Neutral Citation Number: [2017] EWCA Civ 182

Case No: B6/2016/0878

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
His Honour Judge TOLSON QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2017

Before:

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE HALLETT
and
LADY JUSTICE MACUR

- -

Between:

TINI OWENS

Appellant

- and –

HUGH JOHN OWENS

Respondent

- -
- -

Mr Philip Marshall QC (instructed by Payne Hicks Beach) for the appellant
Mr Nigel Dyer QC and Mr Hamish Dunlop (instructed by Hughes Paddison) for the respondent

Hearing date : 14 February 2017

- -

Approved Judgment

Sir James Munby, President of the Family Division :

1. This is an appeal from the refusal of His Honour Judge Tolson QC, sitting in the Central Family Court, to grant a wife a decree nisi of divorce, even though he had, correctly, found as a fact that the marriage has broken down. The judge found that the

wife "cannot go on living with the husband" and continued: "He claims to believe that she can, indeed that she will, but in this in my judgment he is deluding himself." Yet the judge dismissed her petition, on the basis that the wife had failed to prove, within the meaning of section 1(2)(b) of the Matrimonial Causes Act 1973, that her husband "has behaved in such a way that [she] cannot reasonably be expected to live with [him]."

2. The question for us is whether, within the meaning of CPR 52.11(3)(a), the wife can establish that in coming to this decision the judge was "wrong" – in which case we can interfere. If, for whatever reasons, we find ourselves unable to interfere, the question inevitably arises whether, in 2017, the law is in a remotely satisfactory condition?

The facts

3. The wife, Tini Owens, was born in 1950, the husband, Hugh John Owens, in 1938. They married in January 1978 and have two now adult children. They separated, as is common ground, in February 2015. The wife had originally instructed solicitors in June 2012, who under cover of a letter dated 21 December 2012 sent her husband a draft petition which in the event was not pursued. It is now accepted that at the time the wife was carrying on an on-and-off affair which had begun in November 2012 and ended in August 2013.

4. The wife filed her petition on 6 May 2015, seeking a divorce on the ground that the marriage had broken down irretrievably and alleging that the husband had behaved in such a way that she cannot reasonably be expected to live with him. The petition set out the statement of her case as follows:

> "1 The Respondent prioritised his work over home life and was often inflexible in making time available for the family, often missing family holidays and family events. This has caused the Petitioner much unhappiness and made her feel unloved.
>
> 2 During the latter years of the marriage the Respondent has not provided the Petitioner with love, attention or affection and was not supporting of her role as a homemaker and mother which has made the Petitioner feel unappreciated.
>
> 3 The Respondent suffers from mood swings which caused frequent arguments between the parties which were very distressing and hurtful for the Petitioner who has concluded that she can no longer continue to live with the Respondent.
>
> 4 The Respondent has been unpleasant and disparaging about the Petitioner both to her and to their family and friends. He speaks to her and about her in an unfortunate and critical and undermining manner. The Petitioner has felt upset and/or embarrassed by the Respondent's behaviour towards her as well as in front of family and friends.

> 5 As a result of the Respondent's behaviour towards her, the Petitioner and the Respondent have until recently lived separate lives under the same roof for many years and have not shared a bedroom for several years. On 10 February 2015 the Petitioner moved into rented accommodation and the parties have been living separate and apart since that date."

5. On 16 July 2015 the husband filed his acknowledgment of service, answering "Yes" to the question "Do you intend to defend the case?". On 10 August 2015 he filed his answer, indicating his wish to defend and denying that the marriage had irretrievably broken down.

6. In accordance with directions given on 28 October 2015 by Recorder Campbell, the wife amended her petition on 11 November 2015 to provide further particulars of paragraphs 3 and 4 of her statement of case. Particulars were given under paragraph 3 of 9 matters, covering the period from 25 February 2014 to 18 January 2015, and, under paragraph 4, of 18 matters covering the period from 15 January 2013 to 13 November 2014. The husband filed an amended answer responding to each of these allegations on 20 November 2015. The directions given by the Recorder included the listing of the case at the Central Family Court as a defended suit with a time estimate of 1 day.

The hearing

7. The suit came on for hearing on 15 January 2016 before His Honour Judge Tolson QC. The wife was represented by Mr Philip Marshall QC, the husband by Mr Hamish Dunlop.

8. Given the matters raised on appeal by way of criticism of Judge Tolson's approach to the case, I should note the way in which Mr Marshall opened his case:

> "We have indicated, and my client in her statement accepts, that taken in isolation, of course, some of the allegations made would not of and in themselves seem particularly serious. The husband categorises them as very much the stuff of everyday married life, and I suspect there is some force in that. What we say is that taken cumulatively, as your Honour should view them, the effect upon my client has been to wear her down. She variously says in her statement that she has been unhappy, she has been embarrassed, and she has felt that she could no longer continue living with the respondent."

A little later he added:

> "I can say straight away I do not propose, unless your Honour wishes me to do so, to go through each and every one of the 27 allegations.
>
> JUDGE TOLSON: I was going to ask if there is any measure of agreement as to the approach we should adopt to that? … I am

> asking about the forensic approach to 27 separate allegations, some older than others.
>
> MR. MARSHALL: I simply propose to focus upon one or two of them, or three or four of them. My client in her statement has confirmed the veracity of her petition and I will ask her to confirm that, and that will stand as her case to the extent it is supplemented in her witness statement which your Honour will, of course, have in due course."

9. About a third of the way through Mr Dunlop's cross-examination of the wife, there was this interchange:

> "JUDGE TOLSON: Well, gentlemen, shall we get on, we have an awful lot of allegations to cover at some point in the next hour and a quarter.
>
> MR. DUNLOP: Quite so. Your Honour, as to that, may I deal with two matters. The first is you asked my learned friend during the course of his opening how should your Honour approach the question of the particulars? In my submission there is going to be a need for you to look at certainly the majority of the particulars and their findings. Unless your Honour directs me to I do not intend to cross-examine on all of them, but I recognise I need to give your Honour a flavour of my approach.
>
> JUDGE TOLSON: Well, Mr. Dunlop, in your shoes I would have selected a few and cross-examined on them.
>
> MR. DUNLOP: Yes, that is what I intend to do.
>
> JUDGE TOLSON: It is a question for you how you spend the available time."

10. In the reserved judgment which he handed down on 25 January 2016, Judge Tolson said this:

> "The agreed approach at the trial was not to investigate each and every allegation, but through examination and cross-examination of the history of the marriage and selected allegations to give the overall flavour or complexion of the case and of how personal perspective might have altered reality in terms of the pleaded matters. I shall adopt the same approach in this judgment."

Given what the transcript records, that was an unexceptionable approach.

11. In the course of his closing submissions, Mr Marshall explained that he was focusing on incidents in public or involving a third party. Judge Tolson asked him to identify his top two or three ranking allegations. Mr Marshall in fact identified four, all relating to paragraph 4.

12. The first matter, on 13 November 2014 (which I shall refer to as the airport incident), was pleaded as follows:

> "The Respondent told the Petitioner that he had seen a suitable present for their housekeeper, in the departure lounge of Cancun airport. The Petitioner went over to see what the Respondent was referring to but could not find it and, so instead decided to purchase a silver tortoise necklace which the Petitioner knew she would like. When the Respondent found out that the Petitioner had ignored his suggestion, he lost his temper. He raised his voice so that those around them could hear him berating the Petitioner and he snapped "why did you not listen to me?" and demanded "why did you not buy what I told you to?" This caused the Petitioner extreme embarrassment as he was visibly chastising her in front of numerous strangers. The Respondent then stormed off. Later, when they were in the queue to board the plane the Respondent continued to audibly criticise the Petitioner and would not let the matter drop, causing her much further unhappiness and embarrassment. The Petitioner asked the Respondent to lower his voice but he nevertheless continued to berate her at the same level. Once they entered the plane, the Petitioner was forced to ignore the Respondent in order that the argument did not continue."

