IN THE HIGH COURT OF JUSTICE [2021] EWHC 1564 (QB)

QB-2019-000498

QUEEN'S BENCH DIVISION

MASTER MCCLOUD

BETWEEN

Mr Charles Ayeh-Kumi

Claimant/Respondent

And

The Lord Chancellor and Secretary of State for Justice

Defendants/Applicants

REPRESENTATION

For the Claimant: Mr Charles Ayeh-Kumi in person.

For the Defendants: Mr Daniel Cashman of counsel, instructed by the Government Legal Department.

LIST OF AUTHORITIES

Domestic authorities referred to:

Glebe Sugar Refining Company Ltd v The Trustees of the Port and Harbours of Greenock [1921] 2 AC 66 (HL)

Von Lorang v Administrator of Austrian Property [1927] AC 641

John v Rees [1970] Ch 345

Black Clawson International Ltd v Papierwerke AG [1975] 1 All ER 810

R v Barnsley Metropolitan Borough Council, ex parte Hook [1976] EWCA Civ J0220-5

Brenner Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp. [1981] AC 909, HL

Fothergill v Monarch Airlines Ltd. [1981] AC 251

Hunter v Chief Constable of the West Midlands Police [1982] AC 529 (HL)

O'Reilly v Mackman [1983] 2 AC 237

R v Lancashire County Council ex p. Huddleston [1986] 2 All ER 941

R v Secretary of State for the Home Department, ex p Fire Brigades Union [1995] UKHL 3

Thomas v Thomas [1995] 2 FLR 668

R v Director of Public Prosecutions, ex parte Kebilene and Others [1999] UKHL 43

R v Director of Public Prosecutions, ex parte Rechah, [2000] 2 AC 326

Arrow Nominees Inc & Anor v Blackledge & Ors [2000] EWCA Civ 200

Hamilton v Al Fayed [2000] UKHL 18; [2000] 2 All ER 224

Johnson v Gore Wood & Co. [2000] UKHL 65

Swain v Hillman [2001] 1 All ER 91

Three Rivers District Council v Governor and Company of The Bank of England [2001] UKHL 16

Bellinger v Bellinger [2003] UKHL 21

Attorney General's Reference No 3 of 2003 [2004] EWCA Crim 868

Campbell v MGN Ltd [2004] 2 AC 457

Harb v King Fahd (DCA intervening) [2005] EWCA Civ 1324

Miller v Miller; McFarlane v McFarlane [2006] UKHL 24

Kay and others and another (FC) v London Borough of Lambeth and others [2006] UKHL 10

Re P and others (AP) (Appellants) (Northern Ireland) [2008] UKHL 38

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McLaughlin, Martin and Davis v Lambeth Council [2010] EWHC 2726

Ministry of Defence v AB [2012] UKSC 9

SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam)

HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC 64

Alpha Rocks Solicitors v Alade [2015] WLR 4534

Hart v Hart [2016] EWCA Civ 497 (24 May 2016)

Billington v Davies & Anor [2016] EWHC 1919 (Ch)

Owens v Owens [2017] EWCA Civ 182

Dawes and Beedle v Dawes and Dawes,[2017] (unreported)

SW & TW (Human Rights Claim: Procedure) (No1) [2017] EWHC 450 (Fam)

In the matter of an application by Denise Brewster for Judicial Review (Northern Ireland) [2017] UKSC 8

R (on the application of Kay and another) v Leeds Magistrates' Court and Another [2018] EWHC 1233 (Admin)

R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812

Saeed & Another v Ibrahim & Others [2018] EWHC 3 (Ch) (09 January 2018)

The Queen on the application of The Law Society and The Lord Chancellor [2018] EWHC 2094 (Admin)

Cherry QC MP v Advocate General [2019] CSIH 49

R (Miller) v The Prime Minister; Cherry & ors v Advocate General for Scotland [2019] UKSC 41

Kings Security Systems Ltd v King & Anor [2021] EWHC 325 (Ch)

ECtHR authorities referred to:

Golder v United Kingdom, 4451/70, [1975] 1 EHRR 524, [1975] ECHR 1

Marckx v Belgium (1979) 2 EHRR 330

The Sunday Times v United Kingdom (1979-80) 2 EHRR 245

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X and Y v. The Netherlands App No 8978/80 (A/91) (Official Case No) [1985] ECHR 4 (Neutral Citation)

H. v. Belgium ECHR 30 Nov 1987

Dombo Beheer B.V. v The Netherlands App No 14448/88 [1993] ECHR 49

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McGinley and Egan v United Kingdom, 9 June 1998, Reports 1998 III

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Roche v United Kingdom [GC], no. 32555/96, § 162, ECHR 2005 X)

Copland v United Kingdom [2007] ECHR 253

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In A, B and C v Ireland [2010] (Application no. 25579/05)

Legislation referred to:

Matrimonial Causes Act 1973, ss.1, 23, 25

Human Rights Act 1998, ss. 6-9, Schedule 1 (ECHR)

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Hansard references:

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1996 – Lords – Hansard, 4 March - Quickie Divorce and Unreasonable Behaviour

2017 - Divorce (Financial Provision) Bill [HL] (Second Reading 27th January)

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No Contest: Defended Divorce in England and Wales by Professor L. Trinder of Exeter University with M Sefton (Nuffield Foundation - 2018) Accessible at: https://www.nuffieldfoundation.org/about/publications/no-contest-defended-divorce-in-england-wales

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"Reducing family conflict: Government response to the consultation on reform of the legal requirements for divorce" (2018)

Buzzfeed, "A Culture of Deception and Misdirection". January 5, 2019

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Solicitors Regulation Authority (SRA) principles. Accessible at: https://www.sra.org.uk/solicitors/standards-regulations/principles/

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Accessible language summary (not part of ratio of judgment)

This summary has a Flesch score of above 50 and was written to ensure accessibility of the judgment to readers with average reading ability.

In England and h the law called the Matrimonial Causes Act 1973 says that one ground for divorce is that the other spouse has behaved in such a way that the person wanting the divorce cannot reasonably be expected to live with them. The Claimant claims that the law is too vague and does not comply with the requirement of Human Rights Law that laws must be accessible so that people can comply with them and understand the requirements. He relies on numerous occasions when judges and other people have criticised the law in the past but the law has not changed and he says that the court must consider the issue if Parliament will not. The Defendants who are the Government argue that the claim should be dismissed without the arguments being heard in detail because the claim is made too late and in the wrong court and will not succeed. The Judge held that the claim should be considered in view of the fact that the hearing was not a mini-trial and was not a hearing of a trial on a point of law, that it was not too late and not in the wrong court.

JUDGMENT

1. By this claim issued on 12 February 2019 Mr Ayeh-Kumi claims against the Lord Chancellor and Secretary of State for Justice (and therefore effectively against the UK State) remedies in respect of what he alleges are infringements inter alia of the European Convention on Human Rights as incorporated into the law of this jurisdiction by the Human Rights Act 1998. It is trite but since this judgment will be the subject of law reporting in the press I remind the reader that the European Convention on Human Rights and the European Court of Human Rights have no connection with the EU or European Union, which the UK left as a result of "Brexit" and that the ECHR and the Human Rights Act 1998 remain in force (many non-EU countries other than the UK are signatories to the Convention).

