



Neutral Citation Number: [2022] EWHC 3341 (KB)

Case No: QA-2021-000260

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ON APPEAL FROM MASTER MCCLLOUD**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21 December 2022

**Before :**

**MR JUSTICE LINDEN**

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**Between :**

**Charles Ayeh-Kumi**

**Claimant/  
Appellant**

**- and -**

**(1) Lord Chancellor**  
**(2) Secretary of State for Justice**

**Defendants/  
Respondents**

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Mr Ayeh-Kumi in person  
Daniel Cashman (instructed by Government Legal Department) for the Defendants

Hearing date: 13 December 2022  
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**Approved Judgment**

This judgment was handed down remotely at 2pm on 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Mr Justice Linden:****Introduction**

1. On 12 February 2019 the Claimant issued these proceedings by way of a claim under CPR Part 7. At the heart of the Claim is a complaint that divorce proceedings in the family law courts, in which he was involved, breached his rights under the European Convention on Human Rights (“ECHR”) and were contrary to the rule of law. The proceedings led to him being divorced in 2018 after a contested hearing of his former wife’s petition, and the process of determining whether a financial order should be made against him had begun when he issued the Claim. His case is that the relevant terms of the Matrimonial Causes Act 1973, the way in which the proceedings were conducted and the decisions made by the family law courts, failed to protect his human rights. This, he says, was the result of negligence and/or breach of statutory duty on the part of the Defendants in failing to put in place an ECHR compliant system of divorce law and practice. His Particulars of Claim seeks various declarations and an order for damages in the sum of £50,000 for financial loss arising from depression “*and the financial implications and consequences of unilateral divorce*”.
2. On 10 October 2019, the Defendants applied, pursuant to CPR r3.4(2)(a) and/or (b), for the whole of the Particulars of Claim to be struck out on the basis that it is an abuse of process and/or does not disclose reasonable grounds for bringing the Claim and/or for summary judgment pursuant to r 24.2(a)(i). Their argument was and is, in short, that the Claimant’s complaints about the judicial decisions taken in the divorce proceedings should have been, and were to an extent, raised in the divorce proceedings. They say that the Claim is an impermissible collateral attack on those decisions; that these aspects of the Claim are out of time; and that damages are not recoverable in relation to them in any event. Insofar as the Claimant is contending that the provisions of the Matrimonial Cause Act 1973 which were applied to his case in the family law courts are/were incompatible with the ECHR, the Defendants argue that that issue could only be raised by way of a claim for judicial review, and such a claim would in any event be bound to fail. There is no viable claim against the Defendants in private law either.
3. This is, in substance, an appeal and a cross appeal from an order of Master McCloud on the Defendants’ application, dated 3 February 2022. After a hearing on 29 January 2021, on 9 June 2021 she handed down a judgment striking out the whole of the Claim save for the aspects which were interpreted as being, in effect, an application for a declaration of incompatibility pursuant to section 4, Human Rights Act 1998. She also gave permission to both parties to appeal on the basis that there was “*some other compelling reason for the appeal to be heard*”. The Claimant submits, in his proposed appeal, that the Master was wrong to strike out any of his Claim. The Defendants contend that the Claimant’s appeal is out of time and that in any event she should have struck out or dismissed the whole of the Claim.

**The proceedings in the family law courts**

4. Having left the matrimonial home in February 2016, on 19 May 2016 the Claimant’s former wife presented a divorce petition in the Guildford Family Court. She relied on section 1(2)(b) Matrimonial Causes Act 1973 i.e. her case was that the marriage had

Approved Judgment

*“broken down irretrievably”* and she contended that the Claimant had *“behaved in such a way that [she] cannot reasonably be expected to live with”* him.

5. On 22 September 2016, there was a directions hearing before DJ Nightingale which dealt with amendments to the pleadings and listed the matter for a further directions hearing. The subsequent hearing took place before HHJ Nathan on 25 January 2017 and a case management order was made. Neither of the orders which resulted from these hearings was appealed.
6. On 14 March 2017, DJ Beck dealt with an application by the Claimant to strike out the petition for divorce, which he refused, and other procedural matters in connection with the full hearing, which was due to take place on 21 March 2017. Again, his order was not appealed.
7. The divorce hearing then took place before DJ Beck on 21 March 2017. He found that the ground relied on by the Claimant’s former wife had been established and that the marriage had broken down irretrievably. A decree nisi was therefore pronounced.
8. On 10 April 2017, the Claimant appealed against the order of DJ Beck and, on 9 November 2017, permission to appeal was refused by Moor J after a hearing. The Claimant’s pleaded grounds of appeal argued that there was systemic bias in the family law courts and the legal profession against the concept of defended divorce; that HHJ Nathan and DJ Beck had shown actual and apparent bias against the contesting of petitions for divorce; that he had not had a fair hearing for various reasons including a lack of particularity to the petitioner’s case, the admission of hearsay evidence and inadequate directions for the hearing; that DJ Beck had got some of the facts wrong and that he had applied the law incorrectly in coming to his decision. The Claimant’s oral submissions also included a contention, which Moor J rejected as unarguable, that section 1(2)(b) of the Matrimonial Causes Act 1973 was in breach the ECHR and the requirement for legal certainty.
9. On 24 April 2017, the Claimant had also made a formal complaint against HHJ Nathan to the Judicial Conduct and Investigations Office. However, on 30 May 2017 this complaint was rejected.
10. On 17 January 2018, the decree nisi was made absolute and, on 25 March 2018, the Claimant’s former wife lodged notice of her intention to proceed with an application for a financial order.
11. The details of the proceedings for a financial order are scant in the evidence before me. According to a list of key dates in the Particulars of Claim there was a financial settlement hearing on 3 September 2018 at the Staines Family Court.
12. On 7 November 2018, the Claimant made an application for the proceedings to be stayed on the grounds that he was intending to bring a claim in the High Court which sought declarations that they had been contrary to the ECHR and the rule of law, and that sections 1(2)(b) and 23 and 25 of the 1973 Act (which applied to the application for a financial order) were also contrary to the ECHR. On 3 December 2018, that application was dismissed by DJ Bell on the papers as being totally without merit. According to the Particulars of Claim there was then a financial settlement hearing on 13 December 2018 at the Staines Family Court.

**Approved Judgment**

13. On 24 December 2018, the Claimant applied to set aside the order of DJ Bell and for a stay of the proceedings for a financial order pending the outcome of his proposed claim in the High Court. That application was, in turn, dismissed as being totally without merit by DJ Bell on 18 February 2019, proceedings having been issued in the King's Bench Division on 12 February 2019, as I have said.
14. According to the list of key dates in the Particulars of Claim there was another financial settlement hearing on 3 May 2019 at the Staines Family Court.
15. The Claimant appealed DJ Bell's order and permission to appeal was refused on the papers by HHJ Raeside on 26 June 2019 as being totally without merit. Unsurprisingly, the view of DJ Bell and HHJ Raeside was that the interests of justice were not served by delaying the proceedings and that the family law courts should continue to apply the law until such time as they were required to do otherwise.
16. At the time of the hearing before Master McCloud, the proceedings in the family law courts in relation to the application for a financial order were ongoing. In answer to questions from me, the Claimant confirmed that a financial order was made on 17 August 2021 by DDJ Melville Walker at a hearing which he said he did not attend for health related reasons. He said that he could not remember whether he put in written submissions for the hearing. In answer to further questions from the court he said he thought he had put in written submissions and I asked for these to be uploaded onto the CE File for this case. At the time of handing down this judgment they have not been.
17. Again in answer to questions from me, the Claimant added that he had appealed against the financial order and had received an acknowledgement from the court but had not heard anything further and had not taken any further steps to pursue the appeal. It appears from an order of HHJ Farquhar dated 29 September 2021, with which I was provided by Mr Cashman after the hearing, that the Claimant was in fact ordered to obtain a transcript of the judgment of DDJ Melville- Walker. What happened after this remains unclear.