13. The answer to this was as follows:

> "The Respondent did see a suitable present for the parties' housekeeper. He mentioned this to the Petitioner. She returned with another item which the Respondent found perplexing. He asked why the Petitioner had not purchased what he had suggested but the Petitioner's version of this exchange is exaggerated and inaccurate."

14. The second matter, on 19 August 2014 (the restaurant incident), was pleaded as follows:

> "The Petitioner organised for the Respondent and the Petitioner to have dinner with a male friend ("F"). During the course of the dinner, the Respondent made stinging remarks about the Petitioner which made her and F feel visibly uneasy. The Petitioner spoke to the waiter to comment on the excellent quality of the food. The Petitioner then turned back to the Respondent and F to rejoin the conversation and asked where the conversation had reached. The Respondent snapped at the Petitioner "you missed out by thinking it necessary to talk to the waiter" upsetting and embarrassing the Petitioner in front of F. F rushed to the Petitioner's defence as he clearly agreed that the Respondent's critical remarks were unjustified."

15. The answer to this was:

> "Whilst dining with the friend, F, the Respondent believed that the Petitioner had been rude by calling over and engaging with the waiter whilst F was talking to the two of them. The Respondent felt that the Petitioner was ignoring what F was saying and sought to catch her attention to indicate that F was in the course of speaking to them. Any embarrassment that may have been caused by the Petitioner was of her own making."

16. The third matter, on 8 May 2014 (the pub incident), was pleaded as follows:

> "The Petitioner asked the Respondent if they could have supper at the local pub to save her cooking as she was preparing for a dinner party the next day. The Respondent said that he would "rather not". The Respondent later walked into the kitchen visibly irritated and told the Petitioner that he would book a table because otherwise he would "never hear the end of it". The parties had supper at the pub and for much of the time the Respondent sat silently and often with his head resting in his hands and his eyes closed. The Petitioner felt embarrassed and upset by his conduct and such an overt demonstration to all those around that he did not want to be there with her."

17. The answer:

> "The Respondent recalls a discussion about having supper at the local pub. He had had a tiring day in the garden and indicated that he would prefer not to eat out. In deference to the Petitioner's wishes, however, he made arrangements for the meal. The Respondent denies that he caused any embarrassment to the Petitioner during the meal. He accepts that he was tired and that there was little conversation. It is generally the Respondent who initiates conversations between the parties. The implication is that the Respondent was sulking. He was not. He was simply tired."

18. The fourth matter, on 27 February 2014 (the housekeeper incident), was pleaded as follows:

> "The Respondent entered the kitchen at the former matrimonial home where the Petitioner was with their housekeeper. The Respondent criticised the Petitioner in front of the housekeeper for putting cardboard in the skip incorrectly. He reprimanded the Respondent saying, "can I say something without you flying off the handle? I have said this before that when you put cardboard in the skip, do it properly and not without any thought about what will happen to it. It was all over the yard. I have picked up the big pieces but I want you to clear the rest from the shrubbery". The Petitioner felt like she was being chastised like a child and she was extremely embarrassed that she was spoken to in this manner in front of their housekeeper. When the Petitioner went outside to clear up "the mess", she

> and her housekeeper found only four small pieces of cardboard."

19. The answer:

> "Again the Petitioner misinterprets the Respondent's reasonable request as a reprimand. He was simply seeking to point out to the Petitioner that cardboard put into the skip should be weighted down in order to avoid it being blown around in the wind. The Respondent accepts that since this topic had been raised before his frustration may have shown but any embarrassment caused over this incident was because it was the Petitioner who "flew off the handle" in a manner which was unwarranted.
>
> There were only a few pieces of cardboard to be stowed when the Petitioner went outside because the Respondent had already cleared most of it up. It was a very windy day."

20. Before us, the most detailed investigation was of the airport incident. We were taken to the transcript of the evidence. Mr Dunlop cross-examined the wife as follows:

> "Q Then … in the airport, you accept that he had said to you: "I've seen something over there in the airport shop that I think we should get for our housekeeper"?
>
> A Mmhuh.
>
> Q And directed you in the direction of getting it?
>
> A Yes.
>
> Q You say you went to find it, but then bought something else?
>
> A I couldn't find it.
>
> Q And then you say he got angry with you for that?
>
> A And I bought a lovely little silver tortoise and a chain and I knew she would love that.
>
> Q But he did not get angry with you, did he?
>
> A Oh yes.
>
> Q He just expressed irritation?
>
> A No, this was full on embarrassment, I'm sorry."

21. Mr Marshall cross-examined the husband about this matter at some length:

"Q … I am going to ask you about the incident when you came home through the airport. Now, the cause of whatever passed between you is your wife had done something that was not in accordance with your instructions to her. You told her: "Go and buy that present" and she had bought a different one?

A I certainly didn't say: "Go and buy that present". I suggested that she went – because there was a very good, I have forgotten what it was now, but there was a very good offer on something which I thought would suit our housekeeper …

…

Q … 13th November you are coming back from Mexico. You have had a lovely holiday?

A Yes.

Q You have been there for a wedding. You agree with what your wife has said about the reason why you went to Mexico for the wedding, etc. etc, yes? Long planned, that sort of thing, yes?

A Yes.

Q And coming back, just to return to my point, you had told her: "Go and buy that", and she had bought something else, yes?

A As I say, I didn't say: "Go and buy that". I said, I suggested she went over to where I'd seen this special offer on some item which I can't remember what it was, and she came back with something else which I thought wasn't as nice as the one I suggested.

Q Yes.

A And I----

Q Your answer says: "She had ignored your suggestion for a present". You asked her why she had not acquired what you suggested and you say that was it. That was the extent of the disagreement between you. She had not done something you suggested and you asked her why not? Yes?

A Yes.

Q Do you want to look at your answer?

A Yes. I'm trying to understand what you are getting at. I was surprised that she hadn't looked at what I had suggested. If

she'd said: "Yes, I've looked at it, but I think this is better", but she didn't, and I was surprised.

Q You lost your temper according to her. You raised your voice so that those around you could hear you berating her, and snapped at her: "Why did you not listen to me? Why did you not buy what I told you to?" and you embarrassed her. Again, we've all walked through airports, and we've seen these arguments between married couples, one shouting at the other, the other looking embarrassed wishing the ground would open up and swallow them up. You are smiling at me?

A Because I think it's a complete exaggeration of what happened.

Q So she is lying about this?

A She is exaggerating, yes.

Q Did you raise your voice?

A Not to the extent that it might be overheard by other people, or embarrass her, no.

Q Clearly, do you accept she was embarrassed?

A Well, she didn't tell me she was embarrassed.

Q Could you see she was embarrassed?

A No, it was, again, it was over and done within a couple of minutes.

Q Visibly chastising her in front of numerous strangers?

A Oh no, I don't agree with that.

Q "Stormed off" – is she making that up or did you storm off?

A Stormed off?

Q Stormed off?

A No, I don't believe I did storm off.

Q I see. You continued to criticise her even when----

JUDGE TOLSON: Can we just – because I am quite interested in this, and quite interested in the restaurant one.

MR. MARSHALL: Sorry?

JUDGE TOLSON: I am quite interested in this allegation and the restaurant one, because of the suggestion that it involves embarrassment because those around are aware of what is going on, okay?

MR. MARSHALL: Yes.

JUDGE TOLSON: And that is what this has in common with the restaurant. (To the witness) So could I ask you to concentrate on that? Did you draw attention to yourselves in the airport in Cancún?

A My wife and my son and daughter all tell me that I talk too loudly in public places, so whether it's nice things or not so nice, I have a tendency to project my voice, shall we say, but I wouldn't have been shouting. I would not have been aware that other people were listening in to our conversation.

MR. MARSHALL: Not being aware and not caring are quite close, are they not, really?

A No, I don't think so. I would have cared about it embarrassing – it would've embarrassed me. My wife has not got the monopoly on embarrassment. I would not have wanted a public disagreement under any situation.

Q You see, if she is telling the truth, I mean you can agree with me, that this would be very embarrassing in a public place, in a foreign country?

A My wife might think that I am talking in a loud voice and in that case she might think she is telling the truth. Whether I am deliberately doing it to embarrass her is what I contend.

