, when I brought it to his attention, Mr Amos had no effective answer. Two passages make the position clear. First, para 35, where I said:

> "*Niemietz v Germany* shows that private life includes the right of a person to define the 'inner circle' in which he chooses to live his life, including in particular, as it seems to me, the right to choose those with whom he does not want to establish, develop or continue a relationship – in short the right to decide who is to be excluded from his 'inner circle'. Article 8's guarantee of respect for an individual's 'private life' therefore embraces, at least in principle, both X's right to decide to establish and develop a relationship with Y (qualified, of course, by Y's right to decide that he does not wish to establish a relationship with X) and X's right to decide not to establish or continue a relationship with Z."

74. I went on (para 37):

> "If a father and his adult daughter wish to enjoy the type of normal family relationship that the State is obliged by the Art 8 guarantees of respect for each party's private and family life not to interfere with arbitrarily, then all well and good. But if for whatever reason, good or bad, reasonable or unreasonable, or if indeed for no reason at all, the daughter does not wish to have anything to do with her father, then he cannot impose himself upon her, whether by praying in aid his Art 8 right to respect for family life or his Art 8 right to respect for that part of his private life which entitles him in principle to establish and develop relationships with other human beings. His daughter can pray in aid against him her Art 8 right to respect for that part of her private life which entitles her to decide who is to be excluded from her 'inner circle' – and in that contest, because she is a competent adult, her Art 8 rights must trump his."

The same must, of course, go if, as here, the dispute arises, as it were, the other way round.

75. The position at common law had previously been set out by Butler-Sloss LJ in *Re D-R (Adult: Contact)* [1999] 1 FLR 1161, 1165, That was a case where the adult was under disability but, as Butler-Sloss LJ made clear:

> "If she were competent there would be no question of enforcing a relationship between her and her father. He would have a right to a relationship as far as she consented to it and no further."

As I commented in *Re S* (para 36) this can now be explained in Convention terms. It remains good law.

76. The applicant, in my judgment, cannot bring himself within Article 8.

77. Protocol 1, Article 1: In his written submissions of 24 August 2020, the applicant seeks to pray in aid *JM v United Kingdom (Application no. 37060/06)* (2008) in support of the contention that child maintenance comes within the ambit of Article 1 of Protocol No 1, which he can therefore rely upon. His case is, with respect, fundamentally, misconceived.

78. Article 1 of Protocol No 1 protects a person's possessions. The applicant in *JM v United Kingdom* was the pay*er* of maintenance. In that case, Article 1 of Protocol No 1 was engaged because the state (or ex-partner, it makes no difference for this analysis) was, through the CSA, depriving her of her 'possessions'. In the present case, the actions he seeks to bring do not deprive the applicant of his 'possessions'. He has no Article 1 Protocol 1 right to child maintenance. He is the pay*ee*, not the pay*er*. The respondents, in contrast, may be able to pray in aid Article 1 of Protocol 1, for any order that they pay child maintenance to the applicant is, as in *JM v United Kingdom*, an interference with their peaceful enjoyment of those possessions. But this is nothing to the point, for the fact that the respondents' Article 1 rights might be engaged is simply not relevant to the applicant's case. He cannot rely upon Article 1 of Protocol No 1 in support of his application.

79. Article 14: For all these reasons, none of Articles 2, 6, 8 and Protocol 1, Article 1, is engaged and the applicant's various claims do not fall within the ambit of any of them. We therefore never get to Article 14. But I ought nonetheless to deal with it.

80. Both generally, and specifically in relation to Article 14, Mr Amos is clear as to the discrimination he seeks to rely upon. It is, as he puts it, the difference in treatment between a person who is the child of parents who are still living together and a person who is the child of parents who are living separately from one another. He points to the editorial comment in the 2020 Red Book, para 2.233[1], p 488, that "the adult child whose parents are living together and for no valid reason are refusing to support him or her through university is in a *markedly worse* situation than an adult child whose parents have separated (emphasis added)." He submits that on this basis the law is fundamentally unfair and obviously discriminatory in the sense that it treats differently, and, he says, with no good reason, two identical people in otherwise identical situations. The factor of the parents' own living arrangements is, he submits, patently entirely irrelevant from the perspective of the adult disabled child and his needs.

81. Somewhat shifting the emphasis, he submits that, in the present case, no objective or legitimate reason whatsoever exists for the differential treatment of adult disabled children with identical requirements living in a separate household from their parents, let alone the "weighty reasons" required under the leading Strasbourg and domestic authorities. Equally, he adds, "weighty reasons" are required to justify discrimination on grounds of disability, in relation to which he cites *JD and A v United Kingdom (Applications nos. 32949/17 and 34614/17)* [2020] HLR 5. It will be seen that at this point in the argument Mr Amos somewhat shifts the focus in his references to the

applicant being disabled – not, it will be noticed, something reflected at all in his proposed constructions of either section 27 or paragraph 2(4).

82. But his "core" submission, as he makes clear in his skeleton argument in reply, is that the (disabled) adult child of together-parents who are living together with each other, but in a separate household from their child, is self-evidently just as deserving of financial relief from their parents as the identical (disabled) adult child of separated parents who are living in households separate from each other, whether or not also separate from the adult child. To argue otherwise is, he says, to set up an unjustifiable, as well as unnecessary, discrimination.

83. Revealingly, he submits that including the status of the parental relationship, that is, whether the parents are living together or separate, as the focus of paragraph 2(4), brings "the situation perilously, and unnecessarily, close to the accident of birth-status" which it was the central purpose of the 1987 Act to abolish; and also, he says, perilously close to marital status, which is not only irrelevant for these purposes but also clearly acknowledged as an improper basis of discrimination in both Strasbourg and domestic case law.

84. In the final analysis, he submits, the case comes back to rest on the proposition that it cannot be right or even just that children of separated parents are treated better than children of together-parents.

85. Thus far in his submissions Mr Amos has focused on paragraph 2(4). He elaborates the argument in relation to section 27, making two key points:

    i) First, he submits that to deny financial relief to a child within marriage and yet provide it to one in the context of a divorce constitutes unlawful discrimination. It is, he says, classic "birth status" discrimination based on the child's parents' marital status. He submits that the marital status and living arrangements of the child's parents are clearly irrelevant to the child's objective needs and cannot be used as the basis to deny financial relief to a child of married parents in the situation of the applicant (that is, living in a separate household to both his parents) in contrast to the child with identical needs of divorced parents. This, he says, plainly constitutes unlawful discrimination.

    ii) Secondly, he complains that on the view I have taken of the legislation there is discrimination between the adult child who happens to be the payee of an existing order under the 1973 Act and the other "twin" identical child who happens not to be the payee of such an order. On this approach, he says, one of the "twins" has a claim under section 27 because of the previous order, while the other does not, "simply because of the accident of there being no previous order." This, he says, is reminiscent of the kind of immutable personal characteristic which is entirely beyond one's personal control and for which the Strasbourg court has consistently held there can be no objective justification.

86. So, in sum, it is, says Mr Amos, discriminatory under Article 14 to allow adult (disabled) children of divorced parents (the 1973 Act) and of separated parents (the 1989 Act) access to relief, but not the children of married and/or together parents, especially when the adult (disabled) child is, as here, living separately from the

parents and in an identical position to the applicant child of divorced and/or separated parents.