2. The claim against the State arises out of his concerns over the clarity of law pertaining to the grant of a divorce in marriage (and equally applicable to civil partnerships) on the grounds of the fact of 'unreasonable behaviour'. The case involved the citation of a significant quantity of legal and academic, and other sources which are listed above and I undertook to reassure the parties and especially Mr Ayeh-Kumi (who for the most part cited it) that I would consider it, and hence this judgment has taken in part for that reason longer than I would usually expect to take, in production, and I thank the parties for their forbearance.

Background

3. Under the law of this jurisdiction in the form of the Matrimonial Causes Act 1973 (MCA 1973) s.1(1) a person may obtain a divorce on the ground that the (in this case) marriage has broken down irretrievably. To establish that, a Petitioner has to prove that at least one of several facts are true. These include for example desertion by a spouse. However in this case the one of interest for the claim is s.1(2)(b), namely that "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent".

4. In this instance, though it is not directly a matter in issue in this case, the Claimant Mr Ayeh-Kumi was divorced by his former wife, relying on that alleged fact. The Family courts allowed the divorce and all appeals failed. Mr Ayeh-Kumi's experience, on his evidence, of the divorce system has given him the picture of a system which allows such unreasonable behaviour to be found almost with no threshold of seriousness so as to amount to a grant of divorce virtually on demand, which is not what the law says. He also complains that the way in which the test was applied varied wildly between judges such that he says one judge took the view that the grounds in his divorce could not reach the necessary standard whereas others, he says, were resistant to hearing any argument against a divorce. None of that is for me, because firstly the family courts have dismissed his appeals and secondly this case is not brought between him and his former wife but against the UK State. In addition to arguing that the current application of the Act amounts to divorce on demand (or something close to it), he says that the law as presently framed and applied by the courts falls foul of among other things the requirements of the European Convention on Human Rights.

5. In particular he relies on the principle, which is part of this country's law, that interference with a person's Article 8 rights to respect for home and family life must not be permitted unless it is in accordance with the law and is proportionate and in pursuance of a legitimate aim. It is well known, and relied on by Mr Ayeh-Kumi, that to be 'in accordance with the law' means that the relevant law must be reasonably ascertainable. Thus at para 15 of the ECtHR court Guide to Art 8 it indicates:

   "The national law must be clear, foreseeable, and adequately accessible (Silver and Others v. the United Kingdom, § 87). It must be sufficiently foreseeable to enable individuals to act in accordance with the law (Lebois v. Bulgaria, §§ 66-67 with further references therein, as regards internal orders in prison), and it must demarcate clearly the scope of discretion for public authorities."

   And at 16:

   "The clarity requirement applies to the scope of discretion exercised by public authorities. Domestic law must indicate with reasonable clarity the scope and manner of exercise of the

relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which they are entitled under the rule of law in a democratic society (Piechowicz v. Poland, § 212)."

6. It is part of his complaint that the law in this instance is either not being applied (such that the position is 'divorce on demand' contrary to the Statute and thus not in accordance with the law) or that the law is vague to the point that a party to a divorce (presumably either party) cannot know what the relevant factual, evidential threshold for establishing the fact of unreasonable behaviour actually is.

7. This touches on the question of the Rule of Law in the sense that arguably the Rule of Law requires that a law should be such as to be capable of being complied with so as to ensure it has real and practical effect (hence we do not permit retrospective laws).

8. Although the Claimant cites various articles of the Convention as having been infringed in the course of his divorce, the focus *in this case* against the UK State is Article 8, read with Article 14 (discrimination within the ambit of a Convention right) and connectedly Article 1 Protocol 1 which is protection for property rights (the connection here being that the divorce process brings with it rights to pursue various forms of property adjustment orders as between the parties, and in this instance Mr Ayeh-Kumi's case in the family courts is ongoing as regards financial relief arising from the divorce).

9. It needs to be repeated, since this case has already attracted public interest, that this case does not involve this court deciding or commenting on the merits of decisions of the family courts already made (and the appeal(s) pursued) nor does it relate to the ongoing financial proceedings. The only sense in which the material from that case is potentially relevant (and may be relevant alongside other material unconnected with his own divorce) is as evidence going to his point as to the manner of common law interpretation of s.1(2)(b) and the extent to which its interpretation by the courts is 'in accordance with the law' as described above, ie reasonably ascertainable law rather than unpredictable, or 'in accordance with the law' in the sense that courts are not effectively dispensing with the threshold of unreasonable

behaviour so as to create divorce on demand which is not sanctioned at this time in the law of this jurisdiction.

10. This case therefore relates to the law itself and whether it complies with the Convention. The courts do have the power under the HRA 1998 to make declarations of incompatibility of statutes with the convention (as happened in *Bellinger v Bellinger* [2003] UKHL 21 in respect of the same Statute as is under consideration here (but s.11 rather than s.1)). Mr Ayeh-Kumi cited *Bellinger* on that point, and there is no controversy that the courts are so empowered in a proper case.

11. In this instance the root cause of the claim is s.1(2)(b) and its wording and application in Common law by the courts, but the 'knock on' effect in terms of financial relief is also implicitly cited as being (effectively as a consequence) also a breach, hence Mr Ayeh-Kumi puts his claim (in the brief particulars) in the following way referring to ss. 23 and 25 of the MCA 1973 in addition to s.1(2)(b) (there was much detail in this case but this short formulation is usefully clear):

> *"I submit that sections 1.2.(b), 23 and 25 of the matrimonial Causes Act 1973 (MCA) are so broadly drawn and confer unfettered discretion on the courts that they infringe the principles of legality and certainty enshrined in the Rule of Law.*
>
> *I submit that the UK government has failed to ensure that the Family Courts and the family law profession comply with both the Rule of law, and the Human rights Act 1998 in their interpretation and implementation of sections 1.2.b, 23 and 25 of the MCA 1973."*

12. In his longer Particulars he also for example indicates that in his submission the courts are not applying s.3 of the MCA 1973 consistently with the HRA 1998. Section 3 requires courts to "to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent."

The application by the defendant

13. The matter before me is an application by the Defendants, ie the Lord Chancellor and Secretary of State for Justice, to strike out the claim or for Summary Judgment. Mr Cashman for the Defendants appeared against Mr Ayeh-Kumi in person and the hearing was held in open court with Covid protection measures. I am grateful to both sides for their presentation of the case which was measured and cogent.

14. The Defendants' arguments were based on attacking the foundations of the claim. Insofar as the claim was a challenge to the compatibility of the Matrimonial Causes Act 1973, it was said that this was a claim which should have been commenced by way of Judicial Review or at least in the Administrative Court and not as a claim in the Queen's Bench Division seeking remedies under the Human Rights Act 1998. Insofar as the claim could be construed as a challenge to the way in which the law was applied in his own divorce, then it was a collateral challenge to matters which had already been dealt with in the family courts and where all appeals had been concluded unsuccessfully on his part.

15. The brief chronology which Mr Cashman for the Defendants gave was as follows:

20 January 2017: Divorce petition. Directions hearing. A declaration is sought in this claim that the judge there misused his powers. A complaint was made against the Judge which was dismissed.