Q Did you storm off? You were hesitating between saying "yes" or "no" about that?

A Well, because I am trying to remember storming off. I don't know where I would have stormed off to. We were sitting in the departure lounge, I don't think I stormed off.

Q All right. You continued audibly to criticise her when you were in the queue to board the plane, is that right? You would not let the matter drop, just would not let it go. She had not done what you had told her to do and you would not let it go. Is she lying about that?

A I don't remember enough of it to be able to give you a truthful answer. I don't believe it was a one-sided conversation. If we were talking about it, it wouldn't have been an argument, and I don't believe I was berating her, or whatever she said.

> Q Indeed, she says she asked you to lower your voice, but you continued to berate her, you ignored her and continued to berate her at the same level?
>
> A My wife often told me to lower my voice on lots of occasions.
>
> Q And you often ignore her?
>
> A It's my tendency to be aware of how loudly I'm speaking.
>
> Q Even if somebody tells you: "Please don't, lower your voice, you're embarrassing me"?
>
> A Well, she'd often say that in a restaurant, and I'd look around and I would say: "Nobody is listening to us, Tini" – we could be discussing anything, politics, religion, anything and she'd say: "Lower your voice".
>
> Q So, there it is, so all of these things they are all out of context, all explanation, she is wrong about this, she is wrong about that; a happy marriage all the time? Not unhappy?
>
> A I think she had an ulterior motive for collecting all these, what, to my mind was a collection of molehills which she felt suited her purpose to build up into mountains because she had aspirations outside of our marriage."

The law

22. Before turning to Judge Tolson's judgment, it is convenient to examine the law.

23. I start with the legislation. Section 1 of the Matrimonial Causes Act 1973, re-enacting provisions originally in sections 1 and 2 of the Divorce Reform Act 1969, is in the following terms:

> "(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 (hereafter in this Act referred to as "two years' separation") 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 (hereafter in this Act referred to as "five years' separation").
>
> (3) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.
>
> (4) If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2) above, then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to section 5 below, grant a decree of divorce."

24. Section 5 provides as follows:

> "(1) The respondent to a petition for divorce in which the petitioner alleges five years' separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.
>
> (2) Where the grant of a decree is opposed by virtue of this section, then –
>
> (a) if the court finds that the petitioner is entitled to rely in support of his petition on the fact of five years' separation and makes no such finding as to any other fact mentioned in section 1(2) above, and
>
> (b) if apart from this section the court would grant a decree on the petition,
>
> the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would

> in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.
>
> (3) For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved."

25. Where a petition is proceeding as an "undefended case" within the meaning of rule 7.1(3) of the Family Procedure Rules 2010, rule 7.20(2)(a) provides that, where the petitioner has made the appropriate application under rule 7.19,

> "the court must … if satisfied that the applicant is entitled to … a decree nisi … so certify and direct that the application be listed before a judge for the making of the decree … at the next available date."

Rule 7.20(2)(b), which there is no need for me to set out, provides for what is to happen if the court is not so satisfied. If the matter proceeds, as it does in the overwhelming majority of cases, in accordance with rule 7.20(2)(a), the hearing before the judge lasts only a matter of seconds, the task of the judge being merely to pronounce the making of the decree nisi.

26. I turn to the case-law.

27. The relevant authorities to which we were taken are, at first instance, the decisions of Bagnall J in *Ash v Ash* [1972] Fam 135, of Dunn J in *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47 and of Sheldon J in *Stevens v Stevens* [1979] 1 WLR 885, and, in this court, the decisions in *O'Neill v O'Neill* [1975] 1 WLR 1118, *Balraj v Balraj* (1980) 11 Fam Law 110, *Buffery v Buffery* [1988] 2 FLR 365 and *Butterworth v Butterworth* [1997] 2 FLR 336. The most recent authority to which we were referred was the decision of Recorder Alison Ball QC in *Hadjimilitis (Tsavliris) v Tsavliris* [2003] 1 FLR 81.

28. I start with *Ash v Ash* [1972] Fam 135, 140, where Bagnall J said:

> "The general question may be expanded thus: can this petitioner, with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?"

29. In *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47, 54, Dunn J formulated the question as follows:

> "Coming back to my analogy of a direction to a jury, I ask myself the question: Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?"

30. In *O'Neill v O'Neill* [1975] 1 WLR 1118, 1121, Cairns LJ said:

> "The right test is, in my opinion, accurately stated in *Rayden on Divorce*, 12th ed (1974), vol 1, p 216:
>
> > "The words 'reasonably be expected' prima facie suggest an objective test. Nevertheless, in considering what is reasonable, the Court (in accordance with its duty to inquire, so far as it reasonably can, into the facts alleged) will have regard to the history of the marriage and to the individual spouses before it, and from this point of view will have regard to *this* petitioner and *this* respondent in assessing what is reasonable."
>
> If authority is required for that proposition it is to be found in the speech of Lord Reid in *Gollins v Gollins* [1964] AC 644, 660:
>
> > "A judge does, and must, try to read the minds of the parties in order to evaluate their conduct. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better.""
>
> Roskill LJ, at p 1125, adopted as correct what Dunn J had said in *Livingstone-Stallard*.

31. In *Stevens v Stevens* [1979] 1 WLR 885, 887, Sheldon J said this:

> "… the wife would be entitled to a decree in the present suit if she could establish (a) that their marriage remained irretrievably broken down … and (b) that since March 16, 1976, he has behaved in such a way that she could not reasonably be expected to live with him. In my judgment, moreover, it is not necessary for her to establish … that the husband's behaviour, of which she now complains, was in any way responsible for the breakdown of the marriage.
>
> On the other hand, of course, the facts that the marriage had clearly broken down and, a fortiori, that the breakdown was due to the fault of the wife are or may be matters in determining whether the husband's behaviour since has been unreasonable in this context. The court must have regard to the whole history of the matrimonial relationship. In the words of Bush J in *Welfare v Welfare*, The Times, October 12, 1977:
>
> > "Conduct of a respondent could not be looked at in isolation but had to be viewed in the light of all the surrounding circumstances, including the degree of provocation."
>
> I would adopt also as correct the following passages in *Rayden on Divorce*, 12th ed, vol 1, p 219:

> "In all these cases the totality of the evidence of the 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 a consideration of any excuse or explanation which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called upon to endure it.""

32. In *Balraj v Balraj* (1980) 11 Fam Law 110, Cumming-Bruce LJ said:

> "In behaviour cases, where the ground relied upon to prove the breakdown or a condition precedent to breakdown is the effect of behaviour, the court has to decide the single question whether the husband (for example) has so behaved that it is unreasonable to expect the wife to live with him. In order to decide that, it is necessary to make findings of fact of what the husband actually did and then findings of fact upon the impact of his conduct on that particular lady. As has been said again and again between a particular husband and a particular lady whose conduct and suffering are under scrutiny, there is of course a subjective element in the totality of the facts that are relevant to the solution but, when that subjective element has been evaluated, at the end of the day the question falls to be determined on an objective test."

33. In *Buffery v Buffery* [1988] 2 FLR 365, 367-368, May LJ said:

> "… the gravity or otherwise of the conduct complained of is of itself immaterial. What has to be asked, as will appear from the judgment in *O'Neill*, is whether the behaviour is such that the petitioner cannot reasonably be expected to live with the respondent."

Having then referred to what Cairns LJ had said in *O'Neill*, he continued:

> "Thus one looks to this husband and this wife, or vice versa, but one also looks at what is reasonable. That is the point referred to by Roskill LJ in his judgment in the same case."

He then set out the relevant passage where Roskill LJ had quoted the earlier words of Dunn J in *Livingstone-Stallard* and continued:

> "That, in effect, is posing precisely the same test as was spoken to by Cairns LJ quoting from *Rayden*. One considers a right-thinking person looking at the particular husband and wife and asks whether the one could reasonably be expected to live with the other taking into account all the circumstances of the case and the respective characters and personalities of the two parties concerned."