87. Mr Warshaw and Mr Viney submit that the discrimination the applicant seeks to rely upon is imprecise and that it is imprecise because his claim is misconceived. That it is indeed misconceived I entirely agree. There are three reasons:

88. First, the suggested analogy with "birth status" is wholly false. The marital status of the parents at the date of birth (I ignore the subtleties deriving from the doctrine of *legitimation per subsequens matrimonium*) directly affects, indeed determines, the status of their child as legitimate or illegitimate. That status of the child, although derived from the status of the parents, is a status of the child recognised as such in law. It may be that when the parents have died the child also attains the status of an orphan. But the status of the parents as either divorced and/or separated (which is what we are concerned with here) has, in general terms, no effect in law on the status of their child. As Mr Warshaw and Mr Viney put it, legitimacy is a question of both birth and status. The distinction between adult children whose parents are cohabiting and those who are separated is neither. It has nothing to do with the birth of the adult child or the status of the adult child. Likewise, the distinction between adult children whose parents are divorced and those who are not. This is why the reliance Mr Amos places on *Inze v Austria (Application no. 8695/79)* (1987), *Pla and Puncernau v Andorra (Application no. 69498/01)* (2004), *Fabris v France (Application no. 16574/08)* (2013), and *Wolter and Sarfert v Germany (Applications nos. 59752/13 and 66277/13)* (2017), is misplaced; for, as Mr Warshaw and Mr Viney point out, these are all cases of discrimination on the basis of illegitimacy.

89. Secondly, in a case such as this the question in relation to Article 14 concerns the status of the child, not the status of the parents. The issue is, therefore, whether the applicant can bring himself within the relevant words of Article 14: "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The asserted status here is being the child of parents who are either divorced (or not) and/or separated (or not). That is not a status included within the enumerated list, nor, in my judgment, is it an "other status" within the meaning of Article 14. It is, to repeat, a matter of status as between the parents which has no impact in law on the status of the child. Mr Amos has been unable to point me to any authority to the contrary; his failure is unsurprising. I am not aware of any authority suggesting that whether an applicant's parents are cohabiting or not (or divorced or not) impacts upon the 'status' of the applicant.

90. Thirdly, as Mr Warshaw and Mr Viney point out, the wording which the applicant would have me read into paragraph 2(4) does not remedy the alleged discrimination. What it addresses is this applicant's specific situation as an adult child who lives separately from cohabiting parents. Reading paragraph 2(4) in this way would leave a lacuna because the adult child of cohabiting parents who remains in the same household as the parents would, on the applicant's analysis be unable to seek the remedy he now seeks. In other words, there is a fundamental disconnect between the way in which Mr Amos invites me to read paragraph 2(4) and the discrimination upon which he relies, that is, the inability of an adult child whether or not he is living with them to bring a claim against cohabiting parents. Mutatis mutandis there is likewise a

fundamental disconnect between the way in which Mr Amos invites me to read section 27 and the discrimination upon which he relies.

91. Mr Warshaw and Mr Viney also submit that in any event, and even if Article 14 is in some way engaged, any distinction in status (if there is any) is legitimate. They point to *JD and A v United Kingdom (Application nos. 32949/17 and 34614/17)* [2020] HLR 5, para 81, where the Strasbourg court made clear that contracting states are free to treat different categories of people in different ways:

> "The Court also recalls that the provisions of the Convention do not prevent Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention. Indeed, measures of economic and social policy often involve the introduction and application of criteria which are based on making distinctions between categories or groups of individuals."

92. They submit that the restrictions contained within Schedule 1 of the 1989 Act and section 27 of the 1973 Act on claims by adult children against cohabiting parents are both legitimate and proportionate. The legislative purpose of both statutes, they say, is to regulate financial provision on relationship breakdown or where there has been domestic instability. It is, they submit, entirely legitimate and proportionate for the state not to intervene where a cohabiting relationship subsists. The essence of the applicant's case, they say, is that any adult child who is in or contemplating higher education or where there are special circumstances should be able to bring a claim for maintenance against their own parents, whether cohabiting or not. This was never ever envisaged by the drafters of the legislation or by Parliament; in fact, as they point out, it was expressly disavowed. And that statutory scheme, they submit, is both legitimate and proportionate.

93. I need not follow Mr Warshaw and Mr Viney into this further thicket, save to say that I can well see the force of what they are saying.

94. In his written submissions of 14 August 2020, the applicant sought, as I have said, to re-centre his case on Article 14, seeking to pray in aid in this connection *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250. That was a case where the asserted ground of discrimination under Article 14 was disability: the Supreme Court held that there was discrimination where the relevant regulations distinguished between a severely disabled child who required more than 84 days of care and a severely disabled child who required less than 84 days of care. According to the applicant "This case can be seen to have an exact parallel with the present case in which the two relevant comparators in relation to Schedule 1 are (1) severely disabled children of parents who live together and (2) severely disabled children of parents who are separated and who don't live together."

95. Mr Warshaw and Mr Viney submit that *Mathieson* is irrelevant and has no bearing on the present case, where, they say, there can be no discrimination because none of the categories of Article 14 is relevant: the cohabitation of the applicant's parents (Schedule 1) or the requirement to be a party to the marriage (for an application under Section 27) have nothing to do with his status. They add that the status in question is

not the existence of "special circumstances" nor need for "higher education" or disability.

96. I agree. Moreover, there is a fundamental disconnect between this line of argument and both (a) the way in which Mr Amos puts the case under Article 14 and, more importantly, (b) the way in which Mr Amos (and, I assume, the applicant) invite me to read paragraph 2(4) and section 27 and the discrimination upon which the applicant (in distinction to Mr Amos) relies.

97. Mr Amos referred me to other cases: *Weller v Hungary (Application no. 44399/05)* (2009), *Glor v Switzerland (Application no. 13444/04)* (2009), *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250, and AR v SSWP [2020] UKUT 165 (AAC). None of these is in point and none, in my judgment, assists.

98. For all these reasons, the applicant fails to make good his case based on the Convention.

99. I turn therefore to the inherent jurisdiction.

The inherent jurisdiction

100. Before going any further a few general remarks about the inherent jurisdiction may not be out of place. Counsel remind me of Lord Donaldson of Lymington MR's famous description (*In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 13) of the common law – here, the inherent jurisdiction – as the "great safety net which lies behind all statute law, and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interests of society as a whole." But the choice of metaphor is revealing: the inherent jurisdiction is a safety net, not a springboard. And Lord Donaldson would have been the first to acknowledge that the inherent jurisdiction, whatever its theoretical reach, is, in settled practice, recognised as being subject to limitations on what the court can and should do. For an example, see his observations in *In re R (A Minor) (Wardship: Criminal Proceedings)* [1991] Fam 56.

101. I recognise of course that, as Singer J said in *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, relief can be granted in what he acknowledged was a "novel" case. As he said (para [8]):

> "the inherent jurisdiction of the High Court can, in an appropriate case, be relied upon and utilised to provide a remedy ... the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values."

102. I emphatically agree. Striking examples are its recent use in cases of forced marriage, female genital mutilation and, more recently radicalisation. So, as I said in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, para 45:

> "New problems will generate new demands and produce new remedies."

103. But novelty alone does not demand a remedy. Any development of the inherent jurisdiction must be principled and determined by more than the length of the Chancellor's foot (John Selden, Table Talk, 1689; Selden Society, 1927).

104. Moreover, human nature being what it is, many seemingly new problems are far from new. Wardship judges have been familiar down the ages with the impressionable youngster embarking upon some unsuitable relationship or dangerous cause. 'Hot pursuit' in the days of Lord Eldon LC conjures up the image of the coach and four labouring up Shap Fell taking the young heiress and her unsuitable paramour to the Scottish border and the blacksmith's forge at Gretna Green. Today it more probably conjures up the image of the potential teenage jihadist travelling by aeroplane to the Turkish border en route to join so-called ISIS in war-torn Syria. But we have to remember that the romantic or idealistic call to participate in foreign wars is nothing new: one has only to think of John Cornford who went as a young man, but in law still a minor (technically, in the language of the era, an infant), to fight in the British Battalion of the International Brigades in the Spanish Civil War, where he was killed in action the day after his 21st birthday. And, to bring this closer to home, financial disputes between parents and their financially dependent adult children have been with us for ever. Recall that familiar figure in Victorian and Edwardian culture, the remittance man. Yet it is a striking fact that, notwithstanding the prevalence of these disputes, there is no trace of them ever having been litigated. The law – that is, the common law and equity – never entertained a cause of action or claim between a financially dependent adult child and his parents, and this whether the child was illegitimate or legitimate, nor was there any process by which a legitimate adult child could have made such a claim.