21 March 2017: Divorce hearing, reasoned judgment. Claimant found to have behaved unreasonably for the purposes of the MCA based on five conduct allegations pleaded.

10 April 2017 (approximate date taken from the appeal documents): Appeal issued against the divorce decree nisi. The grounds pleaded to which I was taken included an allegation that the divorce courts exhibit systemic bias against the idea of a defended divorce, that the judges had been actually biased in his case, and there were grounds pleaded in relation to procedural and evidential errors and lack of a fair trial under Art. 6.

9 November 2017: Permission to appeal refused with detailed reasons by Moor J.

December 2018: Claimant applied for a stay of his former wife's application for financial provision which was dismissed on paper as totally without merit. A renewed application

was dismissed orally as totally without merit on 18 February 2019. A further attempted appeal was thereafter dismissed by HHJ Raeside as also totally without merit.

Arguments by Defendants

(1) That this is a public law challenge and that it is an abuse to commence the claim other than by Judicial Review, or alternatively that insofar as not a public law challenge, the claim is a collateral attack on other proceedings.

16. The relief sought in broad terms was described as declaratory relief both as to compatibility of the applicable sections of the MCA but also as to the lawfulness of how those sections were applied in the claimant's case in the County Court.

17. I was taken to the White Book commentary which was quoted as follows:

White Book 2020 para 54.3.2:

"The House of Lords has held that, as a general rule, it is contrary to public policy and as such an abuse of process for a person seeking to establish that a decision or action of a person or body infringes rights which are entitled to protection under public law, to proceed by way of an ordinary claim rather than the judicial review procedure, thereby evading the provisions intended to protect public authorities (O'Reilly v Mackman [1983] 2 A.C. 237; this dealt with the provisions of the former RSC Ord.53, but the relevant provisions of Pt 54 are materially identical and there is no reason to believe that the law in relation to Pt 54 is any different from that previously applicable). If a person commences an ordinary Pt 7 claim in circumstances where they should have complied with the judicial review procedure (that is, Pt 8 as modified by Pt 54), the claim will be struck out."

18. It was argued that the Judicial Review process offered important protections to the State which were circumvented if a conventional Part 7 claim is brought, namely the time limits for judicial review and the provision requiring permission before Judicial Review can be proceeded with.

19. Another aspect was the suggestion that this claim also included a claim for damages in proceedings under s.7(1)(a) of the Human Rights Act as a victim of an unlawful act by a state body, but section 9 of the Human Rights Act 1998 provides in relation to judicial acts (if this is a challenge to the actual decisions made by the family judges in the Claimant's divorce case) the claim can only be made by exercising a right of appeal or on an application for judicial review or such other forum as may be prescribed. Section 9(3) provides that damages may not be awarded other than where there has been a deprivation of liberty. It was therefore said to be clear that to the extent that this is a s7(1)(a) claim then it must be pursued in an appeal or by way of Judicial Review.

20. I raised the point that *O'Reilly v Mackman* relied on by the Defendants was an old case and decided well before the Human Rights Act and that it therefore did not deal with that Act specifically. It was acknowledged that there were modern circumstances and some case law where it had been suggested that there were circumstances which were on the borders between public and private law which may be treated differently but it was indicated that I was not being taken to that case law because it was said that to the extent this case related to private rights, that matter was within the scope of the family case which was, as regards the divorce, concluded with appeals all exhausted. This was therefore either within the scope of a public law challenge and hence within *O'Reilly v Mackman*, and an abuse because it was not brought by way of Judicial Review or it was a private rights claim and an abuse as a collateral challenge to the family court decisions.

21. I asked the following: if this is a claim that the relevant parts of the MCA legislation are simply incompatible with the convention, where would that fit into the Defendants' reasoning? Would this be a matter solely for Judicial Review or could that be properly brought as a claim for declaratory relief in a conventional claim? The argument in response was that this would still be about public law legality or that the Claimant is a 'victim' as a result of how the law was applied to him specifically in the divorce, hence a collateral attack on the specific family law decisions, and would remain defective.

(2) The time limit applicable has expired so the claim is out of time

22. The argument was made in the alternative that the case is out of time. Section 7(5)(a) of the Human Rights Act 1998 provides that proceedings must be brought before the end of one year beginning with the date on which the act complained of took place. There is an equitable jurisdiction to extend or disapply that limit but it was argued that the sole challenges here if any, under s.7 were judicial decisions made in 2017 and the claim was not issued until 2019 and hence out of time. Insofar as there is a discretion to exercise, the merits of the claim were said to be too weak to justify exercising the discretion to depart from the 1 year time limit (let alone the 3 month limit applicable to Judicial Review cases).

(3) Merits

23. It was said that even supposing the court decided that this should be Judicial Review and there was a discretion to transfer so as to proceed with an application in the Administrative Court, or that consideration was given to exercising the equitable power to waive the time limit applied under the Human Rights Act 1998, the submission was made that no discretion should be exercised in that regard because the merits were said to be weak. It was argued that it was fanciful to suggest that the whole, or parts, of the MCA legislative scheme was defective (incompatible with the ECHR). Here there was said to be a challenge to parts of s.1, s.23, s.25 and more generally in relation to the legality of the Act. Sections 23 and 25 relate to the making of a financial order on divorce and hence it was accepted by the Defendants that the case in that respect could not be read as a challenge to decisions already made in his divorce case so far, but those had to be seen as a 'high level' type of challenge. There was said to be nothing which was inherent in those sections which could be said to be incompatible with the convention, even arguably, such that challenges should be dismissed or struck out as fanciful. As regards s1 and the unreasonable behaviour requirement it could not be plausible to argue that it was incompatible with the Convention and again, that lack of merit justified striking out or summary judgment and refusal of any extension of time.

24. I asked counsel as to the point which I understood from the documents to be pursued centrally by Mr Ayeh-Kumi that the argument as to s.1's provision about the 'fact' of unreasonable behaviour was not 'reasonably accessible law' for the purposes of Article 8's requirement that interference with that article must be in accordance with the law, because it was said to be unclear in practical terms what the threshold is in terms of the behaviour of a respondent to a divorce petition, and that the lack of certainty is illustrated – by adducing evidence at trial - that the courts of the land are either unpredictable as to the threshold they apply or that they set the threshold so low that it is unclear what if any behaviour would fall below threshold, so in effect rendering the section not 'accessible law'.

25. In response was argued by the Defendants that 'accessible law' was not a principle which prevented statutory provisions which allowed judicial discretion, but accepted that the question was perhaps a boundary one as to where discretionary powers give rise to a degree of uncertainty going beyond the limits of what counts as 'accessible' law. That it was argued would be a matter for Judicial Review. In that event a court's only powers would be the Human Rights Act powers to read down legislation or make a declaration of incompatibility, unless this was pursued as a specific claim in relation to the specific acts in Mr Ayeh-Kumi's case (which falls foul of the criticism that it would clearly then be a collateral challenge).

Claimant's arguments

26. At the outset the Claimant argued that the failure by the Defendants to file a defence in this case would justify me entering judgment. I will not repeat the ruling I gave on that point which dismissed that argument, which I gave extempore, and which Mr Ayeh-Kumi accepted with good grace when shown the relevant rules. I referred to CPR rule 12.3 (claimant may not obtain default judgment if application for strike out or summary judgment has been made and the application has not been disposed of).