34. Finally, in *Butterworth v Butterworth* [1997] 2 FLR 336, 340, Brooke LJ, with whom Balcombe LJJ agreed, treated the test as being that laid down by Dunn J in *Livingstone-Stallard*.

35. In the light of the authorities, I agree that the law is correctly set out in the current edition of *Rayden & Jackson on Relationship Breakdown, Finances and Children* paras 6.82-6.85 (citations omitted):

> "6.82 The words 'reasonably be expected' in the statute prima facie suggest an objective test. Nevertheless, in considering what is reasonable, the court (in accordance with its duty to inquire, so far as it reasonably can, into the facts alleged) will have regard to the history of the marriage and to the individual spouses before it in assessing what is reasonable.
>
> 6.83 Allowance will be made for the sensitive as well as for the thick-skinned and the conduct must be judged up to a point by reference to the victim's capacity for endurance, and in assessing the reasonableness of the respondent's behaviour the court would consider to what extent the respondent knew or ought reasonably to have known of that capacity.
>
> 6.84 The approach has been summarised obiter in *Balraj v Balraj*:
>
> (i) the court has to decide the single question whether the respondent has so behaved that it is unreasonable to expect the petitioner or applicant to live with him;
>
> (ii) in order to decide that, it is necessary to make findings of fact as to what the respondent actually did, and findings of fact as to the impact of that conduct on the petitioner or applicant;
>
> (iii) there is, of course, a subjective element in the totality of the facts that are relevant to the solution, but when that subjective element has been evaluated, at the end of the day the question falls to be determined on an objective test.
>
> 6.85 It has been said that the correct test to be applied is whether a right-thinking person, looking at the particular husband and wife or civil partners, would ask whether the one could reasonably be expected to live with the other taking into account all the circumstances of the case and the respective characters and personalities of the two parties concerned."

36. *Rayden* continues, paras 6.86, 6.88:

> "6.86 Any and all behaviour may be taken into account: the court will have regard to the whole history of the relationship.
>
> …

> 6.88 The court will have regard to the cumulative effect of behaviour. Conduct may therefore consist of a number of acts each of which are apparently reasonable in isolation, but which taken together are such that the petitioner or applicant cannot reasonably be expected to live with the respondent."

37. I do not need and I do not propose to add to the jurisprudence. What the authorities show is that, in a case such as this, the court has to evaluate what is proved to have happened (i) in the context of *this* marriage, (ii) looking at *this* wife and *this* husband, (iii) in the light of *all* the circumstances and (iv) having regard to the *cumulative effect* of all the respondent's conduct. The court then has to ask itself the statutory question: given all this, has the respondent behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent? This being the law, I respectfully agree with the point made by my Lady, Hallett LJ, during the course of argument before us, that if the marriage is unhappy a particular piece of 'conduct' may have more impact and be less 'reasonable' than exactly the same conduct if the marriage is happy. As my Lady put it, and I agree, what may be regarded as trivial disagreements in a happy marriage could be salt in the wound in an unhappy marriage.

38. This is the law. This is the law which it was the duty of Judge Tolson to apply. It is the law which it is equally our duty to apply. It is well known that many hold the view that this is not what the law should be, that times have moved on since 1969, and that the law is badly out-of-date, indeed antediluvian. That may be, and those who hold such views may be right, but our judicial duty is clear. As Sir Gorell Barnes P said in *Dodd v Dodd* [1906] P 189, 206, our task is *jus dicere non jus dare* – to state the law, not to make the law.

39. In one respect, however, the law permits, indeed requires us, to look at matters from the perspective of 2017. Section 1 of the 1973 Act is an "always speaking" statute: see *R v Ireland, R v Burstow* [1998] AC 147, 158. Although one cannot construe a statute as meaning something "conceptually different" from what Parliament must have intended (see *Birmingham City Council v Oakley* [2001] 1 AC 617, 631, per Lord Hoffmann), where, as here, the statute is "always speaking" it is to be construed taking into account changes in our understanding of the natural world, technological changes, changes in social standards and, of particular importance here, changes in social attitudes. Thus, in *R v Ireland*, it was held that those who inflict psychiatric injury by use of the telephone can be guilty of offences under the Offences Against the Person Act 1861 notwithstanding that the telephone had not then been invented and that such psychiatric injury would not then have been recognised. So, as Lord Hoffmann pointed out in *Birmingham City Council v Oakley* [2001] 1 AC 617, 631:

> "the concept of a vehicle has the same meaning today as it did in 1800, even though it includes methods of conveyance which would not have been imagined by a legislator of those days. The same is true of social standards. The concept of cruelty is the same today as it was when the Bill of Rights 1688 forbade the infliction of "cruel and unusual punishments". But changes in social standards mean that punishments which would not have been regarded as cruel in 1688 will be so regarded today."

40. The most obvious application of the principle in family law relates to the concept of a child's "welfare", as the word was used in section 1 of the Guardianship of Infants Act 1925, now section 1 of the Children Act 1989. The concept of welfare is, no doubt, the same today as it was in 1925, but conceptions of that concept, to adopt the terminology of Professor Ronald Dworkin, or the content of the concept, to adopt the corresponding terminology of Lord Hoffmann in *Birmingham City Council v Oakley* [2001] 1 AC 617, 631, have changed and continue to change. A child's welfare is to be judged today by the standards of reasonable men and women in 2017 – not by the standards of their grandparents in 1925 or their parents in 1969 (when the House of Lords decided *J and Another v C and Others* [1970] AC 668; see in particular the speech of Lord Upjohn, 722-723) – and having regard to the ever changing nature of our world, in particular, changes in social attitudes: see *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, para 33.

41. So, in my judgment, when section 1(2)(b) of the 1973 Act, reproducing section 2(1)(b) of the Divorce Reform Act 1969, uses the words "cannot reasonably be expected", that objective test has to be addressed by reference to the standards of the reasonable man or woman on the Clapham omnibus: not the man on the horse-drawn omnibus in Victorian times which Lord Bowen would have had in mind (see *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49, [2014] PTSR 1081, para 2), not the man or woman on the Routemaster clutching their paper bus ticket on the day in October 1969 when the 1969 Act received the Royal Assent, but the man or woman on the Boris Bus with their Oyster Card in 2017.

The judgment

42. It is plain from his judgment that Judge Tolson was unimpressed by the wife's petition. He variously described it as "hopeless" (judgment, paragraph 2), "anodyne" (paragraph 7), and "scraping the barrel" (paragraph 13). He said it "lacked beef because there was none" (paragraph 7). He described paragraphs 3 and 4 as "the only 2 grounds which … might in context have provided grounds for divorce." He said the allegations "are at best flimsy" (paragraph 12).

43. The judge was, and, as it seems to me, with every justification, scathing about paragraph 1:

> "… it is instructive to examine the first ground upon which the husband's behaviour is said to have been unreasonable. It reads [and he set it out]. During cross-examination the wife readily admitted that in fact the husband had been retired, or effectively so, for many years. When he had been working it had been building up a successful business which leaves the couple wealthy. No complaint seems to have been made about this at the time. The idea that the lifestyle, whatever it may have been, now contributes to the breakdown of the marriage is fanciful. The ground is no more than a conventional form of words with no application to the present or the breakdown of the marriage at all."

44. Describing the 27 allegations set out in the particulars of paragraphs 3 and 4, the judge said this:

> "… the wife relied upon events described in a diary she had been keeping … On 11 November 2015 the petition was amended to include 27 allegations taken from the diary … The wife contends that they are examples of behaviour which was more widespread. I do not accept that. The simple reality of this case is that the 27 pleaded allegations of unreasonable behaviour are the best the wife can come up with. It is these allegations which I must examine."