**The Claimant's pleaded case**

18. The body of the Particulars of Claim appears to contain three broad categories of complaint in relation to the divorce proceedings in which the Claimant was involved. There are complaints about:
  - i) the way in which the family law courts dealt with the petition for divorce in the Claimant's particular case, where the complaint is essentially that the Defendants did not ensure a fair process and an outcome which was compatible with the ECHR and/or the requirements of the 1973 Act and/or the rule of law.
  - ii) the application of section 1(2)(b) of the 1973 Act in general, and the practices of the family law courts and of lawyers in those courts in relation to divorce petitions, where the main contention is that the Defendants were required to ensure that the application of the law was in practice generally compatible with the ECHR, the 1973 Act and the rule of law; and

Approved Judgment

- iii) the law itself where it is said that sections 1(2)(b), 23 and 25 of the 1973 Act are incompatible with the ECHR and the rule of law.
19. It is also possible to draw a distinction from the Particulars of Claim between the complaints which focus on the issue of the grounds for divorce and the process of deciding a contested divorce under section 1 of the 1973 Act, on the one hand, and complaints which focus on the (then) prospect of a financial order against the Claimant on the other. This distinction may reflect the fact that no financial order had been made against him at the time when proceedings were issued. The Claimant connects these two parts of the Claim by emphasising that without a divorce sections 23 and 25 of the 1973 Act do not come into play.
20. As far as the proceedings leading to the divorce itself are concerned, essentially the Claimant makes the substantive complaints which he made on appeal in the divorce proceedings but these are now framed as being the result of breaches of duty on the part of the Defendants. So he complains, for example, that he did not receive fair hearings. HHJ Nathan is singled out for particular criticism for remarks which he made in the course of the case management hearing on 25 January 2017 which asked what the point was of contesting the divorce given that it was clear that this was what the Claimant's then wife wanted. The Claimant complains that he was denied his "*fundamental right to adversarial proceedings*", for example by being permitted to cross examine his then wife without the constraints which were required by the court. He complains that there was inequality of arms because the process favoured his former wife and he says that, overall, the process was contrary to Article 6 ECHR. As far as Article 8 ECHR is concerned, his case is that, by failing to enact sufficiently prescriptive laws, the Defendants have wrongly failed to ensure adequate protection for him from "*unilateral divorce*" or "*divorce on demand*" and to refrain from interfering in the sphere of relations between individuals.
21. The Claimant also asserts that his experience of the divorce proceedings reflects the way in which the law is applied by, and the practices of, the family law courts, which he describes as demonstrating "*institutional bias against the concept of defended divorce*" and a predisposition in favour of unilateral divorce. He says that this and the law and practice in relation to financial orders on divorce "*have destabilised and undermined my marriage by encouraging my former wife, and many others before her*" to have an expectation that obtaining a divorce is a mere formality, that they have a right to a financial settlement requiring the other spouse to sustain them for life and that they will have no ongoing obligations in return.
22. As far as the relevant financial provisions of the 1973 Act are concerned, the Claimant does not plead any complaint about any particular decision made in relation to him. Nor is it clear from his Particulars of Claim that he pleads any complaint about the practice of the family law courts or family law practitioners or about the general application of sections 23 and 25 of the 1973 Act other than that these sections are engaged when there is a divorce, but not otherwise, and that the fact that the courts exercise a statutory discretion has led to what he says is inconsistent decision-making. He does, however, complain about the statutory provisions themselves which he pleads are contrary to Article 8, Article 1 of Protocol 1 and Article 14 ECHR because they are insufficiently prescriptive and are discriminatory.

Approved Judgment

23. The Claimant also alleges that Moor J's decision to refuse permission to appeal is contrary to Article 6 ECHR and to his right, under Article 13, to an effective remedy for any breach of his rights under the ECHR.
24. At the end of the Particulars of Claim, the Claimant pleads, under the heading "*Remedies Sought*", the following 11 declarations before going on to claim an award of £50,00 in compensation:

*“121. A declaration that section 1.2.(b) of the MCA 1973 does not comply with the Rule of Law principle of foreseeability, legal certainty and protection from arbitrariness.*

*122. A declaration that contrary to the principles of common law and stare decisis the interpretation of section 1.2.(b) of the MCA 1973 in the lower courts generally, and in my case in particular, is not consistent with the rulings handed down in the vast majority of “unreasonable behaviour cases” decided in the higher courts.*

*123. A declaration that the Family Law Courts failed in its duty to comply with section [1(3)] of the Matrimonial Causes Act 1973, namely “to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.”*

*124. A declaration that the Family Law courts generally, and HHJ Nathan [in] particular[,] have misused and abused power in public office.*

*125. A declaration that a lack of supervision and control has allowed the UK Family Courts to facilitate “Unilateral Divorce”, contrary to the will of Parliament as expressed in the MCA 1973 and subsequent matrimonial law statutes. That in so doing this has breached the Rule of Law and my human rights, specifically sections 6, 8, 13 and 14.*

*126. A declaration that an institutional antipathy towards the concept of defended divorce and desire to facilitate “Unilateral Divorce” has created a hostile attitude amongst family law practitioners and the family law courts towards anybody seeking to defend a divorce petition. This has occasioned a breach of my human rights in respect of articles 6, 8 and 14.*

*127. A declaration that sections 23 and 25 of the MCA 1973 provides no guidance and stipulates no constraints on judicial discretion as to the circumstances in which a financial settlement order may be imposed by the courts. That to exercise discretion outside the boundaries set by the legislation in question may render associated judgements as ultra vires.*

*128. A declaration that the drafting of sections 23 and 25 of the MCA 1973 are so broad and imprecise that they do not comply with the Rule of Law principal of foreseeability, legal certainty and protection from arbitrariness and that imprecision of these clauses have led to breaches of articles 8 and 14.*

*129. A declaration that sections 23 and 25 of the MCA 1973 are discriminatory in that they empower the Family Law courts to impose one sided obligations on*

**Approved Judgment**

*one party to a marriage or civil partnership without concomitant obligations on the other party. This is in breach of my article 14 Human Rights.*

*130. A declaration that the Lord Chancellor and Minister for Justice has failed to uphold the Rule of Law in respect of the implementation and administration of the MCA 1973.*

*131. A declaration that the decrees nisi and absolute issued in my case was ultra vires...”*

25. It will be apparent that a range of different and potentially conflicting complaints underpins these contentions. Some of these were in substance argued in the family law courts (e.g. paragraphs 121-124), some of them contend that the Matrimonial Causes Act 1973 was misapplied in the Claimant’s case, some say that the terms of the 1973 Act are defective or unlawful, some criticise the practice of the family law courts and some criticise the Defendants for having caused or permitted this state of affairs to exist.