27. In terms of some initial points Mr Ayeh-Kumi reminded me that complex cases may not be appropriate for summary judgment. The Defendants early on had sought, and Mr Ayeh-Kumi had agreed, to an extension of time within the pre-action protocol

process, for the benefit of the Defendants, because the Defendants had written on 3 July 2019 citing the complexity of the case, yet now their position was that the case was suitable for summary judgment. They could not, he argued, effectively have it both ways.

28. As to the approach taken on Summary Judgment he drew my attention to dicta of Lord Hope in *Three Rivers District Council v. Governor and Company of The Bank of England*, referring to the familiar principle that the court must not conduct a 'mini trial', at p94:

> "9*4. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is — what is to be the scope of that inquiry?*
>
> *95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. …. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman , at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."*
>
> *"this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-*

examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

29. He urged me to resist the Defendants' attempts to draw me into a such a mini trial.

(1) Claimant's responses to the argument that the claim must be brought by Judicial Review

30. The claimant argued that if it was the case that there was a conflict between the availability of a formal Judicial Review process and rights under the Human Rights Act 1998, the Convention rights ought to take precedence over the formalities of any procedural strictures relating to Judicial Review. He argued that where there is a tension in that form the court must defer to human rights jurisprudence and hence in that sense there was a 'hierarchy of law'. The Act of 1998 stressed that Convention Rights could be relied on '*in any legal proceedings*' and this trumped notions of being limited to the narrow channel of judicial review by procedural rules. It was a fundamental tenet that law should be ascertainable by a party or a lawyer by reference to identifiable intelligible sources, and that was the Act 1998. He cited Section 7 of the Human Rights Act which states:-

"(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

31. It does not state, he pointed out, that an action against a public authority must be by Judicial Review.

32. I was referred to Lord Bingham's statements on the principles of the rule of law (in the context of the Sixth Sir David Williams Lecture) to the effect in relation to principles 1 and 8 in that lecture namely (quoting from the claimant's written submissions):

> *"Principle 1. That the law must be accessible and so far as possible intelligible, clear and predictable.*
>
> *Principle 8. The existing principle of the Rule of Law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations."*

33. Accordingly it was said the law must be clear and predictable and the rule of law requires a state to comply with its international obligations such as treaties, and I took this to refer again to the argument that the Act was clear as to the right to claim in any legal proceedings and did not imply an unstated requirement for Judicial Review.

34. The concept of civil rights and obligations fell within Art 6, in proceedings within what might be said to be a public law context but which was also possibly decisive for private rights. Art. 6 also encompassed constitutional issues where those had a direct impact on private claims such as in relation to private life under Art. 8. There was a right to have Convention rights adjudicated upon in a court or tribunal and in summary, excessive formalism was to be avoided, since this disproportionately deprives applicants of access to a court. The Defendants' argument based on the formal difference between Judicial Review and a Part 7 claim was thus characterised as formalistic and aimed at preventing the Claimant having the points he raised aired

in a court of law and Art. 6 (and the wording of the 1998 Act) was his protection against that excessive formalism.

35. In further support I was referred to "Guide on Article 6 of the Convention" published by the European Court of Human Rights which he quoted as follows and which I will reproduce:

I. Scope: the concept of "civil rights and obligations"

Article 6 § 1 of the Convention

19. The Court regards as falling within the scope of Article 6 § 1 proceedings which, in domestic law, come under "public law" and whose result is decisive for private rights and obligations.

25. Constitutional disputes may also come within the ambit of Article 6 if the constitutional proceedings have a decisive bearing on the outcome of the dispute (about a "civil" right) in the ordinary courts (Ruiz-Mateos v. Spain).

26….Thus, Article 6 extends to proceedings which may unquestionably have a direct and significant impact on the individual's private life (Alexandre v. Portugal, §§ 51 and 54).

42. Conclusion: Where there exists a "dispute" concerning "civil rights and obligations", as defined according to the above-mentioned criteria, Article 6 § 1 secures to the person concerned the right to have any *claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect.*

36. As to the notion that a mandatory requirement for Judicial review was a form of excessive formalism he also cited the same "Guide on Article 6 of the Convention" as follows:

6.2.2. Excessive formalism

Excessive formalism refers to particularly strict interpretations of procedural rules that may deprive applicants of their right of access to a court. This can include strict interpretations of time-limits, rules of procedure and evidence.

19…. It must still be established that the degree of access afforded under the national legislation was sufficient to secure the individual's "right to a court", having regard to the rule of law in a democratic society (see the Golder judgment cited above, pp. 16-18, §§ 34-35).

20. …. However, the rules in question, or the application thereof, should not prevent persons amenable to the law from availing themselves of an available remedy.

37. As to abuse of process by way of collateral challenge (and in effect also on the basis that this was an effort to relitigate to the extent that the claim relates to a challenge about compatibility of prior family court decisions in his divorce) I was referred to Lord Justice Rix in *Aktas v Adepta* at 42:

"The leading modern case on abuse of process is of course *Johnson v. Gore Wood & Co* [2002] 2 AC 1. It was not concerned with delay in the conduct of litigation, but, more generally, with the problem of successive civil actions arising from the same facts. In an already classic passage, Lord Bingham said this (at 31B/D):

> "I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as the unjust harassment of a party.

> It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

38. In this instance it was argued that the Defendants were trying to shut out argument about the convention compatibility of the relevant sections of the MCA when there were arguments to be heard and that the State in effect was using its superior resources to prevent the issues being substantively considered, whereas the proper role of the State should be to engage in a common law process of seeking to ascertain the correct result in law in a joint enterprise with the claimant in court. Sometimes, Mr Ayeh-Kumi said, parliament needs a 'helping hand' from a combination of citizens and the courts. I was asked to recall that it was through a claim brought by a private citizen that the courts addressed the issues in the Prorogation of Parliament case. After 40 years of inaction, Parliament it was said needed 'a helping hand' now to address issues of divorce and financial settlement, with proper discussion in the public forum that is open court. Democratic discourse should he said not be shut down for a handful of narrow technical reasons.

Collateral attack argument (insofar as the claim relates to specific family decisions)

39. As regards the 'collateral attack' argument it was argued that that was not the case. The family case was ongoing and largely not yet determined (as to the financial remedies). His action here was under the HRA and it was stated in *Golder v UK* the sum total of rights to access to a court such as to bring a parallel Convention claim make up the concept of a fair hearing, in totality. Furthermore it was not the case

that merely because something could have been raised in one set of proceedings it was necessarily an abuse to raise it in a different set of proceedings. This was not abusive or 'harassing' litigation.

(2) The argument that the claim is out of time

40. I was reminded that section 7 of the Human Rights Act 1998 provides:

*"***7 Proceedings.**

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a)the period of one year beginning with the date on which the act complained of took place; or

(b)such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

41. He argued that given that the Government in its statement had in fact acknowledged that his family case is still ongoing, there could be no question of being out of time. They had commented that:

"44. At this stage, no financial order has been made against the Claimant. Indeed, insofar as I am aware, there has still not been a financial remedy hearing. If a financial order is made against the Claimant, it will be open for the Claimant to appeal that decision, including on the basis that that decision is contrary to his ECHR rights. However, there is, in my view, no reasonable basis upon which the Claimant can obtain the relief that he is seeking in this civil claim."