45. The judge directed himself as follows:

> "In the present context, the law permits me to grant a decree of divorce only if I can find on a balance of probabilities that *"the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent"* (see sub-section 1(2)(b) of the Matrimonial Causes Act 1973). Only then could I hold the marriage to have broken down irretrievably (if it has). In determining the question whether this Respondent has behaved in such a way I apply an objective test – what would the hypothetical reasonable observer make of the allegations – but with subjective elements. I have to take into account the individual circumstances of the spouses and the marriage: *"would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him taking into account the whole of the circumstances and the characters and personalities of the parties?"* (emphasis in original)"

Mr Marshall submitted that this was muddled. With respect, I do not agree. The judge's self-direction was entirely adequate, correctly drawing attention to both the objective test and the subjective elements. Importantly, given one of Mr Marshall's key grounds of appeal, Judge Tolson recognised that he had to take into account "the whole of the circumstances."

46. The judge expressed his conclusion in these words:

> "In reality I find that the allegations of alleged unreasonable behaviour in this petition – all of them – are at best flimsy. I would not have found unreasonable behaviour on the wife's pleaded case. As it is, having heard both parties give evidence, I am satisfied that the wife has exaggerated the context and seriousness of the allegations to a significant extent. They are all at most minor altercations of a kind to be expected in a marriage. Some are not even that."

He then proceeded to explain why.

47. This part of his judgment falls into three sections. I shall take them in turn. In the first, Judge Tolson said this:

> "My conclusion is at its starkest when considering the batch of allegations which can be categorised as "the husband's reaction to the affair". The first allegation in time is dated January 2013. It is an allegation under Ground 4 above. As pleaded the wife's case reads:
>
> > "When the Petitioner was in France, the Respondent telephoned her to tell her that a letter had arrived for her and to query whether he should open it. The Petitioner said it could wait as she was not expecting anything. The Respondent became suspicious and told the Petitioner in an unpleasant manner that this was the difference between her and him: he did not have anything to hide."
>
> It will be recalled that at this point in time, the wife had just served a draft petition for divorce upon the husband. He had responded by querying whether there was someone else. The wife had denied it. She now accepts that during this very month – January 2013 – after briefly calling off the affair she had been having since November the previous year, she resumed it. It is not clear to me whether this occurred during the same trip to France pleaded in the allegation (the parties have a second home in France), but it matters not. At this point in time the husband did not know of the affair, but was clearly suspicious. The wife did have something to hide and she had hidden it. During the evidence I interrupted the cross-examination of the wife (which was perhaps inevitably hitting the mark) to ask her whether or not she could see that such a reaction by the husband might in context be said to be "fair enough". I suspect that she did see this."

48. In the second section, the judge said this:

> "Any other example from this same batch of allegations might be taken. I shall choose one dated February 2014:
>
> > "The Petitioner took 9 pictures to the picture framers which was time consuming. On her return, the Respondent told her in an accusatory and unpleasant manner that she had taken her time and sarcastically commented that "he must have been an interesting framer.""
>
> Again, in my judgment the objective observer can scarcely criticise the husband, especially as the remark was made only 6 months after the husband first knew of the affair and less than 4 months after he had first taxed the wife with it. The wife claims that the iniquity in this behaviour lies in the extent to which it continued over time: the husband could not come to terms with the affair. This is not so. It is instructive that the wife in her statement claims that the husband's comments in respect of the affair increased after July 2014 … but as the wife accepted in

> cross-examination she has not pleaded and cannot recall a single incident on that subject after that date – which is only 11 months after the husband first knew of the affair. The wife's case in this respect lacks any substance. In my judgment the very fact that these allegations form a part of the wife's pleaded case demonstrates the weakness of that case. It is an exercise in scraping the barrel."

49. In the third section, Judge Tolson dealt with the airport incident, the restaurant incident and the pub incident:

> "During closing submissions I invited leading counsel for the wife to rank his top 3 allegations – ie in terms of seriousness. They were as follows: the 'airport incident' … the 'restaurant incident' … and the 'pub incident' … I will not overburden this judgment by setting out the pleaded allegations in full. This, the wife's best case, skilfully argued by leading counsel, proceeds by emphasising what he submits is her increased sensitivity to the husband's old-school controlling behaviour. It is, so it is argued, not acceptable that he makes an exhibition of the couple's differences by arguing in public. The airport and restaurant incidents are examples of 2 arguments in public which allegedly show the husband being domineering; and the pub incident is an evening of obvious silence over dinner. This case might have found favour if I had been satisfied both that the incidents were examples of a consistent and persistent course of conduct and took place as the wife described. I do not so find. Having seen him, I hope the husband will forgive me for describing him as somewhat old-school. I can also find the wife to be more sensitive than most wives. It matters not. The reality remains that these were in my judgment isolated incidents consisting of minor disputes. In the case of the pub incident, if they sat in silence whenever they went out for a meal, the wife would have told me so and pleaded other examples. The husband claimed that he had been tired on this particular evening and I accept that evidence. The wife has cherry-picked one unsuccessful evening and entered it in her diary. It is an illustration of her approach and the weakness of her case. The airport incident was a minor dispute at the end of what it is common ground was a successful holiday (taking place as late as November 2014). In my judgment these 'top 3' instances are merely examples of events in a marriage which scarcely attract criticism of one party over the other. Much the same can be said in respect of all other allegations and the wife's case generally."

50. Judge Tolson concluded with this:

> "I have not found this a difficult case to determine. I find no behaviour such that the wife cannot reasonably be expected to

> live with the husband. The fact that she does not live with the husband has other causes. The petition will be dismissed."

He recognised that the effect of his decision was to "leave them stymied in lives neither of them wish to lead." He ordered the wife to pay the husband's costs.

The appeal

51. Judge Tolson declined Mr Marshall's request to provide supplementary reasons and refused the wife permission to appeal. Her appellant's notice was issued on 1 March 2016. I granted permission to appeal on 24 March 2016. The appeal came on for hearing, serendipitously, on the Feast of St Valentine, 14 February 2017. Quite by chance, the day before, on 13 February 2017, Lord Keen of Elie, Lords Spokesperson (Ministry of Justice), in answer to a written question from Lord Pendry, "To ask Her Majesty's Government whether they have any plans to review the fault-based divorce system", had provided this answer:

> "The government is committed to improving the family justice system so separating couples can achieve the best possible outcomes for themselves and their families. Whilst we have no current plans to change the existing law on divorce, we are considering what further reforms to the family justice system may be needed."

52. The same counsel appeared before us as before Judge Tolson, though Mr Dunlop was now led by Mr Nigel Dyer QC.

53. Perhaps unsurprisingly, the hearing attracted extensive coverage in the media. Some of the reporting was merely factual. Some of the comment was unfairly critical of Judge Tolson who, after all, was simply attempting faithfully to apply the law, as was his duty. Some was extremely disparaging of the state of the law.

The grounds of appeal

54. In his skeleton argument, Mr Marshall identifies two distinct core grounds of appeal:

    i) His primary contention is that, having adopted a process that was seriously flawed, Judge Tolson:

        a) failed to make essential (core) findings of fact (1) as to what the husband had actually done in relation to the 27 pleaded allegations and (2) as to the impact of that conduct on the wife;

        b) failed to undertake any proper assessment of the wife's *subjective* characteristics;

        c) failed to undertake any assessment of the *cumulative* impact and effect on the wife of the husband's behaviour – a point on which Mr Marshall places particular emphasis; and

        d) failed to apply the law properly to the facts.

ii) His subsidiary argument is that the wife's rights under Articles 8 and 12 of the European Convention are clearly engaged and that we need to consider whether what he calls the old authorities on which Judge Tolson relied:

a) should be "reviewed in line with current thinking and social norms"; and

b) are consistent with the wife's rights under Articles 8 and 12.

He invites us to consider what level of 'fault' must be established to obtain a divorce and whether dispositive, or at least greater, weight should be given to the petitioner's wishes and feelings. More profoundly, he invites us to consider whether the requirement to prove 'fault' is consistent with Articles 8 and 12.

55. Mr Marshall emphasises that his primary case is that Judge Tolson fell into error and was, as he submits, plainly wrong to dismiss the petition upon application of what he calls the *current* law. He characterises Judge Tolson's decision as perverse. He asserts that the wife does not know why her petition has been dismissed and, as he puts it, why she has not been listened to.

The approach of the Court of Appeal

56. Before turning to consider the grounds of appeal I need to explain briefly the functions and approach of the Court of Appeal.