**The application for summary disposal**

26. The grounds for the Defendants’ application to strike out, alternatively to dismiss, the Claim were essentially as follows:
- i) The Claim is an abuse of process because it is a claim in public law. Applying the rule in *O’Reilly v Mackman* [1983] 2 AC 237 it should, therefore, have been brought by way of a claim for judicial review under CPR Part 54 rather than by way of a Part 7 claim.
  - ii) The Claimant’s complaints about the judicial decisions in the divorce proceedings are abusive in that they could only be raised in the context of an appeal pursuant to section 9 of the Human Rights Act 1998, and/or they amount to a collateral attack on those decisions.
  - iii) In any event, the claims in respect of judicial decisions are out of time given the 12 month time limit for claims under section 7 of the 1998 Act. The decision in the proceedings which was complained of was the refusal of permission to appeal, by Moor J on 9 November 2017 i.e. 15 months before proceedings were issued.
  - iv) The claims that sections 1(2)(b), 23 and 25 of the 1973 Act are contrary to the ECHR are totally without merit.

**The Master’s decision**

27. Given the nature of the issues in the appeal, and with respect, it is not necessary to examine the reasons for the Master’s decision in close detail.
28. In summary, she decided that the claims in respect of the judicial decisions made in the divorce proceedings were not out of time. The 1998 Act contemplates that there may be a claim where it is alleged that a public authority “*proposes to act*” incompatibly with a Convention right (see section 7(1)) and the financial remedies aspects of the family law proceedings were ongoing, having been triggered by the

Approved Judgment

grant of the divorce. The Claimant was claiming “*as an ongoing victim of the incompatibility*”.

29. The Master held, however, that these aspects of the Claim were abusive because they required to be raised by way of an appeal rather than fresh proceedings in the King’s Bench Division, and because they were a collateral challenge to the judicial decisions in the divorce proceedings.
30. As far as the Claimant’s arguments about the compatibility of the law itself with the ECHR are concerned, the Master held that the High Court had jurisdiction. She referred to paragraph 2.10 of Practice Direction 7A and held that:

*“some would argue that a Part 8 claim was appropriate if disputes of fact were 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 be disputed...”*

31. As for the merits of the arguments on incompatibility, the Master pointed out that the application before her was to strike out or for summary judgment rather than a trial on a point of law. She noted that a particular theme of the Claimant’s case was his contention that the relevant provisions of the 1973 Act were broadly drawn and confer unfettered discretion on the courts, so that they are contrary to the rule of law. The Claimant had presented voluminous materials showing criticism of the relevant provisions of the Matrimonial Causes Act 1973 by the Law Society, the Law Commission, eminent parliamentarians and judges. These materials, which were not presented in the appeal, apparently included Law Commission papers Nos 103 (1980) and 112 (1981) on “*The Financial Consequences of Divorce*” and 170 (1988) and 192 (1990) “*The Grounds for Divorce*”, the Law Society document “*A Better Way Out*” (1982) and “*Looking to the Future, Mediation and the Grounds for Divorce*”, a paper presented to Parliament by the Lord Chancellor in 1995, from some of which documents she cited extracts. The theme of the criticisms which the Master highlighted was that the provisions were not sufficiently prescriptive and that this meant that outcomes were unpredictable and inconsistent and/or that there was a divergence between law and practice.
32. The Master’s conclusion was that:

*“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....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....”*

33. What was, in effect, a claim for a declaration of incompatibility under section 4 of the 1998 Act would therefore be allowed to proceed, although it is noteworthy that the Master did not refer to section 4 in her judgment. The detail of the arguments in support of this claim were not explored by the Master either and I note that she relied



Approved Judgment

on the issue of accessible law and Article 8 ECHR but did not refer to the other Convention rights relied on by the Claimant.

**The Claimant's appeal**

34. For the purposes of his appeal, Mr Ayeh-Kumi relied on grounds of appeal which he served on the Defendants on 19 November 2021 and a document entitled “Claimants’ (sic) Grounds of Appeal and Skeleton Argument” which he served on Friday 9 December 2022. For the purposes of resisting the Defendants’ appeal, he relied on a document entitled “Claimants’ (sic) Grounds Defence and Skeleton Argument re Procedural Exclusivity” which he had also served on 9 December 2022, as well as a 92 page document entitled “Notes on Procedural Exclusivity” which cut and pasted passages from various authorities and text books as well as making further written submissions.
35. Mr Ayeh-Kumi also addressed the court in detail, explaining his Claim and arguing that it was not a collateral challenge to the decisions of the judges in the divorce proceedings which I have summarised, nor an abuse of process. Nor was it incumbent on him to raise the issues in the Claim by way of appeals from the decisions of the family law courts.
36. In the light of certain passages in Mr Ayeh-Kumi’s written arguments, at the beginning of the hearing I asked a series of questions which were designed to ensure that I understood what his case was given that he appeared to be arguing that it had been misunderstood by the Defendants and the Master. I had also noted that paragraph 3 of the “Claimants’ Grounds for Appeal and Skeleton Argument” said:
- “My case is an Action in Tort relating to negligence and breach of duty by the Lord Chancellor and MOJ. These breaches facilitated various breaches of my human rights and is (sic) a claim for personal compensation arising therefrom”*  
(emphasis in the original)
37. At paragraph 11 he said:
- “Mischaracterisation of my claim as being primarily an attack on previous judgements. The citation in my pleadings of various events during the course of my ongoing proceedings was and is evidence of behaviour that the Lord Chancellor and the MOJ are responsible for protecting citizens against. Such recitation is vital in establishing breach of duty and consequential harm when seeking a remedy for Tort”.*
38. There were various other passages to similar effect in his “Claimants’ Grounds Defence and Skeleton Argument re Procedural Exclusivity” and in the “Notes on Procedural Exclusivity”.
39. I had also noted that Mr Ayeh-Kumi emphasised in writing that his claim was for compensation and did not suggest that it was for declaratory relief. Indeed, in relation to the supposed claim for a declaration of incompatibility, there was no reference to section 4 of the 1998 Act in his Particulars of Claim and paragraph 19 of his “Claimants’ Grounds Defence and Skeleton Argument re Procedural Exclusivity” appeared to disavow such a claim:

Approved Judgment

*“The defendants application is based on the premise that Master McCloud had assumed that my application was based on section 4 of the HRA 1998. I submit that it is wrong to make any such assumption. I also state that I have not at any time referenced or relied on Section 4.”*