42. His argument was that in relation especially to matters which had not yet happened, such as the consequences of any financial remedies, he was entitled to bring an application before a court in anticipation of his human rights being breached ie in anticipation of being 'a victim' under the convention. As I understand his submission therefore his position is that he is a 'victim' of incompatibility of the relevant MCA sections for convention purposes or at least an anticipated victim given the ongoing family case. This could not therefore be said to be a case which is out of time. On the linkage between the alleged incompatibility of parts of s.1 of the MCA and the argument that he is an anticipatory victim in relation to the financial provision aspects of the Act, it was said that it is the divorce process that triggers access to financial settlement. I was referred to dicta of Lord Justice Wall in *Harb v King Fahd (DCA intervening)* [2005] EWCA Civ 1324

"59. That the right to make a claim for financial relief in matrimonial proceedings is exclusively dependent upon the status of the applicant is also

demonstrated by the fact that whereas an unmarried heterosexual couple living together as man and wife may well create a situation in which one is dependent upon the other, the dependent party has no common law right to financial support from the other during the latter's lifetime. Many think this creates an injustice, but it will require legislation to correct it, in the same way that it has required the Civil Partnership Act 2004 to extend such rights to same sex couples.

58. …..Unlike rights of action at common law, the rights enjoyed by spouses or former spouses to make claims for financial relief against each other are exclusively derived from statute, and wholly dependent for their prosecution on the status of the applicant as spouse, or former spouse whose marriage has been dissolved by judicial decree and who has not re-married. There is, in my judgment, no such thing as a right of action at common law enabling one spouse or former spouse to claim financial relief against the other."

(3) On merits in relation to 'accessible law' concerning the relevant sections of the MCA

43. It will be recalled that the Defendants partly relied on merits arguments in relation to the exercise of any discretion I have in the event that this case is out of time, and also more generally. The Defendants as noted above did accept that that the question as to accessible law was perhaps a boundary one as to where discretionary powers of a judge (such as in relation to 'unreasonable behaviour') give rise to a degree of uncertainty going beyond the limits of what counts as 'accessible' law: but the correct process for that was said to be Judicial Review and the remedies would be reading down or a declaration of incompatibility.

44. The Claimant pointed out that the MCA is silent as to any criteria or guidance on the matter what constitutes unreasonable behaviour or what factors form part of it, and the sense which he has was that as a litigant the lower courts and the legal

profession had given him the experience of being 'shut out' from having the issues aired in court in determination of his Convention rights. He quoted again from Lord Bingham's book on the Rule of Law, in relation to the need for clarity, among other things where Lord Bingham wrote:

> *"… if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty. This is not because bank robbers habitually consult their solicitors before robbing a branch of the NatWest, but because many crimes are a great deal less obvious than robbery, and most of us are keen to keep on the right side of the law if we can."*

45. The essence of the point which I understood to be made was that clarity as to the threshold for unreasonable behaviour was not a mere formality but was necessary if spouses are to know where the boundaries lie, at least in terms of some criteria or guidance, in advance.

46. I was referred to Lord Diplock in *Fothergill v Monarch Airlines Ltd.* [1981] AC 251,279G at 82:

"Elementary justice or, to use the concept often cited by the European Court [the Court of Justice of the European Communities], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely on that meaning but was required to search through all that had happened before and in the

course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation."

47. It was said that litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (*Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581 at 590 *per* Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v. Attorney-General for Queensland* [1979] AC 411 at 425 *per* Lord Wilberforce, giving the advice of the Judicial Committee).

48. It was argued that (as is familiar to lawyers) *the right of access to a court must be "practical and effective" (Bellet v. France, § 38). For the right of access to be effective, an individual must "have a clear, practical opportunity to challenge an act that is an interference with his rights"* and to *Edwards v. the United Kingdom*, No. 13071/87, 16 December 1992, para. 34.

49. His substantive case in part, he said, was that clauses in the MCA 1973 are unclear. The observation of lack of clarity had been made repeatedly over a 40 year period and had also been stated by various judges. Per Lord Nicholls in *Miller v Miller; McFarlane v McFarlane* (2006) UKHL 24 referring to the notion of 'fairness' in relation to division of assets on divorce:

> *"The requirements of fairness*
>
> 4. Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present

context there can be different views on the requirements of fairness in any particular case.

5. At once there is a difficulty for the courts. The Matrimonial Causes Act 1973 gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a 'clean break'. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.

6. Of itself this direction leads nowhere. Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties. But an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be an acceptable degree of consistency of decision from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court's approach.

7. This is not to usurp the legislative function. Rather, it is to perform a necessary judicial function in the absence of parliamentary guidance."

50. Per Baroness Hale in the same case:

"133. ….Nevertheless, section 25A does not tell us what the outcome of the exercise required by section 25 should be. It is mainly directed at how that outcome should be put into effect."

51. He cited an example from the transcript of a hearing before DJ Beck on 21st March 2017 at Paragraph 8 in his own divorce:

"The Red Book for 2016 is (dare I say unusually for the learned author of this book) not exactly replete with sub-text explaining the divorce and grounds for divorce. The relevant passage simply says:

> *"The duty of the Court is to inquire into the facts alleged. Section 1.3 places on the court the duty to inquire into the fact alleged and to grant a decree, initially a decree nisi followed by decree absolute, if the fact is proved, i.e. has the marriage broken down irretrievably and the facts on which it is supported, unless the court is not satisfied as to irretrievable breakdown."*

52. The MCA 1973 he argued is 'no stranger to controversy' and past challenges have been brought in relation to human rights in divorce. He said that 40 years of reports, academic and legal had been critical of the MCA 1973 and called for reform. There had been human rights litigation: for example declarations of incompatibility between the ECHR and the MCA 1973 were adjudicated and pronounced in the cases of *Bellinger v Bellinger* [2003] UKHL 21 and *Christine Goodwin v. the United Kingdom* 28957/95 [2002] ECHR 588 The facts in the case of *Bellinger v Bellinger* case concerned the validity of the marriage of a woman who had undergone gender reassignment. She married a male partner, and sought declaratory relief as to the validity of the marriage under the MCA or a declaration of incompatibility . The point there related to tension between s11(c) of the Matrimonial Causes Act 1973 which provides that a marriage is void if 'the parties are not respectfully male and female', and ECHR Article 8 (right to respect private and family life) and Article 12 (right to marry) of the European Convention for Protection of Human Rights and Fundamental Freedoms 1950 which were said to apply for the protection of the rights of the claimant in that case.

Material raising issues with the MCA 1973 by law review bodies, parliamentarians and academics.