105. That the branch of the inherent jurisdiction upon which Mr Amos relies exists is clearly established: *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, approved by the Court of Appeal in *DL v A Local Authority* [2012] EWCA Civ 253, [2013] 2 FLR 511. So too that it applies to those who, while they have capacity, are vulnerable, as that expression is described, even if not defined, in the authorities. The question in the present case is as to the ambit and extent of the jurisdiction, specifically as to the type of relief that can be granted.

106. Mr Warshaw and Mr Viney are scornful of Mr Amos in his attempt to invoke the inherent jurisdiction. They point out that, insofar as the protective jurisdiction with which I am here concerned is akin to the parens patriae or wardship jurisdictions, neither of those jurisdictions includes powers to award maintenance. Indeed, they say, the applicant cannot point to a single authority in which this or any other facet of the inherent jurisdiction has been invoked to require a party to pay maintenance. This, they submit, is unsurprising. Maintenance, they say, is essentially a creature of statute, because although at common law a husband was obliged to maintain his wife and, by extension, his minor children, that duty had no corresponding remedy when breached, save through the agency of necessity, by which a deserted wife could pledge her husband's credit. I agree. Long before the modern law emerged, a deserted mistress could claim maintenance for her illegitimate children under various statutes. And a wife, before 1858, could obtain orders for herself and her children from the ecclesiastical courts under canon law if she petitioned, for example, for a divorce *a mensa et thoro* (since 1858 the remedies available to her in, successively, the new Court for Divorce and Matrimonial Causes, created by the Matrimonial Causes Act

1857, the Probate Divorce and Admiralty Division, and the Family Division and Family Court have been exclusively statutory). But no such remedies were available either at common law or in equity. And, as already noted, neither the common law nor equity ever entertained a cause of action or claim between a financially dependent adult child and his parents. Further illumination on much of this can be found in the speech of Baroness Hale of Richmond in *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] 1 AC 42, paras 50-69.

107. Mr Warshaw and Mr Viney refer to what Ward J said in *Re C (A Minor) (Contribution Notice)* [1994] 1 FLR 111, 116, in connection with maintenance of a child:

> "The strange state of our law is that there may be a so-called common law duty to maintain, but when one analyses what that duty is it seems effectively to come to nothing. Like so many rights, the right extends only so far as the remedy to enforce it extends. There is no longer any agency of necessity and the common law has no remedy. The remedies to enforce a duty to maintain are the statutory remedies which are variously laid down in numerous statutes … One has the statutory framework in Sch 1 to the Children Act 1989, but when one looks beyond that one finds only specific statutory provisions."

108. They point out that the agency of necessity was abrogated by section 41 of the 1970 Act and that the common law duty to maintain has been abolished by section 198 of the Equality Act 2010 (astonishingly, not yet in force). Thus, they submit, there is no longer a common law duty for a husband to maintain his wife and his minor children, while there has never been a common law duty to maintain adult children.

109. Mr Amos submits that the court is faced with a situation in which a vulnerable person has acquired a very significant level of dependency over a long period of very many years, that dependency having been established by the actions – often, but not always, generous – of his parents. If they are to be free to withdraw their support, notwithstanding the level, depth, and intensity of his dependency on them, the reality, he says, is that the applicant will face the prospect of not only penury and degradation but also squalor and abuse. If he cannot claim under either section 27 or Schedule 1, then, says Mr Amos, it is only just and fair that the inherent jurisdiction should fill the legislative gap since, he submits, the adult disabled child of parents living together but in a separate household from their child is self-evidently just as deserving of financial relief as the identical children of parents living in households separate from each other. It is, he says, unreasoned and illogical to make this arbitrary distinction, and both are equally deserving of access to justice, of the court's protection, and of financial relief.

110. In relation to the inherent jurisdiction, his "central proposition" is that the inherent jurisdiction, provided it exists and has not been superseded by statute, is unlimited. The applicant is a vulnerable adult who, without the court's protective help, will be immediately at risk of harm. In these circumstances, he says, the applicant throws himself on the court's protective function. He urges the court to say that the applicant is deserving of succour and that the court has power to order it, not least given that the court traditionally exercises a "paternal" or "parental" jurisdiction – doing what it concludes that a good parent should and would do – especially where, as here, what is

sought is to restore the status quo ante which itself reflects a recognition by his parents of his very real needs.

111. In my judgment the inherent jurisdiction is not available to assist the applicant in the way suggested by Mr Amos.

112. Three separate arguments, separately and cumulatively, drive me without reluctance to this conclusion.

113. The first is that such a claim lies far outside the accepted parameters of the branch of the inherent jurisdiction prayed in aid by the applicant.

114. It is important at the outset to appreciate that, (1) precisely because they do not lack capacity, those subject to this branch of the inherent jurisdiction are fully autonomous adults; and (2) that, fundamentally, the jurisdiction exists to protect and to facilitate their exercise of that autonomy.

115. It is convenient to go first to my judgment in *Re SA*, para 77:

> "the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either: (i) under constraint; or (ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent."

Having elaborated what I meant by "coercion" and "undue influence," I turned to explain what I had in mind when referring to "other disabling circumstances" (para 78(iii)):

> "the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others."

I identified what I called the "common thread to all this" (para 79):

> "The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent."

116. It is useful to explain what I was doing in the particular case. I said (para 126):

> "I have power to make whatever orders and direct whatever inquiries are needed to ascertain, when a marriage is proposed or arranged, what SA's true wishes are and to ascertain whether or not she has been able to exercise her free will or is confined, controlled, coerced or under restraint – in short to ascertain the true state of affairs. Likewise I have power to make such protective or other orders as are best designed to ensure that any marriage really is what SA wants."

I went on (para 131):

> "In the final analysis, my concern must be to enable this vulnerable young woman to exercise her right to self determination, specifically her right to marry as enshrined in Art 12 of the Convention … I emphasise the importance these courts place on the right of the individual to exercise choice in this most intimate area of decision-making. And I agree … that the court has a positive duty to assist SA to enter into what will for her be the 'right' marriage, with someone who will confirm to her, in a way she can understand, that he understands and agrees with what she wants."

I added (para 133):

> "By taking this course, far from depriving SA of her right to make decisions, I am ensuring, as best I can, that she has the best possible chance of future happiness. I am taking these steps to protect, support and enhance SA's capacity to control her own life and destiny in the way she would wish."

117. The same concept was picked up by Macur J in an important passage in *LBL v RYJ and VJ* [2010] EWHC 2665 (COP), [2011] 1 FLR 1279, para 62:

> "I do not doubt the availability of the inherent jurisdiction to supplement the protection afforded by the Mental Capacity Act 2005 for those who, whilst "capacitous" for the purposes of the Act, are "incapacitated" by external forces – whatever they may be – outside their control from reaching a decision ... However, I reject what appears to have been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance ... the relevant case-law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions."

118. Likewise, Theis J at first instance in *A Local Authority v DL & Ors* [2011] EWHC 1022 (Fam), (2011) 14 CCLR 441, para 53(7), said of the jurisdiction:

> "its primary purpose is to create a situation where the person concerned can receive outside help free of coercion, to enable him or her to weigh things up and decide freely what he or she wishes to do. That is precisely what Munby J ordered in *SA*."