40. In answer to my questions Mr Ayeh-Kumi stated that:
- i) The breach of statutory duty alleged against the Defendants was breach of the duty under the Constitutional Reform Act 2005 to uphold the rule of law by putting in place law and practice which ensured that the family law courts, and practitioners in those courts, complied with the ECHR and abided by the rule of law: *“all else flows from that”*. He confirmed that this was how paragraphs 5 and 6 of his Particulars of Claim should be understood and that he was not alleging that the Defendants themselves breached the Human Rights Act 1998.
  - ii) The claim in negligence was on the basis that the Defendants owed him a duty of care to put in place law and practice in the family law courts which protected his rights and interests. He said that this duty was owed by politicians by virtue of their being elected, and by civil servants by virtue of the nature of the role to which they were appointed. There had been significant criticism of existing law and practice for more than 40 years. The government was therefore aware of the issues and yet it had done nothing. He accepted that he had not alleged negligence in his Particulars of Claim, nor pleaded the existence of the duty of care alleged, nor the basis for such a duty, but he said that the thrust of his complaint was clear enough and that allowances should be made for the fact that he is not legally qualified.
  - iii) The pleaded complaints about how his case was dealt with by the family law courts, the practice in the family law courts more generally, and the allegations that his human rights were breached were pleadings of the consequences of the Defendant’s breach of duty which, in turn, caused the loss in respect of which he claims damages.
41. With respect, Mr Ayeh-Kumi was less clear on where this left what appeared to be his pleaded claims for declaratory relief. At one point he appeared to be confirming, consistently with his written arguments, that he was not seeking a declaration of incompatibility under section 4 of the 1998 Act. However, ultimately I understood his position to be that paragraphs 121-131 of his Particulars of Claim were in effect conclusions of law which he asked the court to reach as steps which led to the conclusion that his claim in damages succeeded. However, he said that he *was* claiming a declaration of incompatibility and, making allowances for the fact that he is not legally qualified, I will deal with the Defendants’ appeal on that basis.
42. On the basis of this explanation of his Claim Mr Ayeh-Kumi went on to argue that therefore the Claim was not a collateral attack on the decisions of the judges in the divorce proceedings; nor was it abusive. His Claim was not founded on those decisions. It was a claim against “third parties” for breaches of duties which they owed to him. The decisions of the judges were a consequence of those breaches of duty and they illustrated the state of affairs in the family law courts which has resulted from the Defendants’ failings. The Claim could not have been brought in the divorce

Approved Judgment

proceedings, whether in the context of an appeal or otherwise; still less was there any obligation on him to do so. There was therefore no sense in which it was abusive.

**Discussion and conclusion on the Claimant's appeal**Introduction

43. Mr Cashman raised a preliminary objection to the appeal on the basis that Mr Ayeh-Kumi had not complied with an order of Yip J dated 31 March 2022 to file his Notice of Appeal in that he had not attached his Grounds and Skeleton Argument to the Notice when it was filed. He had served Grounds on 19 November 2021 but his attempt to file his Notice of Appeal had failed because the sealed order was not then available. He had then served his skeleton argument(s) on 9 December 2022. Mr Cashman's submission was that Mr Ayeh-Kumi required relief against sanctions (see *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633; [2015] 1 WLR 2472) but he agreed that I should hear the arguments in the appeal before coming to a view.
44. Having done so, for the reasons set out below I agree with Mr Cashman's submission that on any analysis – whether on the basis of the Particulars of Claim or Mr Ayeh-Kumi's explanation of them - the Claim is bound to fail and/or abusive.

No arguable breach of duty

45. On the basis of the Claim as recently explained by Mr Ayeh-Kumi, there is no real prospect of his claim for damages for breach of the Constitutional Reform Act 2005 succeeding. The Particulars of Claim do not specify the section or sections of the 2005 Act which are said to have been breached but paragraph 6 pleads that the Act and the Lord Chancellor's oath of office mean that he "*has a duty to ensure that both the Family Law courts and the legal profession uphold and abide by the Rule of law, the HRA 1998 and ensure that the Judiciary and the legal profession uphold the principals (sic) of Natural justice*".
46. As the preamble to the 2005 Act states, it was:
- "An Act to make provision for modifying the office of Lord Chancellor, and to make provision relating to the functions of that office; to establish a Supreme Court of the United Kingdom, and to abolish the appellate jurisdiction of the House of Lords; to make provision about the jurisdiction of the Judicial Committee of the Privy Council and the judicial functions of the President of the Council; to make other provision about the judiciary, their appointment and discipline; and for connected purposes."*
47. Plainly, it did not create any statutory duty on the part of the Defendants which is enforceable by individual citizens by way of a private law action against them in damages. The remedy for any decision of the courts which is said to be wrong or unlawful is to appeal against, or claim judicial review of, that decision.
48. Nor is there any real prospect of Mr Ayeh-Kumi succeeding in a claim for negligence on the basis explained by him, even if negligence had been pleaded or were pleaded pursuant to an application to amend. There is no possibility of a relevant duty of care

Approved Judgment

being owed to him on the basis which he suggested or at all. As to breach, Mr Cashman received no answer from Mr Ayeh-Kumi to the question what the non-negligent act would have been. If the answer was to enact more prescriptive or different laws and/or to change the decision making or the practices of the family law courts, this further highlights the fundamental problems with Mr Ayeh-Kumi's case. Causation of damage would also be highly problematic given that it would require consideration of what laws ought to have been enacted and, if they had been, what the outcome would have been.

49. On the basis of the Claim as explained in writing and orally by Mr Ayeh-Kumi, nothing is then left of the Claim as he cannot establish any breach of duty on the part of the Defendants. However, insofar as the Claim includes complaints that there was a failure by the Defendants, in breach of the Human Rights Act 1998, to introduce different laws, I note that section 6(3) of the 1998 Act specifically provides that "*public authority*" for the purposes of section 6(1) does not include "*either House of Parliament or a person exercising functions in connection with proceedings in Parliament*" and that sections 6(6)(a) and (b) provide that "*an act*" for these purposes does not include a failure to introduce or lay before Parliament a proposal for legislation, or a failure to make any primary legislation or remedial order. A complaint that it was a breach of the 1998 Act to fail to introduce different laws would therefore be bound to fail.

The complaints about the family law proceedings were required by the Human Rights Act 1998 to be raised by way of an appeal and were therefore an abuse of process

50. Insofar as the Claim complains of failure by any of the relevant judges to apply the Matrimonial Causes Act 1973 correctly in the course of the divorce proceedings, or breached their duty to act fairly, the correct route for any challenge was by way of appeal.
51. Insofar as the Claim complains that the 1973 Act ought to have been interpreted compatibly with the rights under the ECHR which were incorporated by the 1998 Act (his "Convention rights"), the place and time to make this argument was in the family law courts when the judges in those courts were conducting the proceedings and making decisions about his case. This is the effect of section 3 of the 1998 Act, which enacts an obligation on the courts, so far as it is possible to do so, to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights, and/or of section 6(1) which provides that it is unlawful, subject to section 6(2), for a public authority (which expressly includes "*a court or tribunal*": section 6(3)(a)) to act in a way which is incompatible with a Convention right.
52. Insofar as the Claimant's case is that the judges in the divorce proceedings made decisions which were incompatible with his Convention rights he was required to make this case by way of an appeal. Again, that is the effect of sections 3 and/or 6 of the 1998 Act given that the appellate court would be subject to the interpretive obligation and is a public authority. But, in addition to this, section 9 of the 1998 Act deals specifically with claims that a judicial decision breached a Convention right. Section 9(1) provides, so far as material:

*"(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—*

Approved Judgment

(a) *by exercising a right of appeal;*

(b) ... *or*

(c) *in such other forum as may be prescribed by rules.*” (emphasis added)

53. Section 9(3) provides that where the proceedings are “*in respect of a judicial act done in good faith*” damages may not be awarded other than in cases where there is a breach of Article 5(5) or 6 of the ECHR which results in the unlawful detention of the claimant. Section 9(4) provides that any such award is to be made against the Crown and requires, first, that the Minister or a person or department nominated by him is joined to the proceedings.
54. Parliament therefore clearly intended that claims for damages caused by a judicial decision made in breach of the 1998 Act may only be brought by way of an appeal from the impugned judicial decision, and that damages would not be recoverable unless the decision was taken in bad faith or resulted in detention of the claimant. Neither is the case here. I therefore accept Mr Cashman’s submission that insofar as the Claimant complains about alleged breaches of the Human Rights Act 1998 by the courts, his claims are contrary to section 9 of that Act and they fall to be struck out on that basis alone.
55. I also agree with Mr Cashman that the Claimant’s complaints about the practice of the family law courts do not add anything to his complaints about the law which was applied in his case and the decisions which were taken. If the latter were well founded, he would succeed regardless of the practice more generally. They are not well founded but the fact, if it is a fact, that the same law was applied in other cases and similar, or even different, decisions were made in those cases does not help him to establish his claim for damages arising out of the decisions in his own case.

The complaints about the divorce proceedings were a collateral challenge to the judicial decisions made in those proceedings and an abuse of process

56. As far as the Master’s conclusion that the parts of the Claim which complain about the judicial decisions in the divorce proceedings are an abuse of process is concerned, in addition to the points made above, Mr Cashman argued that these parts amount to a collateral challenge to those decisions. In this connection he submitted that the Claimant’s recent clarification of his Claim was in truth a tactical attempt to distance his case from being a direct challenge to the judicial decisions in those proceedings by presenting the case as being based on alleged omissions of the Defendants. But in any event there was no substance to the case put on that basis for the reasons I have explained above at [45]-[49].
57. Mr Cashman reminded me of the test which was confirmed by the Court of Appeal in *Allsop v Banner Jones Limited* [2021] EWCA Civ 7; [2022] Ch 55 at [45]. Having drawn attention to the point that different considerations apply where it is alleged, as in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, that subsequent civil proceedings amount to a collateral challenge to an earlier criminal conviction, Marcus Smith J said:

Approved Judgment

*“45 In short, the doctrine of abuse of process is best framed, at least in the context of a “collateral” attack on a prior civil decision, by reference to the test.....: If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if (a) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (b) to permit such relitigation would bring the administration of justice into disrepute.”*

58. Mr Cashman emphasised that the principal concern in this type of case is that the administration of justice should not be brought into disrepute by the subsequent proceedings being seen to call into question the findings and conclusions of an earlier court other than in the context of an appeal or an application for judicial review. What therefore matters is the extent to which the conduct which is impugned, and is the focus of the subsequent proceedings, is independent of the conclusions of the earlier court: see [44(iv)(c)] at 87G. This is a fact sensitive question: see 88A/B.

59. On this basis the Court of Appeal in *Allsop* noted the decision of the Court of Appeal in *Laing v Taylor Walton* [2008] PNLR 11 where, although the claim was brought against the solicitors who acted for the claimant in the earlier proceedings, Buxton LJ held that:

*“What is sought to be achieved in the second claim is.....not the addition of matter that, negligently or for whatever reason, was omitted from the first case, but rather a relitigation of the first case on the basis of exactly the same material as was or could have been before [the judge in the earlier proceedings]”*

60. At 88E/F Marcus Smith J said of *Laing* that in that case the earlier judicial decision:

*“was being revisited in later and distinct proceedings on the basis of no new evidence at all. In those circumstances, it is easy to see how the existence of or potential for divergent judgments of courts of co-ordinate jurisdiction does amount to a potential abuse of the court’s processes... In reality.... the subsequent proceedings were no more than an (improper) attempt to appeal the [earlier] decision....”*

61. At 88G/H he added:

*“Where the later litigation is litigation that should, properly seen, have been an appeal of the earlier litigation, then the doctrine of abuse may have a role, as in Laing. But where the later proceedings are simply alleging a breach of duty on the part of the claimant’s legal advisor, which breach resulted in a loss that is measured by reference to the probability that the earlier judgment would have been different, questions of finality of process simply do not arise”*

62. I accept Mr Cashman’s submission that the present case falls into the former category rather than the latter. Here the formulation of the Claim as being based on breaches of duty by the Defendants is hopeless for the reasons I have given. All that is therefore left is the aspects of the Claim which complain about the conduct of the divorce proceedings and, in particular, the judicial decisions which were made in those proceedings. In any event, the reality of the Claim is also that it is a complaint about

Approved Judgment

the law itself and the application of the law in the Claimant's case. The arguments put forward in the Claim are in effect an appeal from the decisions of the judges in the divorce proceedings and ought to have been raised in the context of an appeal, as to an extent they were.

63. Thus, whether as a free standing objection or taken in combination with the effect of the Human Rights Act 1998, discussed above, these aspects of the Claim are abusive and this aspect of the Master's decision was correct.

The limitation point

64. As far as limitation is concerned, I would also hold, in respectful disagreement with the Master, that any complaint about any judicial decision which led to or confirmed the Claimant's divorce was out of time. Section 7(5) of the 1998 Act provides:

*“(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.”*

65. The divorce was made absolute in January 2018 and permission to appeal was refused by Moor J on 9 November 2017. The Claim was therefore outside the one year time limit as far as these aspects were concerned.
66. The fact that the Claimant makes complaints about sections 23 and 25 of the 1973 Act as well does not affect this point. His complaints about the decisions about the divorce are of a particular nature – that, contrary to the ECHR/the rule of law, the law discouraged defence of a petition for divorce and did not sufficiently protect him from divorce on demand etc - and they related to a specific outcome namely the bringing of the Claimant's marriage to an end. Whilst the fact of the divorce meant that sections 23 and 25 were engaged, this was a consequence of the decisions in the divorce proceedings which were complained about. Sections 23 and 25 are separate provisions which deal with a different issue on the basis of different considerations. A claim that they are incompatible with the ECHR, or may be the basis for future decisions which are in breach of a Convention right, does not mean that the decision making which led to the divorce, or the divorce itself, are part of the same future judicial act or acts; still less can a complaint about the judicial decisions which led to the Claimant's divorce be the same complaint as a claim for a declaration of incompatibility in relation to sections 23 and 25.
67. No application to extend time was made and nor did the Master extend time. I can see no reason why time should be extended bearing in mind that the Claimant had the opportunity to raise his human rights arguments in the course of the divorce proceedings and I therefore would have refused such an application had it been made.

Conclusion on the Claimant's appeal

Approved Judgment

68. I therefore dismiss the Claimant’s appeal on the merits and refuse relief against sanctions. I might have been willing to grant relief if the appeal had merit, but it does not.