53. Mr Ayeh-Kumi provided me with a bundle of material from among others the Law Society, The Law Commission, Parliamentarians and academics which he would wish to cite in argument if the points of law here were to be tried, and which he says

illustrate criticisms of the extent to which the MCA adheres sufficiently to notions of of the Rule of Law illustrated by Lord Bingham in his works. He referred to parliamentarians (Baroness Deech**,** Baroness Shackleton of Belgravia), Lord Walker of Gestingthorpe (CB), Lord Brown of Eaton-under-Heywood (CB), Lord Davies of Stamford), academics (Gwynn Davis and Mervyn Murch, Newcastle University: The Centre for Family Studies, Professor Liz Trinder of Exeter University) and also judicial observations as follows: Sir James Munby in *Owens v Owens*, Lord Nicholls in *Miller v Miller; McFarlane v McFarlane*, Baroness Hale in *Miller v Miller; McFarlane v McFarlane*, Mr Justice Mostyn in *SS v NS* (Spousal Maintenance), Lord Justice Wall in *Harb v King Fahd (DCA intervening)*).

54. The list of sources at the start of this judgment gives the complete set of cases and sources referred to by both sides but below I list the sources specifically listed in his submissions on the subject of past critiques and criticism of the Act, and which were cited before me on the basis that the list was not intended to be a complete one (he referred to it as an 'incomplete history'). These were as follows:

1979 – A Better Way Out, published by the Law Society.

1980 - The Financial Consequences of Divorce: The Basic Policy Law Com. No. 103

1981 - The Financial Consequences of Divorce, (Law Com. No. 112).

1982 – A Better Way Out Reviewed, published by the Law Society.

1988 – Grounds for Divorce by Gwynn Davis and Mervyn Murch

1988 - Facing The Future, A Discussion Paper On The Grounds For Divorce Law Com (No.170)

1990 - Family Law – The Ground for Divorce (Law Com. No. 192)

1995 - Looking to the Future, Mediation and the ground for divorce, presented to Parliament by the Lord Chancellor.

1995 – November – Lord Chancellor's statement to the House of Lords, published in Hansard.

1996 - Lords – Hansard, 4 March - Quickie Divorce and Unreasonable Behaviour

2004 - Picking Up The Pieces: Marriage and Divorce Two Years After Information Provision - Newcastle Centre for family Studies.

2014 - Matrimonial Property, Needs and Agreements – (Com. No. 343).

2017 - Divorce (Financial Provision) Bill [HL] (Second Reading 27th January).

2018 - No Contest: Defended Divorce in England & Wales. Research study by Trinder and Sefton.

2018 - Divorce (Financial Provision) Bill [HL] (Second Reading 11th May)

Public Interest – some other compelling reason for a trial

55. Briefly Mr Ayeh-Kumi argued in relation if necessary to the alternative discretion to allow a trial if there is some other compelling reason for it. He cited the significance of the court's duty to uphold the rule of law, which mandates 'Clear and Understandable laws' (his words but referring to the notion of accessible law), the duty of the State to cooperate in exploring the issues in a common enterprise upholding the principles of the Convention and clarity, and the reality that the issues are of legal and social interest (both in the sense that the matter has attracted public attention and in the more relevant sense that the case raises what he would say are matters of public interest in clarity of law in divorce).

Decision

Summary judgment and striking out: general points

56. Whilst Mr Ayeh-Kumi and the Defendants are well aware of the position, I shall for clarity state that my task on this an application is not to try the case or even to carry out a 'mini trial' without hearing the evidence and full argument on the legal issues. This was not listed as a trial on a point of law.

57. My task therefore is to consider whether there are no reasonable grounds for bringing the claim, or whether it is an abuse, or whether if the matter went to a trial on the basis of evidence before me now and evidence and fully presented legal argument which I could reasonably anticipate will be obtained for trial, there is no reasonable prospect of the claim succeeding on the merits and no other good reason for a trial. The test of 'reasonable prospects of success' is a low bar: if a claim stands more than 'fanciful' prospects then it should be allowed to proceed unless for example it is also an abuse of process. The test is a low one in part so as to safeguard a party's Article 6 rights to a fair hearing.

(1) Is it an abuse to have commenced this claim in the High Court in the matter undertaken here under s.7 and not by way of Judicial Review or in the course of the family proceedings?

58. The CPR in Practice Direction 7A at 2.10 make it clear that a claim which involves a possible declaration of incompatibility of a statutory provision can only be determined in the High Court (the county court cannot grant a declaration of that sort).

    PD 7A 2.10 states:

    "The normal rules apply in deciding in which court and specialist list a claim that includes issues under the Human Rights Act 1998 should be started. They also apply in deciding which procedure to use to start the claim; this Part or CPR Part 8 or CPR Part 54 (judicial review)."

59. In my judgment *O'Reilly v Mackman*, and general principles of public law remain applicable where one is concerned with a challenge to the legality of specific acts done or not done by a public body. Either one would appeal a specific decision or one would challenge by way of seeking a judicial review remedy where the challenge relates to an act by the State. To the extent that this claim can be understood as an attack on actual steps and decisions taken by the judges in the case as emanations of the State, in the family court, then it is plain in my judgment that any question of lawfulness of those steps including as to (for example) Art. 6 and the respect afforded to Art. 8 rights, were correctly a matter for an appeal, and appeals were dismissed or leave not granted. Those proceedings were of course between different parties (the Claimant and his former wife, in the family case, and the Claimant and the Lord Chancellor and Secretary of State, in this case), and a challenge to decisions in the family case would be an abuse if brought here.

60. It is fair to say that this claim consists of a mix of challenges to the manner in which the law was applied to the Claimant in the family case and *also* a challenge to the law itself on Convention grounds. The former cannot be pursued here because it is a collateral challenge to the family case. See for example *Hunter v Chief Constable of*

the West Midlands Police [1982] AC 529 (HL), where the House of Lords defined as an example of abuse of process:

> *"the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which had been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had full opportunity of contesting the decision in the court in which it was made."*

61. Insofar as this case however is not a challenge to the way in which the law was applied but is instead a challenge to the compatibility of the legislation with the Convention, that is a harder point not so readily dismissed.

62. A challenge to compatibility is not a challenge to an act by a State Body or a judicial act, and the 'victimhood' of the applicant in that context arises from the incompatibility of the legislation. To the extent that this case amounts to a challenge to the compatibility of the relevant sections of the MCA, in my judgment this means, first, that the High Court is an acceptable venue (indeed the required venue) to commence the claim and second that insofar as one is considering what procedure (Judicial review, Part 7 or Part 8) the normal court rules apply, following the above quotation from the Practice Direction.

63. When framed in that way, for the aspects of this claim which are not a challenge to judicial acts or acts of the State, then in my judgment it is not necessarily an abuse to have commenced it by way of a claim seeking declaratory relief in the manner done here, if limited just to the Convention challenge. I think Mr Ayeh-Kumi could be said to have used Part 7 when some would argue that Part 8 of the CPR would be appropriate if disputes of fact are unlikely but to hold that choosing Part 7 in this instance was an abuse would be excessively rigid in circumstances where if necessary case management directions can enable a case to progress as if under Part 8, and where such facts as may be relied on in any trial are as yet unclear and may well be disputed, since they may relate to material illustrating lack of clarity in previous court decisions in other cases. I therefore conclude that insofar, and insofar only, as this case challenges the Convention compatibility of the relevant sections of

the MCA recited in the claim, it is not by reason of the *O'Reilly* case an abuse of process to have commenced it in the manner in which it was here.