119. The Court of Appeal specifically approved all this. McFarlane LJ, with whose judgment Davis and Maurice Kay LJJ agreed, said this of the jurisdiction (para 53):

> "It is, as … the judgments of Munby J and Theis J demonstrate, targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the MCA 2005."

He went on (para 54):

> "The jurisdiction, as described by Munby J and as applied by Theis J in this case, is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity"

He added (para 67):

> "I would expressly commend the approach described by Macur J … The facilitative, rather than dictatorial, approach of the court that is described there would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their European Convention Art 8 rights."

120. There is nothing in any of this which begins to support the proposition that this branch of the inherent jurisdiction can be used as Mr Amos would have me accept. Quite the contrary.

121. Recently, it has been suggested, by Hayden J in *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202, and by Lieven J in *London Borough of Croydon v KR & Anor* [2019] EWHC 2498 (Fam) (though contrast the approach of Cobb J in *Redcar and Cleveland Borough Council v PR and Others* [2019] EWHC 2305, [2020] 1 FLR 827, and in *Wakefield Metropolitan District Council and Another v DN and Another* [2019] EWHC 2306 (Fam)), that the jurisdiction may extend further. As Lieven J said in the latter case (para 63):

> "I do not reject the possibility that in extremely exceptional cases the inherent jurisdiction might be used for long term or permanent orders forcing the vulnerable adult not to live with the person(s) he wants to, as was the case in Meyers. However, that must be a truly exceptional case. As was contemplated by Macur J in *LBL*, and apparently supported by McFarlane LJ in *DL* at [67], the normal use of the inherent jurisdiction is to secure for the individual, who is subject to the alleged coercion or undue influence, a space in which their true decision making can be re-established. If the inherent jurisdiction is used beyond this then the level of interference in the individual's article 8 rights will become increasingly difficult to justify."

122. There is no need for me to consider whether this is correct, though I have to confess to some doubt. But even if correct, it must, not least for the reasons articulated by Lieven J, mark the extremity of what can be done in exercise of the jurisdiction; moreover, even this somewhat wider view does not begin to support Mr Amos.

123. The second reason why the inherent jurisdiction is not available to assist the applicant is because of the fundamental principle that the inherent jurisdiction cannot be used to compel an unwilling third party to provide money or services.

124. The key point was stated by Millett LJ in *In re R (Wardship: Restrictions on Publication)* [1994] Fam 254, 271:

> "the wardship court has no power to … obtain for its ward rights and privileges not generally available to children who are not wards of court."

125. It follows as a matter of principle that neither the wardship judge exercising the inherent jurisdiction in relation to a child nor a judge exercising the inherent jurisdiction in relation to an adult can require a third party to provide facilities or services, or to put their hand in their pocket, if they are unwilling to do so: for an illustration see *Re C (A Minor) (Wardship: Jurisdiction)* [1991] 2 FLR 168 (independent school refusing to admit ward of court).

126. In *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413, Baroness Hale of Richmond put it this way (paras 30, 38):

> "When any family court decides with whom the children of separated parents are to live … it must choose from the available options … the court can[not] create options where none exist … Family courts have no power to conjure up resources where none exist."

127. Exactly the same principle applies in relation to an incapacitated adult and to the jurisdiction of the Court of Protection. As Baroness Hale of Richmond DPSC said in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67; [2014] AC 591, para 18:

> "This Act [the Mental Capacity Act 2005] is concerned with enabling the court to do for the patient what he could do for himself if of full capacity, but it goes no further. On an application under this Act, therefore, the court has no greater powers than the patient would have if he were of full capacity."

128. She returned to the same theme in *N v A Clinical Commissioning Group and others* [2017] UKSC 22, [2017] AC 549, para 35:

> "… the court only has power to take a decision that P himself could have taken. It has no greater power to oblige others to do what is best than P would have himself. This must mean that, just like P, the court can only choose between the "available options". In this respect, the Court of Protection's powers do resemble the family court's powers in relation to children. The family court … cannot oblige an unwilling parent to have the child to live with him or even to have contact with him, any more than it can oblige an unwilling health service to provide a particular treatment for the child."

129. Fastening upon the expression "available options", Mr Amos says that his parents, who are enormously wealthy, have plenty available for the applicant. Maybe, but "available" here has the connotation of 'willing to make available', and that, it seems, they are not.

130. Mr Amos submits that the respondents, being his parents, are not for this purpose to be treated as third parties vis-à-vis the applicant. He invites my attention to what he calls the family dynamic and reality: the respondents are the parents of an adult child who is (assumed to be) a vulnerable adult with (assumed) special needs; and they are being asked "to put their hands in their pockets", not for some new or unrelated liability, but rather for the results, and the continuation, of the dependency which they themselves have inculcated, or fed, or simply serviced, generously, for over 20 years. The legal nexus is in truth, he says, one of the closest imaginable, namely between

parents and their vulnerable and disabled, albeit adult, child, and what he seeks is only a restoration of the very long status quo ante.

131. The short answer to this is that provided in paragraphs 104 and 106 above and in the passages I have set out, in paragraphs 107 and 128 above, from the judgments of Ward J in *Re C (A Minor) (Contribution Notice)* [1994] 1 FLR 111 and Baroness Hale in *N v A Clinical Commissioning Group and others* [2017] UKSC 22, [2017] AC 549.

132. The third reason why the inherent jurisdiction is not available to assist the applicant is because of the fundamental principle which I summarised in *In re X (A Child) (Jurisdiction: Secure Accommodation), In re Y (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam), [2017] Fam 80, where I referred (para 37) to:

> "the well known and long-established principle that the exercise of the prerogative – and the inherent jurisdiction is an exercise of the prerogative, albeit the prerogative vested in the judges rather in ministers – is pro tanto ousted by any relevant statutory scheme."

133. The question in that case was whether the inherent jurisdiction could be exercised to put a child in secure accommodation in a case which fell outside the provisions of section 25 of the Children Act 1989. Having gone through the authorities, I said (para 45):

> "Section 25 does not, to use Lord Dunedin's phrase, [in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508] at p 526, cover "the whole ground", it is not, in contrast to the legislation being considered in *B v Forsey* 1988 SC (HL) 28, a comprehensive statutory scheme intended to be exhaustive. To have recourse to the inherent jurisdiction in a situation, as here, wholly outside the territorial ambit of the statute, does not, to use Lord Sumption JSC's phrase in *In re B (A Child) (Reunite International Child Abduction Centre intervening)* [2016] AC 606, para 85, "cut across" the statutory scheme, nor, to use Sir John Dyson JSC's phrase in *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15, para 34, would it be "incompatible with" the statutory scheme."

134. Mr Amos referred me to *Anderson v Spencer* [2018] EWCA Civ 100, [2019] Fam 66. Although it is not apparent that either the Court of Appeal or the judge at first instance (Peter Jackson J, [2016] EWHC 851 (Fam), [2016] Fam 391) had been referred to these earlier authorities, their approach was exactly the same. Holding that the inherent jurisdiction had not been ousted, Peter Jackson J said (para 71(1)):

> "The [Family Law Reform Act 1969, as amended] is the only statute concerned with testing for evidence of biological relationships. It is comprehensive in relation to cases falling within its scope … In contrast, the testing of DNA post-mortem falls distinctly outside the scope of the legislation. The FLRA cannot be read purposively or convention-compliantly so as to cover cases of the present kind. I therefore do not accept that a power to give directions for post-mortem DNA testing has been ousted by the Act."

The Court of Appeal agreed (para 40):

> "The Act is, of course, comprehensive in relation to cases falling within its ambit … whereas post-mortem testing is, as the judge put it 'distinctly outside the scope of the legislation'."