**The Defendants’ appeal**Introduction

69. The Defendants’ appeal was on two grounds:
- i) First, the only claim which Master held was not abusive, i.e. the claim for a declaration of incompatibility, was a public law claim. It ought, therefore, to have been brought as a claim for judicial review. The Claim was therefore an impermissible and abusive attempt to circumvent the procedural strictures of CPR Part 54, including the strict time limits and the need for permission. It ought, therefore, to have been struck out pursuant to the procedural exclusivity principle in *O’Reilly v Mackman*. (“Ground 1”)
  - ii) Second, the claim for a declaration of incompatibility was bound to fail in any event. As far as the challenge to section 1(2)(b) of the Matrimonial Causes Act 1973 was concerned, this is now academic given that the section has been amended by the Divorce, Dissolution and Separation Act 2020, in effect to introduce no fault divorce with effect from 6 April 2022. In any event, sections 1(2)(b), 23 and 25 of 1973 Act were unarguably compatible with the ECHR. (“Ground 2”)
70. Mr Ayeh-Kumi argued, in writing and orally, that his Claim was a private law claim. In any event, procedural law has moved on since *O’Reilly v Mackman* and technicalities should not prevent the courts from addressing the merits of his case. That case raises long standing concerns about the approach of the law to petitions for divorce and applications for financial orders consequent on divorce, and it has sufficient merit to be heard at a full hearing. To dispose of it summarily would, itself, be contrary to Article 6 ECHR.

Ground 1

71. Section 4 of the 1998 Act provides:

***“4.— Declaration of incompatibility.***

*(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.*

*(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.”*

72. Subsections (3) and (4) go on to deal with cases in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right. In summary, a declaration of incompatibility may be made where the primary legislation prevents the removal of the incompatibility by the court.



Approved Judgment

73. Section 4(5) of the 1998 Act defines “*court*” for these purposes and in this regard it is relevant to note that a court below the High Court does not have a power to make such a declaration. Mr Ayeh-Kumi therefore could not have brought a section 4 claim in the proceedings in which he was involved in the family law courts unless the matter was transferred to the High Court.
74. Section 5 then provides that where a declaration of incompatibility is under consideration the Crown is entitled to notice in accordance with the rules of the court and is entitled to be joined as a party to the proceedings. Under section 5(3), notice of a wish to be joined “*may be given at any time during the proceedings*”.
75. Mr Cashman accepted that Parliament therefore provided that in any proceedings in the High Court, whether under Part 7 or Part 8, a party which brings claims, including private law claims, which rely on or are affected by Convention rights may rely on the section 3 interpretive obligation and claim, in the alternative, a declaration of incompatibility. If it is or becomes apparent that the interpretive obligation is not sufficiently powerful to enable the court to achieve a result which is compatible with a Convention right, the possibility of a section 4 declaration arises. This is what happened in, for example, *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467 and, indeed, this is typically the form which the argument takes; a simple application for a declaration of incompatibility would be unusual and the court would be cautious about granting relief without the benefit of the factual findings about a particular case or cases. However, Mr Cashman’s argument was that the question whether such a declaration should be made is a public law issue. Where, therefore, the only claim is for a declaration of incompatibility the claim must be brought by way of a claim for judicial review and be subject to the procedural rigour of CPR Part 54.
76. As to whether the question whether a declaration of incompatibility should be made is a question of public law, section 4 of the 1998 Act concludes:
- “(6) A declaration under this section (“a declaration of incompatibility”)— (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.”*
77. Where a declaration of incompatibility is made, Section 10 then permits a Minister, by order, to make the amendments to the legislation which are necessary to remove the incompatibility where there are compelling reasons to do so pursuant to section 10.
78. In *R (National Council for Civil Liberties) v Secretary of State for the Home Department* [2019] EWHC 2057 the Divisional Court summarised the position under section 4 as follows at [88]:
- “It will be seen therefore that in principle an application can be made for a declaration of incompatibility of primary legislation where the nature of the allegation is that it is the legislation itself which is incompatible with the Convention rights. This is in substance a kind of constitutional review of primary legislation, so as to assess its compatibility with fundamental human rights, even though there is an important limit on the court’s power to grant a remedy. As we have indicated earlier, the scheme of the HRA is such that the higher courts have*

Approved Judgment

*the power to declare primary legislation to be incompatible with the Convention rights but they have no power to strike it down or disapply it. The legislation continues to have effect unless and until it is amended or repealed. A declaration of incompatibility is not binding on the parties, let alone on Parliament. Although a declaration of incompatibility may have political or moral effect, the only legal effect of such a declaration is that it enables the Government to amend the incompatible primary legislation by way of secondary legislation, described in the HRA as a “remedial order”, under section 10. The Government has a discretion as to whether it wishes to use that route to cure the incompatibility.....”*

79. I accept that the terms of sections 6(6) and 10 and the nature and consequences of a declaration of incompatibility as summarised in the *NCCL* case demonstrate that the issue is one of public law, rather than private law rights. Indeed, the rights of the parties to the dispute are not affected by a declaration of incompatibility.

80. In *O’Reilly v Mackman*, (supra) at 280H-281A, Lord Diplock noted that the rationale for the procedural requirements of what was then RSC Order 53 was that:

*“The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision”*

81. He went on to say, at 285D-E, that now that Order 53 provided a procedure for bringing claims for judicial review which included provisions which were designed to protect public authorities:

*“it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.”*

82. What is now CPR Part 54 contains similar protections. These include the requirement for standing, the requirement to bring claims promptly and in any event not later than 3 months after the grounds to make the claim arose, the requirement for permission, the duty of candour in place of the obligation to provide standard disclosure, and the fact that oral evidence and cross examination are not the norm. Such cases are also heard by a specialist court.

83. In *Richards v Worcestershire County Council* [2017] EWCA Civ 1998; [2018] PTSR 1563 Rupert Jackson LJ reviewed the authorities which consider the position where a claim raises private law and public law issues, including *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 on which Mr Ayeh-Kumi relied, and he derived two propositions from these authorities at [65]:

*“(i) The exclusivity principle applies where the claimant is challenging a public law decision or action and (a) his claim affects the public generally or (b) justice*

Approved Judgment

*requires for some other reason that the claimant should proceed by way of judicial review.*

*(ii) The exclusivity principle should be kept in its proper box. It should not become a general barrier to citizens bringing private law claims, in which the breach of a public law duty is one ingredient”*

84. Mr Cashman’s argument was that a claim which is solely for a declaration of incompatibility clearly falls within (i)(a) of this formulation, but the present case also falls within (i)(b) in that justice required that the strictures of CPR Part 54 should not be sidestepped by the bringing of an ordinary action under Part 7. As for (ii), this is not a case in which there are any private law claims other than ones which are abusive and it follows that the exclusivity principle is not being relied on by the Defendants as a barrier to the bringing of private law claims. The claim is solely in public law.