64. Insofar as it can be understood as challenging the merits of actual judicial decisions made in his family case, however I reiterate that the claim would if pursued in that form be an abuse because the correct manner to challenge judicial acts in the course of a case is generally by appeal, as in fact happened. The potential would exist however for Mr Ayeh-Kumi to consider appeal from the final decision of the Family Courts to the European Court of Human Rights, but that was not a matter argued before me and may or may not remain open to Mr Ayeh-Kumi.

(2) **Time limits**

65. The time limit for claiming in respect of acts done in breach of the Convention is one year. In this instance I accept Mr Ayeh-Kumi's point (and here I must take his pleaded case at face value on a strike out) that he is claiming effectively as an ongoing victim of the incompatibility (he took me, materially, and I think correctly to the provisions in the Act which refer to a claim where a public authority 'proposes' to act in a way which is incompatible with the Convention). The financial remedies aspects for example in his divorce remain ongoing and hence the impact, if there is an incompatibility with the Convention is either ongoing or is apprehended and arises from the triggering of the divorce under the provisions of s.1. In my judgment he is not out of time to bring a compatibility claim.

(3) Merits

66. The hearing before me was conducted on the basis of submissions of modest length over about half a day as one would expect where the issues are for summary judgment and strike out and not a 'mini trial' or a trial on a point of law. Further material was, perfectly properly and with my agreement, received afterwards by way of supplying me with text spoken to by Mr Ayeh-Kumi at the hearing so that I had his full case. I have indicated above that substantial material was provided by way of academic and other material (which he extracted and placed into a separate file, rather than duplicating the whole of each document) and which no doubt would

form part of legal argument if this was a trial on point of law or a full trial in other respects. I have not recited quotations from the academic material in any substance here but have read it and absent a trial on a point of law it would not be proportionate to do so (and nor did I hear detailed submissions about) the issues in those documents. Where I do quote below I have taken the quote from Mr Ayeh-Kumi's quotations of the relevant document.

67. Notable criticisms of the clarity and practicality of parts of the MCA relating to decrees of divorce and to financial provision appear for example in the Law Commission document number 103, and 112 including as to uniformity of application of the law and criticism of the notion of leaving judges to decide broadly what is 'just' but without the statute providing guidance or criteria. The document from the Law Society ('A Better Way Out') from 1982 cites (from *Wachtel v Watchtel* [1975]) Lord Justice Ormrod thus "*What is wrong with this is that it is unrealistic to expect a court to ascertain with any degree of reliability the truth of a petitioner's claim that he or she finds life with the respondent intolerable. What actually happens is that the courts have to take the petitioner's word for it. Thus, this requirement is, in fact, meaningless.*"

In the Law Commission Paper 170 cited for example it is further said:

"Thus, it is clear that the law in practice is quite different from the law on the statute book. This is not simply an academic problem because the inconsistency is apparent to and causes confusion to litigants. Davis and Murch refer to "the frustration—and indeed sheer bewilderment—which flows from a law founded on principle being circumvented by procedures based on expediency."

This clear divergence between law and practice can only bring the law of divorce and the administration of justice generally into disrepute."

In the document 'Looking to the Future' (Presented to Parliament by the Lord Chancellor in 1995):

"2.5 It has been generally acknowledged that breakdown is not in itself justiciable. The law has therefore sought to provide specific facts by which the breakdown of the marriage can be established. These facts are, in theory, justiciable. In reality they are not. The details pleaded in divorce petitions in support of, for example, the fact of intolerable behaviour, do not need to be corroborated and are irrebuttable. Such allegations are therefore easy to make and easy to establish."

68. I could continue to refer to extracts but the nature of argument before me did not (rightly) focus on the merits of the points pursued in the academic material in detail beyond placing them before me: that is understandable in a short summary hearing and I think rather underscores that in a case where I have held that the claim is not out of time (so that there is not a discretion to exercise as to time) and is not commenced in the incorrect forum and is not an abuse, the very fact that there is extensive legitimate academic debate and (in the post HRA context) an argument framed in terms of the requirement for accessible law under article 8, which seems to me fairly arguable, means that a more mature substantive hearing on the law is required. Summary disposal, requiring as it would so as to be fair an effective trial on the law, is not a suitable approach here: the point of law is not fanciful, even if Mr Ayeh-Kumi probably faces a considerable mountain to climb in due course given that years of judicial application of the Act are embedded and the issue has not (apparently) been argued before even if mooted in academia and elsewhere: but it is his right within reason to attempt to do so, in accordance with Art. 6 and to obtain adjudication on the argument and not to be shut out without hearing on the merits.

69. Whilst it did not feature in oral submissions, but did appear in the Defendants' skeleton and in the materials, I should consider the transcript of the application for leave to appeal which was heard by Moor J., the relevant parts of which are to be found at p208 onwards. Those parts have led me to the need to consider whether the Convention compatibility point has in fact *already* been determined such that the matter is *res judicata* or practically so. That would, if so, mean that irrespective of my conclusions above I would have to strike out this case.

70. Moor J., be it recalled, was hearing an application for permission to appeal against the grant of decree nisi, at an oral hearing. Argument was presented by Mr Ayeh-Kumi and the outcome was a reasoned judgment refusing leave to appeal. It does not appear that the compatibility issue had been raised before that point and it was, then, raised effectively 'on his feet' for consideration and argued briefly without (as far as I can tell) written materials focussing on the point, as I have here. I have annexed the relevant extract of the transcript.

71. Although not raised previously, Moor J. permitted Mr Ayeh-Kumi to make the compatibility point briefly right at the end of a hearing but evidently under time pressure, and then held that it was not meritorious. I have annexed the relevant part of the transcript to the end of this judgment but the decision was as follows:

> Mr Justice Moor: *"The points have never been taken, ever, by any experienced practitioner or lawyer, over the 40 to 50 years that this statute has been in place. The reason these points have never been taken is obvious. The arguments are totally without merit"* (at [34]).

72. In those circumstances I have to decide what the status of that ruling is in terms of res judicata or precedent. This was an application for permission to appeal, and not a final trial, and of course the proceedings were between different parties, in part, to those now before the court, but it is nonetheless the case that the judge was sitting in an appellate capacity and therefore not at first instance as a judge of coordinate jurisdiction with myself, and is a senior and experienced judge whose decisions must be afforded proper and indeed very significant respect. Has there been a substantive trial and decision on the issue after argument? In my judgment it would be to stretch the meaning of those words too far given the task of a judge on a permission to appeal application, which is one-sided (ex parte) and is directed at an assessment of whether the argument relied on can found a legitimate criticism of the judgment below (where the point had not I think been raised or ruled on as to convention compatibility) and where the materials were barely mentioned somewhat in passing by a litigant in person speaking 'on his feet'.

73. For the purposes of respecting Art. 6 I think to find that the case now brought has in effect been ruled upon conclusively in these circumstances would be to go too far: the point has not been tried, and arguably if an appeal permission hearing could amount to a trial of an issue that would raise problems in terms of the absence of an appeal route from that trial decision, under Art. 6, and would risk imposing significant burdens on appeal judges to have to rule fully on points as if trying them ab initio, yet not expressly substituting their own decision for the court below. I also remind myself that citation of permission to appeal hearings is generally not permitted by way of authority, which perhaps points to the general acceptance that such hearings seldom make law unless doing so expressly on a point of principle.