135. The point was put very pithily by Lieven J in *JK v A Local Health Board* [2019] EWHC 67 (Fam), (2019) 171 BMLR 184, para 57:

> "The inherent jurisdiction cannot be used to simply reverse the outcome under a statutory scheme, which deals with the very situation in issue, on the basis that the court disagrees with the statutory outcome."

136. Of course, on one view this all depends on the degree of generality or specificity with which one chooses to define or describe the ground or scope or ambit of the relevant statutory scheme. In *DL* there was a bright-line distinction between incapacity and capacity, the relevant legislation dealing exclusively with the former. In *In Re X* there was similarly a bright-line distinction between secure accommodation in England and secure accommodation in Scotland, the relevant legislation dealing exclusively with the former. In *Anderson v Spencer* there was a bright-line distinction between testing inter vivos and testing post mortem, the relevant legislation dealing exclusively with the former.

137. The legislation with which I am here concerned is rather different. Between them, the 1973 Act and the 1989 Act provide a comprehensive statutory scheme dealing, along with much else, with the circumstances in which a child, including, as here, an adult child, can make a financial claim against a living parent (I put the point this way to make clear that I have not overlooked section 1(1)(c) of the Inheritance (Provision for Family and Dependants) Act 1975). More specifically, the legislation, in its general reach, applies to the applicant, as to every adult child, and is comprehensive in relation to cases falling within its ambit. Furthermore, as Mr Warshaw and Mr Viney point out, the legislation deals explicitly with the very claims the applicant seeks to make; indeed, in the case of the 1989 Act it explicitly prohibits the claim he seeks to pursue. There is accordingly, in my judgment, no scope for recourse to the inherent jurisdiction. To exercise the inherent jurisdiction in these circumstances would simply be to do what Lieven J has rightly said is impermissible.

138. For all these reasons it is quite clear, in my judgment, that the inherent jurisdiction is not available to the applicant.

Conclusion

139. So far as concerns the three matters currently before me, I am, for all these reasons, satisfied that the applicant has no case. His applications should be summarily dismissed. The court has no jurisdiction to give him the relief he seeks under the 1973 Act or the 1989 Act and the inherent jurisdiction cannot be exercised as he would wish.

140. I should add two things:

141. The first is that the TOLATA claim raises issues entirely different from those considered in this judgment. Nothing I have said (or not said) here should be thought to throw any light on whether or not the applicant has a proprietary claim to the flat.

142. Secondly, I have not had to consider, and have heard no argument on, the ambit of section 27(6B)(a) of the 1973 Act and the corresponding provision in paragraph 2(1)(a) of Schedule 1 to the 1989 Act, nor on how the court should exercise its powers in a case where, unlike the present case, it does have jurisdiction under one or the other of these provisions. Conventional wisdom and practice are that, in an appropriate case, the court will make orders in relation to secondary and tertiary education, the latter extending to one first degree course, but no further. Whether in addition an order will be made to cover a post-graduate professional qualification – qualifying, for example, to be called to the Bar or admitted as a solicitor – is, it would seem, an open question amongst practitioners, and neither I nor the very experienced counsel before me is aware of any case in point, reported or not. I would not want to be thought necessarily opposed to the making of such an order in an appropriate case, though I would require to be persuaded that it was right as a matter of principle. But it will be appreciated that the applicant's contention here goes much further, since he already has a first degree, is qualified as a solicitor and, indeed, has further qualifications. I make the point because I would not want it to be thought that by saying nothing I am somehow accepting that in this respect the law and practice extends anything like as far as the applicant asserts the court should go. On the contrary, conventional wisdom and practice would suggest that these provisions were never intended to be used and cannot be used to fund the education of a perpetual student.

Postscript (28 September 2020)

143. The judgment as it appears above is, with only a small number of trivial corrections, in the form in which it was sent to the parties in draft by email in the usual way on 8 September 2020. In that email I asked to be sent submissions on costs and a draft order, agreed if possible. Later the same day I confirmed that the draft judgment could be shown to the lay clients. By the end of the same day, counsel responded with their proposed corrections. The following day, 9 September 2020 I informed the parties, by email, that I would be ready to hand down the judgment on 11 September 2020 "but prefer not to until I have a draft order and submissions on costs." By email on 10 September 2020, Mr Amos invited me to defer handing down until the following week after he had had a consultation with his clients. That I readily agreed to.

144. It will be recalled (paragraphs 14, 15 above) that at the end of the hearing on 12 August 2020 I had asked Mr Amos whether further time was being sought to develop the Convention arguments – he told me it was not. Notwithstanding that, I subsequently received, on 14 and on 24 August 2020, two further written submissions prepared by the applicant himself. Unsurprisingly, Mr Warshaw and Mr Viney complained that each of these had caused the respondents to incur further, not insubstantial, costs. On 25 August 2020 I circulated an email to the parties, asking the applicant’s solicitors to confirm that it was not proposed to send me any more such documents (I explained that I needed to know because I was at the very point in preparing the judgment where I was about to deal with these issues). They replied the following day: "it is not proposed to send you any more such documents." On the basis of that assurance, I completed the judgment in draft and circulated it, as I have said, on 8 September 2020.

145. In his email of 10 September 2020, Mr Amos said this:

> "Although I have not yet been able to discuss the matter with my client, I know that he is very keen, in order that he may understand your judgment better, that I ask you formally to rule on the question of whether discrimination between (1) the severely disabled children of together-parents and (2) the severely disabled children of separated and not-together-parents is objectively and reasonably justified. Whenever you decide to hand down your judgment, I should be very grateful if you would add a passage to your draft judgement in order to address this point please."

146. On 15 September 2020 I received a further email from Mr Amos in which, amidst much else, he said this:

> "My client expressly and specifically instructs me to send to you his Invitation to reconsider and change your judgment prior to hand-down, in accordance with the principle enunciated in [*In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634]."

This was set out in a Note, prepared by the applicant himself, running to some 15 closely spaced pages and referring to a number of new authorities. The Note asserts that "there are clear and obvious errors of law that need to be immediately corrected in order to avoid handing down a judgment that is "fundamentally wrong" and the enormous trouble and expense associated with a subsequent appeal."

147. It is important to appreciate that this latest submission is confined to the applicant's contentions in relation to his rights under Article 2, Article 6 and Article 8 of the Convention and Article 1 of Protocol 1, read together with Article 14; that is, and I emphasise the point, the matters, and only the matters, dealt with in paragraphs 61-98 above. I emphasise the point for this reason. As will be appreciated, the structure I had adopted in my judgment was to deal first with the question of 'reading down' (paragraphs 48-60) before dealing with the underlying issue of incompatibility (paragraphs 61-98). I had emphasised (paragraph 50) that I approached the issue of 'reading down' by assuming in the applicant's favour that without the reading down for which he contended there would be a breach of his rights on one or other of the grounds relied on under the Convention. So, as I explained in paragraph 61, given my decision in relation to 'reading down', my decision on the issues dealt with in paragraphs 61-98 did not and could not, nor can it now, affect the outcome.

148. The applicant ventures the opinion that it is "highly likely that if this case had been brought in the Administrative Court, a public law Judge would have either read down the relevant statutes" – a topic on which the Note otherwise makes no submissions whatever – "or at the very least made declarations of incompatibility." He continues:

> "if the learned Judge maintains his view that section 3 reading down is impossible in the circumstances of this case, then he should promptly proceed to update and correct his draft judgment based on the above discussion and proceed to make the following declarations of incompatibility:
>
> i. Paragraph 2(4) of Schedule 1 of the Children's Act 1989 is incompatible with Article 14 when read with Article 8 and/or Article 1 of Protocol 1 in that it unjustifiably discriminates against the adult disabled child based on the

living arrangements/status of his/her parents and insofar that it restricts entitlement to relief based on the living status of the Applicant child's parents.

ii. Section 27 MCA 1973 is incompatible with Article 14 when read with Article 8 and/or Article 1 of Protocol 1 in that it unjustifiably discriminates against the adult child of married parents in comparison with the adult child of divorced parents and/or a child who is the beneficiary of an existing section 27 MCA 1973 financial provision order and insofar that it restricts entitlement to relief based on the marital status of the Applicant's parents and/or whether the Applicant is the beneficiary of a pre-existing financial order."