85. Mr Cashman supported this submission by reference to *Trim v North Dorset District Council* [2010] EWCA Civ 1466 where Carnwath LJ (as he then was) confirmed that the cases which consider the position where public and private law principles overlap do not undermine the principle that “*purely public acts should be challenged by judicial review*” [23]. He also relied on the following passage from *Judicial Remedies in Public Law* (Lewis, 6<sup>th</sup> Ed) at 3-018:

*“Cases where the claim is based solely on substantive principles of public law, and where the only remedy which could be sought is one to quash or set aside the consequences of the decision (and in this sense constitutes a public law remedy) are clearly within the rule. Such cases can only be brought by judicial review and not ordinary claim. O’Reilly v Mackman is itself a clear example of such a case.”*

86. And Mr Cashman relied on passages, from the judgment of Hale LJ (as she then was) in *R (Wilkinson) v Broadmoor Hospital* [2001] EWCA Civ 1545; [2002] 1 WLR 419 at [61] and from *McGregor on Damages* (21<sup>st</sup> Edition) at 50-048, which draw a distinction between claims for damages, and claims which challenge delegated legislation or the policy of a public body or the validity of an administrative act or measure. The remedies sought in the latter type of claim, they suggest, will only be available in the context of judicial review.

87. As to the consequence of not bringing the section 4 claim by way of judicial review, Mr Cashman’s submission was that this was itself an abuse of process and this claim should therefore be struck out as it was in *O’Reilly v Mackman* and in *Trim*. He relied on the following statement at 54.3.2 of the White Book:

*“If a person commences an ordinary Part 7 claim in circumstances where they should have complied with the judicial review procedure...the claim will be liable to be struck out as an abuse of process.”*

88. Although there is force in Mr Cashman’s argument, I note that the exclusivity principle originates in a concern to prevent a claimant from sidestepping the protections afforded to public authorities by CPR Part 54 where the challenge is to a decision taken by such a body. I am not convinced that the rationale which underpins this approach, as explained by Lord Diplock, applies with the same force where the

Approved Judgment

issue is whether a section 4 declaration should be made. An application for such a declaration is not a challenge to the decision to enact the legislation, as such. Nor does such an application prevent a public body from implementing a decision which it has made and nor is a section 4 declaration comparable to a quashing order or declaratory relief in relation to a decision of a public body: the consequence is merely that Parliament is empowered to correct the flaw in the legislation by the making of a remedial order.

89. Secondly, the decisions and statements of principle on which Mr Cashman relies concern situations where the claim is, at the outset, solely a challenge to a public law decision. Here, the putative application for a declaration has emerged as what is left after the rest of the Claim was struck out. That was a claim for damages, as I have noted. I asked Mr Cashman how far his principle went – would it apply if the rest of the Claim had been struck out or dismissed for reasons other than abuse of process e.g. because the private law claims were fanciful or because of failure to comply with a procedural rule, practice direction or order (i.e. under CPR r3.4 (a) or (c) or Part 24)? If the private law claims failed after a trial, would the court then be bound to strike out the section 4 claim on the grounds that it was an abuse of process? Wisely, Mr Cashman indicated that he did not wish to go further than to submit that where the other claims are abusive the court should approach the matter on the basis that the claim is based solely on principles of public law. The position in other situations would have to be dealt with on the facts of those situations.
90. Thirdly, this is not a case where the Claimant knew or necessarily ought to have known that his claim was a public law claim and sought to sidestep CPR Part 54. It is a case where the claim is in damages and there was and is a degree of uncertainty about whether, strictly speaking, he is bringing a section 4 claim at all. Moreover, as I have pointed out, the family law courts dealing with his divorce proceedings could not, themselves, have made a declaration of incompatibility.
91. Finally, if the application for a declaration of incompatibility had merit there might be something to be said for transferring the matter to the Administrative Court to be dealt with as a claim for judicial review, rather than striking it out or dismissing it summarily.
92. For these reasons, and given that the Claimant is not legally represented and I therefore have not had the benefit of full argument on the point, I would prefer not to express a firm conclusion on Ground 1 and the issues of principle which it raises. In view of my conclusion on Ground 2, it is also unnecessary for me to do so.

Ground 2*The test under section 4*

93. As to the merits of any application by the Claimant for a declaration of incompatibility, in the *NCCL* case the Divisional Court went on to say this at [89] and [90]:

*“89 It is important to appreciate, however, that such cases where primary legislation itself is intrinsically incompatible with those rights will be relatively rare. More often primary legislation will not itself be intrinsically incompatible*

Approved Judgment

*with the Convention rights: its application to a particular case may be in breach of the Convention rights, depending on the concrete facts. But that would not be a case where it would be appropriate or even possible to grant a declaration of incompatibility. It would be a more conventional case, in which it is argued (and may be found by a court) that the act of the executive ... is in breach of section 6 of the HRA. (emphasis added)*

*90 Furthermore, it should always be recalled that all legislation, including primary legislation, must (so far as possible) be read and given effect in a way which is compatible with the Convention rights: section 3 of the HRA. It is well established that the obligation of interpretation in section 3 is a strong one and may require an interpretation which is not the natural interpretation of legislation and may lead, for example, to the reading of words into legislation so as to render it compatible with the Convention rights...Nevertheless, there is a line which must not be crossed between interpretation and legislation. The court has no power under section 3 to engage in judicial legislation..."*

94. The concept of incompatibility is therefore a narrow one and I note that, even where the test is satisfied, the court is not obliged to make a declaration. Section 4 merely provides that it “may” do so: see *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1 at [56].

The relevant provisions of the Matrimonial Causes Act 1973

95. At the time of the divorce proceedings, section 1 of the 1973 Act provided so far as material as follows:

*“(1) Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.*

*(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say—*

*(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*

*(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;*

*(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;*

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

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

Approved Judgment

96. Pursuant to amendments made by the Divorce, Dissolution and Separation Act 2020, section 1(1) now enacts a right to apply to the court for an order which dissolves the marriage on the ground that the marriage has broken down irretrievably. An application under subsection (1) must be accompanied by a statement by the applicant or applicants that the marriage has broken down irretrievably and section 1(3) provides that the court dealing with an application under subsection (1) must take the statement to be conclusive evidence that the marriage has broken down irretrievably, and make the order. This right came fully into effect on 6 April 2022.
97. At the time of the Claim, section 23 of the 1973 Act provided:
- “On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders....”*
98. Subsections (1)(a)-(f) then provide for different types of orders for a party to the marriage to make periodical or lump sum payments to, or for the benefit of, the other party or children. Importantly for present purposes, the power to make any of the orders is in relation to *“either party”* to the marriage and not just the petitioner or the respondent. This is relevant to the Claimant’s claim that the provisions are discriminatory.
99. Section 25(1) enacts a duty, in deciding whether to exercise its powers under section 23 (amongst other powers) and, if so, in what manner:
- “to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.”*
100. Sections 25(2)-(4) then oblige the court to have regard to particular matters in exercising the relevant powers. For example, in the case of a proposed order to make or secure periodical payments, or to make a lump sum payment, the following matters must be taken into account under section 25(2):
- “(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;*
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;*
- (d) the age of each party to the marriage and the duration of the marriage;*
- (e) any physical or mental disability of either of the parties to the marriage;*

Approved Judgment

*(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;*

*(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;*

*(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit . . . which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.”*

The putative challenge to section 1(2)(b)