74. In my judgment the issue as to Convention compatibility is not a matter which is suitable for disposal in the circumstances here. It would lead this court into what amounts to a trial on a point of law, which are sometimes undertaken in this court but which was not the mode of hearing here, and the arguments are not I think so plainly fanciful given the body of material cited to me but not before Moor J., as to justify summary judgment or striking out of the case. The order I shall make is one which stays the claim, and provides for the Claimant to plead fresh particulars limited to the issue of the Convention compatibility of the sections of the MCA to which he refers in his claim. It is not a case which can proceed on the footing of a challenge to the human rights compliance of the judgments of judges in the divorce case itself. The Defendants rightly accepted before me that 'accessible law' was not a principle which prevented statutory provisions which allowed judicial discretion, but that the question was perhaps a boundary one as to where discretionary powers give rise to a degree of uncertainty going beyond the limits of what counts as 'accessible' law.

75. I reiterate my appreciation for the courteous and efficient manner in which both sides argued this case and I invite the parties to discuss a draft order, and any consequential directions. The matter is already listed for handing down but if an order was agreed that could take place in absentia.

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MASTER VICTORIA MCCLOUD

9/6/21

ANNEX 1 – Extract from argument orally in application for permission to appeal before Moor J.

Mr Ayeh-Kumi: You may well frown at me for this one.
Moor J: Well you make your submission. But if you don't think it's going to help you before you start. (laughs)
Mr Ayeh-Kumi: Oh no, well I, well I think that --
Moor J: Anyway, you get on.
Mr Ayeh-Kumi: OK. Well, I, I think it should.
Moor J: Right.
Mr Ayeh-Kumi: OK. I contend that DJ Beck did not follow the, the principle of legal, legal certainty, not he himself, that the law itself does not follow the rule of law principle of legal certainty. Right, my submission is. Section 1.2B of the MCA violates a fundamental

principle of the rule of law, the European Convention on Human Rights, The UK Human Rights Act 1998, and the Constitutional Reform Act 2005.
Moor J: Well there we are, that is a bold submission, why do you say that?
Mr Ayeh-Kumi: I, I said you wouldn't agree with me.
Moor J: Yes, why do you say that?
Mr Ayeh-Kumi: OK. Let me follow. As such it is ultra vires of the Court to pronounce a Decree Nisi on the basis of statute law that is itself outside the law. That is my contention.

Moor J: OK, why, why is it outside the law.

Mr Ayeh-Kumi: OK. There are two considerations to my submission. Section 1.2B of the Matrimonial Causes Act 1973 states:

"That the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent."

The above formulation does not comply with the rule of law principle of legal certainty, which requires that the law must be accessible and, so far as is possible, intelligible, clear and predictable, and that the laws thus promulgated should be capable of guiding one's conduct in order that one can plan one's life. Any law properly passed by parliament should adhere to these principles. The second part of this particular argument is this. The way that Section 1.2B of MCA 1973 is interpreted and operated by the legal profession and the lower courts is inconsistent, arbitrary and capricious. In consequence, it is almost impossible for a citizen to establish prospectively in his own mind, the standard of behaviour that might legitimately prompt a spouse to invoke Section 1.2B of the MCA 1973. My arguments in support of this submission are set out below. It is apparent that DJ Beck struggled to find a definition of unreasonable behaviour, I won't go over that bit. Right. I go on to say, I've consulted Rayden and Jackson on divorce. I've consulted six firms of lawyers. I've consulted, I have conducted extensive research on the internet, and I've purchased six books

on divorce law. I have read commentaries on judgments on over 50 cases. None of the references or authorities provides anything that resembles, to a layman, a straightforward

and unambiguous guide to what would enable a citizen to regulate his conduct. There appears to be a lack of consensus as to relative merits of objective and subjective testing of the determination of behaviour in relation to Section 1.2B. A short extract from Rayden and Jackson on divorce, taken from page 234 illustrates my point. Right, at paragraph 34, Rayden and Jackson state:

"Reasonably expected to live with the Respondent. The statute gives no further guidance."

Then a few more words which go into the concept of cruelty, but that is now being repealed.

"In all these cases, the totality of the evidence of matrimonial history must be considered, and the conclusion will depend on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view, after consideration of any excuse or explanation which this Respondent might have in these circumstances, the conduct is such that this Petitioner ought not to be called upon to endure it. It is undesirable, if not impossible to create by judicial pronouncement certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances amounting to behaviour in such a way by a respondent that the Petitioner cannot reasonably be expected to live with them. Every case depends on its facts."

OK. So, Rayden and Jackson are actually saying that there is no definition of unreasonable behaviour, and yet that is the fundamental principle of the rule of law, that there must be legal certainty. I cannot go anywhere and ask anybody any advice as to what is this behaviour that is expected of me. Now if I may continue --

Moor J: Well, I we're, we're past quarter to one.

Mr Ayeh-Kumi: Please, My Lord.

Moor J: I haven't stopped you. How much longer are you going to be?

Mr Ayeh-Kumi: Can you give me another five minutes please?

Moor J: I'll give you until ten to.

Mr Ayeh-Kumi: Thank you. There is a paper by Paul Craig, by Professor Paul Craig, given to the select committee on constitution, on constitutional reform to the house, House of Commons. What I've just said was quoted by him. Furthermore, Lord Bingham when invited to present the sixth Sir David Williams lecture, chose as his subject, the rule of law. The core of the existing principle is this. I suggest that all persons and authorities within the

state whether public or private should be bound by, excuse me, and entitled to the benefits of the law as publicly promulgated, publicly administered. The first law must be at first, the law must be accessible so far as is possible, possible, intelligible, clear and predictable. This seems obvious. If everyone is bound by the law, they must be able without undue difficulty to find out what it is, even if that means taking advice, as it usually will, and the answer when given should be sufficiently clear that a course of action can be based on it. There is English authority for, to this effect, and the European Court of Human Rights, has also put the point very explicitly, explicitly and then he quotes from the European Court of Human Law, which states:

"The law must be adequately accessible. The citizen must be able to have an indication that is adequate in the circumstances of legal rules applicable to the given case. A norm cannot be regarded as a law, unless it is formulated with sufficient precision to enable the citizen to regulate its conduct."

There is also authority from Lord Diplock on exactly the same. We cannot be surprised to find it clearly stated --

Moor J: Right, I, I know what all those quotes are.

Mr Ayeh-Kumi: Thank you. OK, so you, you're with me on that. He quotes it in *Black-Clawson International Ltd v Papierwerke AG*. He quotes it again in *Fothergill v Monarch Airlines Ltd* [1981]. Sir, I repeat my contention is the, the law itself is not sufficiently well founded, and this is specifically Section 1.2B, the other four sections, I would contend, fall within the definition of clearly defined, but behaviour, which is to be defined by the, the

Petitioner tells me that there is no way I can know what is in a Petitioner's mind. I can't, I cannot regulate my behaviour within the law based on what is in Marion's mind, and what was in Marion's mind 20 years ago. That is my contention, My Lord.

Moor J: Right. Thank you.

(judgment given)

Moor J: Right, I hope that is the end of it. Thank you very much.