149. Upon receiving this document I circulated an email on 16 September 2020 asking Mr Warshaw and Mr Viney whether it was their submission that I should embark upon a detailed analysis of these new points (in which case, I said, I would need their submissions in response), or that I should not (in which case, I said, I would need their submissions as to why I should not). Their response the same day was that I should *not* embark upon a detailed analysis, followed shortly after by their written submissions in respect of that proposition. They complain that the applicant seeks to reopen the entire case and reconsider every single point – which is correct so far as concerns paragraphs 61-98 of the judgment. It is, they say, a fundamental abuse of process, a waste of court resources and puts the respondents to yet further costs. So far as concerns the contention that I should grant a declaration of incompatibility, this, they say, is a volte face, Mr Amos having, as I have already noted, specifically disclaimed any such application.

150. The applicant's response to this arrived on 21 September 2020. The key points he made were that (i) he was *not* merely rearticulating the case as previously deployed on his behalf by Mr Amos – he was putting forward *new* points and arguments and *additional* authorities; (ii) those arguments demonstrated I was wrong in law; and (iii) correction of the judgment as he was proposing was appropriate to "obviate the need for a time consuming, expensive and unnecessary appeal." Later the same day, though after hours, I notified the parties by email that I had decided not to answer the question posed by Mr Amos in his email of 10 September and not to alter my judgment as requested by the applicant. I now give my reasons.

151. I do not criticise Mr Amos for raising the matters referred to in his emails of 10 and 15 September 2020, because I suspect he has an unusually difficult, demanding and pertinacious lay client to deal with. But I absolutely decline to go down the routes he – or rather his lay client – would have me traverse.

152. In relation to the question posed in his email of 10 September 2020, I decline to rule on it:

i) The question as formulated is in the most general and abstract terms, and it is not the function of the court to give advisory opinions.

ii) Insofar as the question arises in relation to Article 14, I have already explained (paragraph 93 above) that I saw no need to go further into it than I had.

iii) The sending out of a judgment in draft is *not* an invitation to enter into an ongoing Socratic dialogue.

153. In relation to the other matters raised by the applicant, it is remarkable that in his Note of 21 September 2020 he does not engage at all with the authorities to which Mr Warshaw and Mr Viney had appropriately directed attention in their submissions of 16 September 2020. To these I must now turn.

154. A most valuable exegesis of *In re L* and the subsequent authorities is to be found in the judgment of Mostyn J in *AR v ML* [2019] EWFC 56, [2020] 1 FLR 523. For present purposes, however, it suffices to note that the overriding objective in exercise of the jurisdiction, which undoubtedly empowers me to do what the applicant seeks, is to deal with the case in question *justly*.

155. How then should I proceed?

156. I start with the memorable observation of Lewison LJ in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, [2014] FSR 29, para 114(ii), that: "The trial is not a dress rehearsal. It is the first and last night of the show." In *WM v HM* [2017] EWFC 25, [2018] 1 FLR 313, para 39, Mostyn J said that:

> "the demands by Mrs Carew Pole for correction and amplification of the draft judgment went far beyond what is permissible, and amounted to blatant attempts to reargue points which I had already rejected. This practice is becoming commonplace and should be stopped in its tracks in the interests of efficiency and the conservation of the resources of the court. Suggested corrections should be confined to typographical or plain numerical errors, or to obvious mistakes of fact. Requests for amplification should be strictly confined to claimed "material omissions" within the terms of FPR PD 30A para 4.6."

In *In Re I (Children) (Practice Note)* [2019] EWCA Civ 898, [2019] 1 WLR 5822, [2019] 2 FLR 887, para 40, King LJ agreed and endorsed what Mostyn J had said, provided, she added, that the term "material omission" was taken to embrace the totality of the matters included in my judgment in *In re A (Children) (Judgment: Adequacy of Reasoning) (Practice Note)* [2011] EWCA Civ 1205, [2012] 1 WLR 595, [2012] 1 FLR 134, para 16:

> " … it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process."

She added this important observation (para 41):

> " I would merely remind practitioners that receiving a judge's draft judgment is not an "invitation to treat", nor is it an opportunity to critique the judgment or to enter into negotiations with the judge as to the outcome or to reargue the case in an attempt to water down unpalatable findings."

157. In relation to the matters raised by the applicant in his Notes of 15 and 21 September 2020, I refuse to alter my judgment. I can set out my reasons very shortly:

i) This is a blatant attempt to persuade me to allow re-argument on the whole of the matters already dealt with in paragraphs 61-98, explicitly on the footing that the applicant wishes to put forward *new* points and arguments and *additional* authorities. It is an attempt to do the very things denounced in clear and robust terms by both Mostyn J and King LJ. The plain fact is that the applicant seeks to reargue these points because he finds my decision unpalatable and because, with the benefit of hindsight, he seemingly does not like the way in which they were argued by his own leading counsel and imagines that he can do better.

ii) As I have already explained, whatever the position may be in relation to these points cannot affect the outcome. I remind the applicant that appeals lie against orders, not judgments, so in relation to paragraphs 61-98 the appeal which he contemplates would be misconceived, inappropriate and otiose. I repeat the point already made, that the matters sought to be canvassed by the applicant cannot, for the reasons I have already explained in paragraph 147, affect the outcome. So, an appeal in relation to these matters would serve no useful purpose.

iii) The ultimate requirement is that I deal with the case justly. From the applicant's point of view, to embark upon the further exploration of these issues can, as I have indicated, achieve nothing, whether the new arguments he wishes to deploy be right or wrong. So, I do not act unjustly to the applicant if I proceed as I have indicated. If, on the other hand, I were to proceed as he wishes, I would be acting unjustly to the respondents, significantly increasing their costs and all for nothing.

iv) The applicant's proposal that I should now make declarations of incompatibility is completely misconceived. Quite apart from the fact that this marks a complete volte face, it is elementary that the court cannot grant such a declaration without the involvement of the Crown: section 5 of the 1998 Act and FPR rule 29.5.

158. I add this. I had already, despite the additional burden of costs this threw on to the respondents, been prepared to indulge the applicant, not once but twice, after the argument had been concluded (paragraph 15 above). His further attempts to expand and reopen the argument are an abuse of process. Enough is enough. There must be an end to this.

Costs

159. Costs in respect of the proceedings under the 1973 Act and the 1989 Act are governed by FPR Part 28; costs in respect of the claim under the inherent jurisdiction by CPR Part 44: *Redcar & Cleveland Borough Council v PR* [2019] EWHC 2800 (Fam).