57. I take the liberty of repeating what I said in *Re F (Children)* [2016] EWCA Civ 546, paras 22-23:

> "22 Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB and KP* [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."
>
> 23 The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):
>
> > "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved

> judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."
>
> It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis"."

58. So far as concerns the appellate approach to findings of fact, I need go no further than to the recent judgment of Lord Hodge in *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93, paras 21-22:

> "21 But deciding the case as if at first instance is not the task assigned to this court or to the Inner House … Lord Reed summarised the relevant law in para 67 of his judgment in *Henderson* [*Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600] in these terms:
>
> > "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."
>
> When deciding that a judge at first instance who has heard the evidence has gone "plainly wrong", the appeal court must be satisfied that the judge could not reasonably have reached the decision under appeal.
>
> 22 The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for

> what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence."

59. I turn to consider the various grounds of appeal.

The grounds of appeal: process

60. In *Griffiths v Griffiths* [1974] 1 WLR 1350, a 'behaviour' case tried by Arnold J, the pleadings ran to 66 pages – in the present case they take up a more modest 15 pages –, the hearing lasted 26 days and the judgment occupied 64 pages of transcript. In this court, Roskill LJ said, 1353:

> "The parties having chosen to fight the case in this way, the judge was obviously bound to find, as he did find with the utmost care, where he thought the truth lay on every one of those allegations which had been launched before him by way of charge and countercharge over so long a period."

61. Litigation conducted in that way may have been acceptable and required in 1973, but things have moved on since then. The "overriding objective" is spelt out in rule 1.1 of the Family Procedure Rules 2010, which provides that:

> "(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that it is dealt with expeditiously and fairly;
>
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
>
> (c) ensuring that the parties are on an equal footing;
>
> (d) saving expense; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

FPR rule 1.1 is supplemented by FPR rule 22.1, which confers on the court extensive powers to control the evidence, including, by rule 22.1(2), the power to exclude admissible evidence.

62. In any event, in this particular case, the parties, wisely and prudently, chose to conduct the proceedings in a more focused and controlled manner. They accepted that the final hearing should be listed for only one day. I have set out (see paragraph 8 above) the way in which Mr Marshall opened the case to Judge Tolson. Given that, given the way in which the hearing then developed before him, and given the terms of FPR rules 1.1 and 22.1, Judge Tolson in my judgment was entirely justified in proceeding as he did and for the reasons he did (paragraph 10 above).

63. I reject this ground of appeal.

The grounds of appeal: failure to make findings of fact

64. Before addressing Mr Marshall's complaints I note some important findings of fact made by Judge Tolson. First (see paragraph 44 above), he specifically rejected the wife's case that the pleaded 27 allegations were "examples of behaviour which was more widespread." His finding was clear: "I do not accept that." He made the same point (paragraph 49 above) in relation to the airport and restaurant incidents. He said that the wife's case might have found favour if "both that the incidents were examples of a consistent and persistent course of conduct and took place as the wife described." Again, his finding was clear: "I do not so find." Second (paragraph 48), he found that the wife's case in relation to the husband's reaction to her affair "lacks any substance" and "demonstrates the weakness of [her] case." Third (paragraph 49), he accepted the husband's evidence in relation to the pub incident. Fourth (paragraph 46), and more generally, he found that "the wife has exaggerated the context and seriousness of the allegations to a significant extent." These, in my judgment, were all findings which were plainly open to the judge and with which we cannot possibly interfere.

65. Mr Marshall seeks to undermine the second of these findings by drawing attention to the fact that, at the trial and for the first time, the husband indicated that he did not believe the wife when she said the affair had ended and, indeed, said he believed it was still continuing. Mr Marshall asks rhetorically, how could it be reasonable in the light of that new evidence to expect the wife to continue to live with the husband? He submitted that Judge Tolson became distracted by his consideration of the wife's pleaded case whilst failing to address the new evidence, and, furthermore, that this belated assertion undermined the reliability of the husband's evidence. There are, in my judgment, two answers to this: first, the wife never sought to amend her petition to raise this new matter; second, and more fundamentally, I do not agree that the new evidence can or did have the significance which Mr Marshall would have us accept.

66. Mr Marshall's first complaint is, in short, that Judge Tolson ought to have made specific findings in relation to each of the 27 pleaded allegations. I do not agree. What Judge Tolson had to do was decide whether the husband's conduct as proved by the wife established her case under section 1(2)(b) of the Act. That did not require him to make specific findings in relation to each allegation: see *Re F*, para 22. What it did require him to do was to explain what it was he had found. He made it clear (see paragraph 44 above) that he was examining all 27 pleaded allegations: "It is these allegations which I must examine." Having made his findings in relation to the airport incident, the restaurant incident and the pub incident (paragraph 49), he continued: "Much the same can be said in respect of *all* other allegations and the wife's case *generally* (emphasis added)."

67. Mr Marshall's other complaint is that Judge Tolson failed to make proper findings as to the impact on the wife of the husband's behaviour. I do not agree. It is apparent from his self-direction on the law that Judge Tolson well understood that he had to evaluate the impact on the wife of the events which found proved. His findings were clear. First, there are his descriptions (see paragraph 42 above) of the allegations as being, for example, "anodyne", "lack[ing] beef" and "flimsy". Second (paragraph 46), there is his finding that the wife has "exaggerated the context and *seriousness* of the allegations to a *significant* extent (emphasis added)." Third (paragraph 49), there is his description of the airport incident, the restaurant incident and the pub incident as "merely examples of events in a marriage which scarcely attract criticism of one party over the other." These are findings with which we cannot interfere and, in my judgment, they demonstrate two things: first, that Judge Tolson was well aware that he had to evaluate the impact on the wife of what had happened; second, that, as he evaluated these events, he found their impact to be modest at best.

68. In my judgment, this ground of appeal fails.

The grounds of appeal: failure to assess the wife's subjective characteristics

69. Judge Tolson directed himself that he had to have regard to the characters and personalities of both the husband and the wife. He did precisely that. He found the husband (see paragraph 49 above) to be "somewhat old-school." Responding to Mr Marshall's submission about the wife's "increased sensitivity to the husband's old-school controlling behaviour", Judge Tolson said "I … find the wife to be more sensitive than most wives." Mr Marshall complains that in the very next sentence the judge continued. "It matters not." That, however, has to be read in context, for the judge went on, "The reality remains that these were in my judgment isolated incidents …"

70. There is, in my judgment, nothing in this ground of appeal.

The grounds of appeal: failure to assess the cumulative impact

71. This ground has given me some pause for thought, because one does not find anywhere in his judgment, any explicit reference by Judge Tolson to the *cumulative* effect on the wife of the husband's conduct. But the judgment has to be read as a whole, and we must not fall into the trap of becoming embroiled in the "narrow textual analysis" against which Lord Hoffmann has warned us.

72. Mr Marshall had opened his case (see paragraph 8 above) by reminding Judge Tolson that the wife's allegations had to be "taken cumulatively." The judge, in his self-direction, recognised that he had to take into account "the whole of the circumstances." And I agree with Mr Dyer that, read as a whole and taken in context, Judge Tolson's use (paragraph 49) of the phrases "a consistent and persistent course of conduct" and "isolated incidents", his criticism of the wife for "cherry-pick[ing]" and his reference to "all other allegations and the wife's case generally", show that he was indeed looking to all the circumstances and to their cumulative effect.

73. In my judgment, this ground of appeal fails.

The grounds of appeal: failure to apply the law

74. The judge directed himself correctly in law. In relation to the facts, and how they were to be evaluated, he was entitled to find as he did and for the reasons he gave. His reasoning, in my judgment, displays no error of law, principle or approach. He was entitled, at the end of the day, to conclude as he did and for the reasons he gave.

75. In my judgment this ground of appeal fails.

The grounds of appeal: the Convention

76. I turn to Mr Marshall's subsidiary argument.

77. Mr Dyer's argument in answer to Mr Marshall's argument was simple, clear and, in my judgment, irrefutable. There is, he submitted, no Convention right to be divorced nor, if domestic law permits divorce, is there any Convention right to a favourable outcome in such proceedings. He referred to two authorities.