101. I agree that any application by the Claimant for a declaration that section 1(2)(b) of the 1973 Act is incompatible with the ECHR will inevitably fail.
102. Firstly, the issue is now academic. As Mr Cashman submits, and the court would inevitably decline to exercise its discretion to make a declaration of incompatibility even if it considered that such incompatibility existed. Section 1 has now been substantially amended so that the issue as to legal certainty which the Claimant raises no longer arises. The law is clear and certain even if it has moved in the opposite direction to that which the Claimant would have chosen. There is no prospect whatsoever of a declaration of incompatibility resulting in retrospective legislation which materially or favourably affected the Claimant’s interests or, indeed, of any remedial order or legislation to correct any defect in section 1(2)(b) as it was drafted. Given the direction of travel of the law, still less is there any prospect of an amendment to the legislation to make it easier to contest a petition for divorce. A declaration of incompatibility would therefore be entirely pointless and would be refused.
103. Second, in any event the argument that section 1(2)(b) of the 1973 Act is incompatible with the ECHR would inevitably fail. The Claimant would need to show that the old section 1(2)(b) was not capable of being applied in a manner which was consistent with the ECHR; establishing that it was not applied consistently with the ECHR in his particular case, or in some other cases, would not be sufficient:
- i) As far as his complaint about compatibility with Article 6 is concerned, plainly the terms of section 1(2)(b) did not mean that the hearing of a contested petition for divorce would be unfair. Given the FPR there was every likelihood of a fair hearing and there was scope for an appeal if a hearing was not fair. The Claimant’s real objection is that, where the ground relied on by the petitioner was section 1(2)(b), more often than not the outcome was likely to be that the petition succeeded. The section required consideration of the petitioner’s perspective – could she reasonably be expected to live with the respondent – and a modern understanding of marriage (i.e. as a consensual partnership of equals) was the context for this question: see *Owens v Owens* [2018] UKSC 41; [2018] AC 899. But this did not mean that a petition would necessarily succeed, as *Owens v Owens* itself shows.

Approved Judgment

- ii) As far as Article 8 is concerned, in *Owens v Owens* (supra) at [29] the Supreme Court rejected an argument that section 1(2)(b) was incompatible with Article 8, ironically in a case where the petition had been dismissed. The Supreme Court took account of academic and judicial criticism of section 1 of the 1973 Act in coming to its decision and was itself critical of this aspect of the law, suggesting that Parliament should consider reform. But these criticisms did not mean the section was incompatible with Article 8. That was where the issue was whether it was incompatible with Article 8 for the law to prevent a spouse from being released from a marriage; the suggestion that it would be incompatible with Article 8 to permit a petitioner to be released where the court was satisfied that it was not reasonable to expect them to live with the respondent is, at best, fanciful.
- iii) As to Article 13, this is not amongst the rights incorporated by the 1998 Act but, in any event, the 1998 Act itself provides an effective remedy for those whose rights and freedoms under the relevant Convention rights have been violated. Even if the Claimant's Convention rights were violated in the divorce proceedings, the argument that the 1998 Act itself is incompatible with the Convention rights which it incorporates is circular and hopeless.
- iv) As to Article 14, it is not clear how the terms of section 1(2)(b) discriminate, on grounds of status or at all, in securing Convention rights. This is not explained in the Claimant's pleaded case and nor was it explained in his written or oral arguments. Notwithstanding the declarations sought by the Claimant at paragraphs 125 and 126 of the Particulars of Claim, this complaint appears to be directed at section 23 and 25 of the 1973 Act.
104. As for the Claimant's argument that section 1(2)(b) of the 1973 Act "*does not comply with the Rule of Law principle of foreseeability, legal certainty and protection from arbitrariness*", this was interpreted by the Master as an argument that the decision on the petition for divorce was not "*in accordance with the law*" for the purposes of Article 8, as I have noted. The suggestion that the point is arguable is inconsistent with the decision in *Owens v Owens* but, in any event, in *R (P) v Secretary of State for Justice* [2019] UKSC 3; [2020] AC 185 Lord Sumption described the following passage from *Huvig v France* (1990) 12 EHRR 528, para 26 and *Kruslin v France* 12 EHRR 547, para 27 as "*the classic definition of law in this context*:"

*"The expression 'in accordance with the law', within the meaning of article 8.2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law"*

105. He went on to say:

*"17 The accessibility test speaks for itself. For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, "a government of*



Approved Judgment

*laws and not of men". A measure is not "in accordance with the law" if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice."*

106. Section 1 of the 1973 Act did not confer a discretion on the courts. It set out legal tests which required to be established on the evidence. The legal tests were, with respect to the Master, obviously accessible in the relevant sense and the likely outcome of their application in a given case was foreseeable. As the decision of the Supreme Court in *Owens v Owens* reflects, there was a very long standing body of case law which explained how section 1.2(b) was to be applied and to which the Claimant and any legal adviser could turn when considering the likely outcome of the divorce petition.

The putative challenge to sections 23 and 25

107. Again, there seems to me to be no real prospect of the court making a declaration of incompatibility in relation to sections 23 and 25 of the 1973 Act:
- i) As far as Article 6 is concerned, it is not clear that any point is taken by the Claimant but in any event there is no sense in which the terms of sections 23 and 25 would prevent a fair hearing of the application for a financial order.
  - ii) As to Article 8, the terms of sections 23 and 25 do not prevent an Article 8 compliant result in a given case. They permit the court to take Article 8 into account where relevant and to apply principles of proportionality in making any financial order.
  - iii) As to A1P1, the answer is the same.
  - iv) As for Article 14, the Claimant's case was based on a mistaken assertion that financial orders could only be made against one party to the divorce. He also complained that such orders could only be made where there had been a marriage and then a divorce but this is part and parcel of the legal institution of marriage. For these purposes, people who are not married are in a materially different position to people who are, and treating them differently therefore does not amount to discrimination. Even if they were in materially the same position, the proposition that it would be contrary to the ECHR to draw a distinction between people who are married and people who are not is hopeless, not least given that Article 12 ECHR provides for a right to marry in accordance with national laws.
108. As far as the Claimant's "rule of law" argument is concerned, again this is said to be relevant to the question whether any interference with the Claimant's rights is "*prescribed by law*" for the purposes of Article 8 or "*provided for by law*" for the purposes of A1P1. At [17] of his judgment in *P* Lord Sumption went on to say:

*"The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers*

Approved Judgment

*discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. ... If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree.”*

109. Here, sections 23 and 25 clearly establish a discretion on the part of the court but they also set out considerations to which the court is required to have regard in exercising that discretion. There are also safeguards against arbitrary decision making in the form of the FPR, the availability of an appeal, and the principles which have been identified by the courts as applicable in deciding whether to make a financial order and, if so, what order. These include the principles confirmed by the House of Lords in *Miller v Miller*; *Macfarlane v MacFarlane* [2006] 2 UKHL 24; [2006] 2 AC 618 to which Mr Ayeh-Kumi referred. Again, the law is plainly accessible and the outcome in a given case is sufficiently predictable for sections 23 and 25 to be regarded as “law” for these purposes. Any suggestion to the contrary is surprising and bound to fail.

Conclusion on the Defendants’ appeal

110. For all of these reasons, in respectful disagreement with the Master, I allow the Defendants’ appeal.