160. The respondents' costs (on which no VAT is chargeable because they are non-resident) amount in all to £74,467.50: £63,420 down to 12 August 2020; £5,730 from 13 August to 10 September 2020; £5,317.50 from 11 to 21 September 2020. Mr Viney's submissions can be summarised as follows:

i) The starting point (see the well-known passage in the judgment of Butler-Sloss LJ in *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR 233, 236) is that costs follow the event.

ii) There is no reason for displacing that starting point; quite the contrary. So, costs should follow the event.

iii) Applying the principles in *Three Rivers District Council and others v The Governor & Company of the Bank of England* [2006] EWHC 816 (Comm), [2006] 5 Costs LR 714, para 25, confirmed by the Court of Appeal in *Timokhina v Timokhin* [2019] EWCA Civ 1284, [2019] 1 WLR 5458, paras 56-57, this is a case where an order for costs on the indemnity basis is appropriate. "The test is not conduct attracting moral condemnation … but rather unreasonableness … Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails." As against that, as Mr Viney fairly acknowledges, such conduct must be unreasonable "to a high degree" for 'unreasonable' in this context "does not mean merely wrong or misguided in hindsight" and "whilst the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order": *Noorani v Calver (No 2/Costs)* [2009] EWHC 592 (QB), paras 8-9. The applicant's conduct here, he says, meets those tests.

iv) There should be a summary assessment in the full amount claimed.

161. Mr Amos says that there should be no order as to costs; alternatively, that costs should be on the standard basis, be the subject of detailed assessment and not be enforced without the leave of the court. He makes these key points:

i) I cannot in fairness depart from the assumption that I have previously, and correctly made, that the applicant is a "vulnerable adult". This, with respect to Mr Amos, is a hopeless submission. I made a forensic assumption, to facilitate legal argument as to proper ambit of the inherent jurisdiction, that the applicant was vulnerable within the meaning of the authorities on the inherent jurisdiction. I made no finding of fact to this effect; indeed, in the order I made on 28 July 2020 the assumption was expressly stated to be "without prejudice to the respondents' case as to whether he is." Mr Amos also refers to the medical evidence filed on behalf of the applicant: the report of a consultant psychiatrist. Given the nature of the hearing before me on 12 August 2020, this has never been the subject of either cross-examination or submissions. Moreover, even if it be the fact that the applicant is vulnerable, it has never been suggested that he lacks capacity either to litigate or to manage his affairs; and the documents he has himself prepared demonstrate his intellectual abilities. Vulnerability does not confer a licence to litigate with impunity.

ii) The applicant, to all intents and purposes, has no resources at all whereas, in very stark contrast, his parents have very considerable wealth. That may be, but poverty or economic inequality is not, in my judgment, a licence to litigate with impunity.

iii) The starting point must be that it would be extremely unusual for the court to make a costs order against an adult disabled and vulnerable child with on-going dependency because of his disability, who had brought a needs based child support application to the court because he was being inadequately provided for by his parents. Mr Amos cites no authority in support of this proposition, perhaps unsurprisingly given that this application is unprecedented. Be that as it may, I am unable to accept an assertion which, in my judgment, is contrary to principle.

iv) The applicant previously acted through solicitors working under a legal aid certificate and would have continued his case on legal aid, but for the complexity of this matter which required the engagement of a leading matrimonial finance firm and counsel who do not undertake legal aid work. No adverse or immediate costs order would have been made against him had he still been in possession of a legal aid certificate. He should not now be penalised for the complexity of his case, which was clearly outside of his control. To this I would merely observe that the fact is that the applicant is *not* legally-aided and that, even if he were, this would not immunise him from the making of an order for costs, merely from its enforcement without further investigation and order.

v) The clear picture that comes out of the correspondence written without prejudice save as to costs is one of the applicant trying his best to mediate/conciliate and putting out numerous olive branches to his parents, whilst they consistently refuse to cooperate and/or negotiate and set unreasonable pre-conditions to any discussions taking place, which clearly goes against the spirit and intent of mediation. This, says Mr Amos, is an important factor which I can and should have regard to in deciding whether to make a costs order. This may be, but the simple fact is that, on my reading of the correspondence, the applicant was holding out for significant ongoing financial provision – and in that endeavour he has wholly failed.

vi) Although the respondents' jaundiced view is that the applicant's case was "weak, speculative and opportunistic", and they seek indemnity costs on that basis, the applicant, as Mr Amos puts it, "would clearly not have brought this case without the assistance of expert matrimonial finance solicitors and Counsel unless he thought the case had some considerable substance to it." While noting what Mr Amos says, the fact is that, absent disclosure of the privileged discussions between the applicant and his advisers, this can only be speculation.

vii) In relation to *quantum*, beyond asserting that the respondents have spent more in legal costs and over a shorter period than the applicant, there is no specific challenge by Mr Amos either to the work alleged to have been done, or its reasonableness, or the seniority of the fee-earners, or the level of fees being charged.

162. In these circumstances, I conclude, without hesitation, that in principle the applicant should be ordered to pay the respondents' costs. Such an order accords with principle and none of the factors identified by Mr Amos, whether taken in isolation or together, suffices to justify any different conclusion. The fact is that an adult son has chosen to

make financial claims against his parents. In that endeavour he has utterly failed. There is no reason at all why he should not suffer the consequences. Fairness and justice to the respondents require such an order; in contrast, neither fairness nor justice to the applicant requires that I not make an order. He must pay their costs. And I refuse to make any order preventing enforcement without leave of the court. Such an order would, in my judgment, be unprincipled and unjust to the respondents.

163. The more troubling question is whether costs should be on the standard or indemnity basis. I have come very close to ordering the applicant to pay all the costs on an indemnity basis but am persuaded – just – that that would be to go too far. In relation to the costs down to the end of the hearing on 12 August 2020 I shall order the costs to be paid on the standard basis. For reasons which will be apparent (see for example paragraph 158) the position from 13 August 2020 onwards is significantly different. The abuse of process to which I there referred requires that these costs be paid on the indemnity basis. In relation to the first period the costs claimed amount to £63,420; in relation to the second period to £11,047.50. I summarily assess them in the sums of £47,500 and £9,925 respectively.

The TOLATA claim

164. At the end of the hearing on 12 August 2020 I said this:

> "Now the only other thing, and I suspect the answer is a matter for after judgment, is TOLATA. I raise it because, irrespective of the outcome of the current application, I would be averse for TOLATA to be hanging around there indefinitely. It seems to me that subject to submissions in due course, the respondents are entitled to know within a reasonable amount of time whether or not the TOLATA claim will be pursued. I just put it down by way of a marker, because it is something I am likely to require to be answered so it can be incorporated in my judgment."

165. Mr Amos argues that "having expressly adjourned further consideration of the TOLATA claim, on 28 July, and that claim not having in fact been pursued in the sense of formally issued, this Court need not and should not concern itself further with the TOLATA aspect at all." Indeed, in his final submissions on the point dated 22 September 2020 he submits that any direction is "unnecessary and otiose" because there is "no jurisdiction or legal purpose."

166. I do not agree. On the contrary, in my judgment, I can and should deal with it.

167. On 9 June 2020 the applicant registered a restriction against the title to the property and in his witness statement dated 17 July 2020, paragraphs 49-53, he set out the factual basis of his TOLATA claim, provided a draft of his claim form and specifically invited the court to give directions about it, which both Mostyn J and I have done. My order, on 28 July 2020, merely adjourned further consideration of the unissued TOLATA claim "generally" and not for any specified time.

168. In these circumstances interesting questions might be thought to arise in relation to the well-known principle in *Henderson v Henderson* (1843) 3 Hare 100, most recently analysed by Nicklin J in *Tinkler v Ferguson and others* [2020] EWHC 1467 (QB), [2020] 4 WLR 89, paras 34-38. There are also the interesting and suggestive

observations of Carnwath LJ, as he then was, in *Fitzhugh Gates (A Firm) v Claudia Sherman* [2003] EWCA Civ 886, paras 55-57. I note also section 49(2) of the Senior Courts Act 1981 which provides that:

> "Every such court [that is, "every court exercising jurisdiction in England or Wales in any civil cause or matter"] … subject to the provisions of this or any other Act, shall so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided."