78. In the first, *Johnston v Ireland* (1986) 9 EHRR 203, paras 52-53, the Strasbourg court said this in relation to Article 12:

> "52 The Court agrees with the Commission that the ordinary meaning of the words 'right to marry' is clear, in the sense that they cover the formation of marital relationships but not their dissolution. Furthermore, these words are found in a context that includes an express reference to 'national laws'; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12.
>
> Moreover, the foregoing interpretation of Article 12 is consistent with its object and purpose as revealed by the *travaux préparatoires* … In the Court's view, the *travaux préparatoires* disclose no intention to include in Article 12 any guarantee of a right to have the ties of marriage dissolved by divorce.
>
> 53 The applicants set considerable store on the social developments that have occurred since the Convention was drafted, notably an alleged substantial increase in marriage breakdown.
>
> It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate."

79. In relation to Article 8, the Court said this, para 57:

> "It is true that, on this question, Article 8, with its reference to the somewhat vague notion of 'respect' for family life, might appear to lend itself more readily to an evolutive interpretation than does Article 12. Nevertheless, the Convention must be read as a whole and the Court does not consider that a right to divorce, which it has found to be excluded from Article 12, can, with consistency, be derived from Article 8, a provision of more general purpose and scope. The Court is not oblivious to the plight of the first and second applicants. However, it is of the opinion that, although the protection of private or family life may sometimes necessitate means whereby spouses can be relieved from the duty to live together, the engagements undertaken by Ireland under Article 8 cannot be regarded as extending to an obligation on its part to introduce measures permitting the divorce and the re-marriage which the applicants seek."

80. In the second case, the very recent judgment in *Babiarz v Poland (Application no. 1955/10)*, 10 January 2017, paras 47, 49-50, 56, the Strasbourg court, referring to *Johnston v Ireland*, said:

> "47 … In the area of framing their divorce laws and implementing them in concrete cases, the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention and to reconcile the competing personal interests at stake.
>
> …
>
> 49 The Court has already held that neither Article 12 nor 8 of the Convention can be interpreted as conferring on individuals a right to divorce. Moreover, the *travaux préparatoires* of the Convention indicate clearly that it was an intention of the Contracting Parties to expressly exclude such right from the scope of the Convention. Nevertheless, the Court has reiterated on many occasions that the Convention is a living instrument to be interpreted in the light of present-day conditions. It has also held that, if national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons the right to remarry.
>
> 50 Thus, the Court has not ruled out that the unreasonable length of judicial divorce proceedings could raise an issue under Article 12. The Court did not rule out that a similar conclusion could be reached in cases where, despite an irretrievable breakdown of marital life, domestic law regarded the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party. However, that type of situation does not obtain in the present case, which concerns neither a complaint about the excessive length of

> divorce proceedings nor insurmountable legal impediments on the possibility to remarry after divorce.
>
> …
>
> 56 In the Court's view, *if the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, a fortiori, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of that law allowing for a divorce* (emphasis added)."

81. The words I have emphasised are, in my judgment, determinative.

The result

82. Accordingly, for these reasons I would dismiss the appeal. We cannot interfere with Judge Tolson's decision to refuse the wife the decree of divorce she sought.

The outcome

83. Mr Marshall complains that the effect of Judge Tolson's judgment is to leave the wife in a wretched predicament, feeling, as she put it in her witness statement, unloved, isolated and alone, and locked into a loveless and desperately unhappy marriage which, as the judge correctly found, has, in fact if not in law, irretrievably broken down.

84. It may be of little consolation to the wife but she is not totally without remedy under the present law. If she waits until February 2020, assuming that she and her husband are still alive, she will, seemingly, be able to petition in accordance with section 1(2)(e) of the Act. Of course, the husband may seek to dispute that there has been five years' continuous separation or to defend the petition in accordance with section 5(2) on the footing that the dissolution of the marriage would result in "grave hardship". Both seem unlikely. It is also possible that her husband may eventually consent to a divorce on the grounds of two years' separation in accordance with section 1(2)(d). But, unless she can bring herself within the "no fault" provisions of subsections 1(2)(d) and (e) she must remain trapped in her loveless marriage. As I observed during the course of argument, Parliament has decreed that it is not a ground for divorce that you find yourself in a wretchedly unhappy marriage, though some people may say it should be.

85. Such is the law which it is our duty to apply.

86. In 1906, in *Dodd v Dodd* [1906] P 189, 207, Sir Gorell Barnes P unleashed an outspoken and withering attack on the then state of the law:

> "That the present state of the English law of divorce and separation is not satisfactory can hardly be doubted. The law is full of inconsistencies, anomalies, and inequalities amounting almost to absurdities; and it does not produce desirable results in certain important respects."

87. What Cretney, in his magisterial *Family Law in the Twentieth Century: A History*, 2003, p 207, referred to as the President's "sustained indictment of the failings of the law", proved to be the catalyst for substantial statutory reform, first, by the Matrimonial Causes Act 1923, and then by the Matrimonial Causes Act 1937, culminating in the Divorce Reform Act 1969 (re-enacted in the Matrimonial Causes Act 1973) and the introduction in 1973, with modifications in 1976, of the so-called 'special procedure' for undefended divorces – a historical process the description of which occupies no fewer than 180 pages (206-385) of Cretney's magnum opus. In a brief coda (385-391), Cretney tells the depressing story of the ultimately failed attempt to introduce 'no fault' divorce, provided for by Part II of the Family Law Act 1996, never brought into force and eventually repealed by section 18 of the Children and Families Act 2014.

88. It is a sobering thought that the long journey from *Dodd v Dodd* to the 1969 Act took 63 years, whilst throughout the ensuing 48 years – years of enormous social change – the law has remained unchanged.

89. By 1969, family law had entered the modern world. After all, as the poet famously remarked, "Sexual intercourse began / In nineteen sixty-three". But we do well to remind ourselves just how much our world has changed since 1969. Few in 1969 would have agreed with the view of Sir James Hannen P in *Durham v Durham* (1885) 10 PD 80, 82, that marriage involved "protection on the part of the man, and submission on the part of the woman," or with Bargrave Deane J's reminder in *Pretty v Pretty (The King's Proctor Shewing Cause)* [1911] P 83, 87, that "the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different from those of the man." But, in July 1969, even as the 1969 Act was being debated in Parliament, Lord Denning MR in *Gurasz v Gurasz* [1970] P 11, 16, could still describe "the husband's duty to provide his wife with a roof over her head" as "elemental in our society". Not until May 1970, with the Matrimonial Proceedings and Property Act 1970, was there fundamental reform of the law relating to ancillary relief. And it has to be remembered that not until *R v Reid* [1973] QB 299 was it finally established that a husband could be guilty of the common law offence of kidnapping his wife, that not until *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529 was the doctrine of the unity of husband and wife dismissed as a medieval fiction to be given (per Sir George Baker) no more credence than the medieval belief that the Earth is flat, that not until *R v R (Rape: Marital Exemption)* [1992] 1 AC 599 was the husband's immunity from prosecution for rape finally exploded as the absurd fiction it had always been, that only in *White v White* [2001] 1 AC 596, 605, was the principle of marital equality finally embedded in family law, with Lord Nicholls of Birkenhead's famous pronouncement that "there is no place for discrimination between husband and wife and their respective roles," and that not until *R v Dica (Mohammed)* [2004] EWCA Crim 1103, [2004] QB 1257, was the husband's immunity in relation to sexually transmitted infections likewise swept away. How many in 1969 would have predicted the increase in cohabitation without benefit of matrimony, accompanied by the vast numbers of children born nowadays to the unmarried, or could have contemplated that within their lifetimes we would have seen enacted first the Civil Partnership Act 2004 and then the Marriage (Same Sex Couples) Act 2013?

90. As Cretney pointed out, *Cretney* 391, behind this debate about 'no fault' divorce there lurks, at a conceptual level, a profoundly important point of principle and public policy: ought the decision whether or not a marriage should be dissolved to be one for the parties which the State is not in a position to question? – something which, as he observes, would mark an extremely radical departure from the arrangements for divorce entrenched over the years since 1857.

91. But what are the everyday realities behind the professorial ponderings or the moralisers' anathemas?

92. Consider the course of a 'conduct' petition relying upon section 1(2)(b) of the Act. In the vast majority of such cases the petition proceeds without interrogation. The respondent is not even put to the trouble, nor his conscience stretched, by having to engage either with the facts alleged by the petitioner or even with the allegation that the marriage has irretrievably broken down, let alone with the contention that his behaviour has been unreasonable. All he has to do is put the word "No" in the relevant box in answer to the question in paragraph 4 of the acknowledgment of service: "Do you intend to defend the case?" Consistently with the form of the acknowledgment of service, the respondent does not even have to verify it by a statement of truth.

93. The obligation imposed on the court by section 1(3) of the 1973 Act to "inquire … into the facts" is qualified by the crucial words "so far as it reasonably can", so, unless there is something to alert the judge to the fact that 'something is going on', the task for the District Judge or Legal Adviser considering an undefended case in accordance with FPR 7.20 comes down to this question: assuming the facts alleged are true, does what is pleaded amount to unreasonable behaviour within the meaning of section 1(2)(b)? The challenge for the divorce lawyer is therefore to draft an anodyne petition, carefully navigating the narrow waters between Scylla and Charybdis to minimise the risks that if the petition is too anodyne it may be rejected by the court whereas if it is not anodyne enough the respondent may refuse to cooperate. Since the former risk is probably very low in practice (and if it materialises the remedy is simply an amendment sufficiently 'beefing up' the petition as to satisfy the court: for an example see *X v X (Y and Z intervening)* [2002] 1 FLR 508, paras 17-18), many petitions are anodyne in the extreme. The petition in present case is a good example; I cannot help thinking that, if the husband had not sought to defend, the petition would have gone through under the special procedure without any thought of challenge from the court.

94. The simple fact, to speak plainly, is that in this respect the law which the judges have to apply and the procedures which they have to follow are based on hypocrisy and lack of intellectual honesty. The simple fact is that we have, and have for many years had, divorce by consent, not merely in accordance with section 1(2)(d) of the 1969 Act but, for those unwilling or unable to wait for two years, by means of a consensual, collusive, manipulation of section 1(2)(b). It is ironic that collusion, which until the doctrine was abolished by section 9 of the 1969 Act was a bar to a decree, is now the very foundation of countless petitions and decrees.

95. The hypocrisy and lack of intellectual honesty which is so characteristic a feature of the current law and procedure differs only in magnitude from the hypocrisy and lack of intellectual honesty which characterised the 'hotel divorce' under the old law, so

mercilessly satirised in 1934 first by Evelyn Waugh in *A Handful of Dust* and then by A P Herbert in *Holy Deadlock* and, in the post-war world, more soberly described by Sir Robin Dunn in *Sword and Wig, Memoirs of a Lord Justice*, 1993, pp 139-140. Too often the modern 'behaviour' petition is little more than a charade. The 'hotel divorce' centred on a charade played out in front of the chambermaid or private inquiry agent who then gave evidence of events which would enable a judge, who either was or affected to be credulous, to find that adultery had been committed even though the services provided by the unnamed woman found in the respondent's bed when breakfast was taken in usually did *not* include the sexual intercourse which was, as it remains, essential to the act of adultery. That particular charade 'worked' because of the legal principle that adultery could be inferred if there was inclination and opportunity; the modern charade 'works' because of the operation of the rule of pleading (not in the real world much affected by either section 1(3) or FPR 7.20(2)(a)), that if a claim is conceded it goes through in effect by default.

96. Let me make it absolutely clear that these observations imply not the slightest criticism of the lawyers engaged in this sensitive and difficult work. On the contrary, it must be borne in mind that solicitors are, very properly, if I may say so, advised by their professional bodies to be very moderate in what they include in a 'behaviour' petition. The Law Society's Family Law Protocol, ed 4, 2015, para 9.3.1, identifies guidelines which should be followed in drafting a divorce petition. Guideline 2 is in the following terms:

> "Where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court, and not to include any reference to children"

Resolution in its 2016 Guide to Good Practice on Correspondence has, as an example of good practice and how correspondence can be constructive, a form of letter beginning divorce proceedings:

> "Jane tells me that neither of you is solely responsible for your marriage breakdown but she does feel that it is irreversible. The law relating to divorce does not permit a no-fault divorce until a period of at least two years has expired since you stopped living together. In order to obtain a divorce sooner, couples have to rely on the fault-based facts of adultery or unreasonable behaviour.
>
> Jane tells me that neither of you have formed a new relationship so the purpose of this letter is to ask whether you would be prepared to consider co-operating with a petition based on details of behaviour.
>
> … I will let you have a draft of the divorce petition so that, if possible, this can be dealt with by way of agreement. Alternatively, if you would prefer to let me have some details of your behaviour that would be acceptable to you as the basis for a petition please let me have a draft. I enclose some sample

> examples that I have already provided to Jane to demonstrate the sort of things that may be referred to.
>
> Jane would like both of you to retain your dignity throughout the divorce and the information about alleged behaviour will be as mild and uncontentious as possible."

97. Let me return, finally, to Cretney's proposition, undoubtedly right as a matter of abstract analysis, that the introduction of 'no fault' divorce would mark an extremely radical departure from what has been the governing principle of our divorce law ever since 1857. What is the current reality?

98. In the year to January 2017, there were 113,996 petitions for divorce. The details are not published, but I understand that, over the same period, notice of intention to defend was given in some 2,600 acknowledgements of service (some 2.28% of all petitions) while actual answers filed were about 760 (some 0.67% of all petitions). There are no available statistics, but one can safely assume that the number of petitions which proceed to a final contested hearing is minute, probably little more than a handful. So, the attritional effect of the process itself reduces from an initial 2.28% of respondents who are minded to oppose the petition to an utterly trivial, let us say something of the order of magnitude of 0.015%, of respondents who actually carry their opposition through to a contested hearing. Is the great principle identified by Cretney, is the public policy which underlies our current divorce law, still needed? Can it really be justified, where its application is confined to such a minutely small number of cases?

Lady Justice Hallett :

99. With no enthusiasm whatsoever, I have reached the same conclusion on this appeal as my Lord, the President, for the reasons that he gives. It was the trial judge's duty, and ours, to apply the law as laid down by Parliament. We cannot ignore the clear words of the statute on the basis we dislike the consequence of applying them. It is for Parliament to decide whether to amend section 1 and to introduce "no fault" divorce on demand; it is not for the judges to usurp their function. Furthermore, this court cannot overturn a decision of a trial judge who has applied the law correctly, made clear findings of fact that were open to him and provided adequate reasons, simply on the basis we dislike the consequence of his decision.

100. This was a petition for divorce under section 1(2)(b) of the 1973 Act; the judge could only grant the petition if satisfied that the husband has behaved in such a way that the wife cannot reasonably be expected to live with him. I accept that concepts of unreasonable behaviour may change over time. I need no persuading that behaviour considered trivial in the context of a happy marriage may assume much greater significance for a husband or wife trapped in an unhappy marriage. I bear very much in mind the cumulative effect of any proven behaviour and, of course, I bear very much in mind the impact of this particular husband's behaviour on this particular wife.

101. However, try as I might, I cannot find a legitimate basis for challenging the judge's conclusions. He applied the law correctly and on the evidence before him, he was entitled to reach the conclusions that he did and provided good reasons for them. In

my view, the criticisms made of the judge in this court and elsewhere were unwarranted.

102. I very much regret that our decision will leave the wife in a very unhappy situation. I urge the husband to reconsider his position. On any view, the marriage is over. I can only hope that he will relent and consent to a divorce on the grounds the parties have lived apart for a continuous period of two years, rather than force his wife to wait until five years have elapsed.

Lady Justice Macur :

103. I agree with both judgments.