169. I can, however, and prefer to proceed on a narrower front.

170. The applicant in my judgment cannot properly continue indefinitely to 'sit on the fence' whilst at the same time maintaining the restriction. Putting it bluntly, he must 'put up or shut up.' This is merely an application of a familiar principle which one comes across in many legal contexts and which finds expression in the aphorism that you cannot approbate and reprobate, in more homely language that you cannot have your cake and eat it.

171. I appreciate that the applicant may need time to come to a decision, and in all the circumstances I am prepared to give him a little more time. The appropriate way forward, in my judgment, is for me to include in the order I propose to make directions that (1) the applicant is to inform the respondents and the court within six weeks whether or not he proposes to proceed with a TOLATA claim and if he does (2) the applicant is within 3 weeks thereafter to issue the proceedings and serve points of claim. Failure to comply with these directions (time to be of the essence) will debar the applicant from pursuing the claim and lead to the removal of the restriction. Mr Viney submits that the periods specified should be respectively four and two, but as Mr Amos points out the respondents will not in reality be prejudiced if the applicant is given the slightly longer period, and, given the nature of the order I propose to make, it is, I think, appropriate to give the applicant that extra leeway.

<u>Permission to appeal</u>

172. Mr Amos seeks permission to appeal. He does not identify any specific grounds of appeal, or even those parts of the judgment he seeks to challenge, but in his submissions on the point dated 22 September 2020 he seemed to indicate that the focus of the proposed appeal would be the points raised by the applicant since the end of the hearing on 12 August 2020.

173. I refuse permission to appeal. There is, in my judgment, no prospect of an appeal being successful and no other reason justifying the grant of permission. I repeat what I have said in paragraphs 146 and 157(ii) – that an appeal in relation to those matters would serve no useful purpose.

174. Mr Amos seeks an extension of time for renewing the application. He submits that the applicant "should have a sufficient time in which to consider his position and the question of any attempted appeal, rather than being rushed into making an application" and that the respondents will not suffer any prejudice if time is extended. He says that "justice cries out for a longer period than the standard 21 days." That is

hyperbole. I refuse to extend time. The judgment was circulated in draft on 8 September 2020 and the applicant has known since 22 September 2020 that I was not prepared to allow the re-argument for which he was contending. He has had plenty of time in which to consider his position and formulate it in appropriate detail. He has been treated with considerable indulgence; if he wants further indulgence, he must seek it in another place.

Further postscript (29 September 2020)

175. On 28 September 2020 at 10am I circulated to the parties by email (a) the judgment as it would be handed down two days later and (b) the draft of the order I proposed to make. I invited counsel to identify any typographical or other corrections to paras 143-174 of the judgment *or to the order*. No corrections to either were identified, but Mr Amos by an email on 29 September 2020 invited me to include in the order a stay of execution in relation to the order for costs pending appeal. He justified this on the basis of what he called "pragmatic simplicity", so that the question of costs enforcement stand or fall with the appeal process itself rather than requiring the applicant to seek additional specific relief from the Court of Appeal. That is not, in my judgment, an adequate justification for what he seeks. I refuse the application.

176. Having, as it seemed, achieved finality, and in what I believed to be the spirit of the Covid-19 Protocol, at 4.25 on the afternoon of 29 September 2020 I circulated to the parties by email the judgment as it was to be handed down at 12 noon the following day, 30 September 2020, and the order in its final form. I was staggered to receive from Mr Amos just after 9.30 in the evening this email:

> "the Court's proposed ToLATA debarring order is, even contingently, with respect new. On behalf of the applicant I submit that, if the Court is really minded to impose such an order, it should by analogy with inter alia Children Act s.91(4) be subject to the filter of a future Court's leave, not absolute as proposed and without limit of time, as a matter of inter alia the Applicant's Article 6 rights."

There was not a word of explanation as to why this new point had not been raised by Mr Amos in his earlier email, as one might have thought it could and should have been. Be that as it may, I see no reason to depart from the approach spelt out in paragraphs 170-171 or to alter in any way paragraph 7 of the order as set out below – which, I must emphasise, had been sent to the parties in this form on 28 September 2020. The suggested analogy, with all respect to Mr Amos, is wholly inapt, and his reference to Article 6 (in relation to which, I note, he cites no authority) takes him nowhere. The point, to repeat, is that the applicant cannot properly continue indefinitely to 'sit on the fence' whilst at the same time maintaining the restriction. He must, as I said, 'put up or shut up.' The respondents are entitled to know, within a specified time, whether or not he is going to pursue the claim. An order in this form is Article 6 compliant. The time I have afforded him is, it will be recalled, the very time sought by the applicant, *not* the shorter time for which the respondents contended. An order in the form now being proposed by Mr Amos would defeat this wholly desirable, indeed necessary, objective.

The Order

177. Accordingly, I make the following order:

> "Recital
>
> 3. This Order is made further to the Order herein dated 28 July 2020 in which the Court, treating the Applicant's application under the Inherent Jurisdiction as being before the Court even though not issued and adjourning generally further consideration of the unissued TOLATA claim, gave directions for a further hearing to determine jurisdiction in relation to the Applicant's claims under the Matrimonial Causes Act 1973 and the Children Act 1989 and under the Inherent Jurisdiction on the assumption (without prejudice to the Respondents' case as to whether the Applicant is a vulnerable person) that the Applicant is a "vulnerable person" as defined in the authorities.
>
> 4. The Court's judgment resulting from the jurisdiction hearing on 12 August 2020 was formally handed down today, in anonymised form so as not to publish the names or identifying features of any of the parties, the Judge having rejected the Applicant's applications for (a) expanded explanation of the Court's decision in relation to comparator groups for the purposes of discrimination and (b) revision of the draft judgment.
>
> It is ordered that:
>
> 5. The Applicant's applications for interim maintenance and legal costs funding orders in relation to the said claims are each hereby dismissed.
>
> 6. The Court having determined that it does not have jurisdiction in relation to the claims under the Matrimonial Causes Act 1973 and the Children Act 1989 and that jurisdiction under the Inherent Jurisdiction cannot be exercised as the Applicant asserts, the Applicant's claims under the Matrimonial Causes Act 1973 and the Children Act 1989 and under the Inherent Jurisdiction are hereby dismissed.
>
> 7. As regards the Applicant's unissued claim against the Respondents, under the Trusts of Land and Appointment of Trustees Act 1996, in relation to the property at … registered at HM Land Registry under Title No … and in respect of which the Applicant lodged a Restriction on 20 June 2020:
>
> a. The Applicant shall by 4pm on 11 November 2020 (time to be of the essence) notify both the Court (by email to Sir James Munby at …) and the Respondent's solicitors (by email to … of Clintons Solicitors at …) whether or not he intends to pursue the claim.
>
> b. If within the time specified above, or within such further time as may have been allowed in accordance with sub-paragraph c, he has given notice that he does intend to pursue the claim then the Applicant shall by 4pm on 2 December 2020, or within such further time as may have been allowed in accordance with sub-paragraph c, (time in either case to be of the essence) issue his application together with Points of Claim setting out succinctly the facts and matters he relies upon.

c. In the event that the Applicant fails within the time specified to comply with either of these directions then (unless the court has on application made by the Applicant before the expiry of the relevant time extended time):

i. The Applicant shall be debarred from pursuing any such claim; and

ii. The Restriction shall be removed (for which purpose the Respondents are to be at liberty to apply to HM Land Registry and/or to the Court).

8. The Applicant shall within 21 days pay (a) the Respondents' costs down to 12 August 2020, summarily assessed on the standard basis at £47,500 and (b) the Respondents' costs from 13 August 2020 summarily assessed on the indemnity basis at £9,925.

9. The Applicant's applications (a) for permission to appeal (b) for an extension for the time to make an application for permission to appeal and (c) for a stay of execution in relation to paragraph 8 pending appeal are dismissed."