Neutral Citation Number: [2025] EWCA Civ 1136

Case No: CA-2024-001698

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
The Hon Mr Justice Cohen
[2019] EWHC 2956 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/09/2025

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE FALK
and
LORD JUSTICE COBB

- -

Between :

NATALIA NIKOLAEVNA POTANINA	**Appellant**
- and –	
VLADIMIR OLEGOVICH POTANIN	**Respondent**

- -

POTANINA v POTANIN (No.2)

- -

Charles Howard KC, Deepak Nagpal KC and **Jennifer Palmer** (instructed by **Hughes Fowler Carruthers**) for the **Appellant**
Lord Faulks KC, Rebecca Carew Pole KC, Rebecca Bailey-Harris (instructed by **Payne Hicks Beach**) for the **Respondent**

Hearing date : 22 July 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 4 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Cobb :

Introduction

1. This is the second occasion on which this court has considered an appeal against an order made by Cohen J, sitting in the Family Division, on 8 November 2019 in proceedings under Part III of the Matrimonial and Family Proceedings Act 1984 ('the 1984 Act').

2. By the order under appeal, Cohen J:

   i) Set aside an earlier grant of leave to the Appellant (whom I shall hereafter refer to as 'the wife', adopting the convention used throughout in this litigation) to pursue a claim under the 1984 Act; leave to the wife had earlier been granted by Cohen J at a hearing conducted on 25 January 2019 without notice to the Respondent (hereafter 'the husband');

   ii) Dismissed the wife's renewed application for leave to pursue an application for financial relief under Part III of the 1984 Act against the husband.

   Cohen J's judgment explaining his reasons for these orders is reported as *Potanin v Potanina* [2019] EWHC 2956 (Fam); [2020] Fam 189 (hereafter '*Potanina (FD2)*').

3. The wife's first appeal from that order came before this court in January 2021 (King, David Richards and Moylan LJJ). The judgment in that first appeal is reported as *Potanina v Potanin* [2021] EWCA Civ 702; [2022] Fam 23 (hereafter '*Potanina (CA1)*'). This court allowed the wife's appeal against the order summarised at §2(i) above; this had the effect of re-instating the original grant of leave. The court made clear that the appeal at that time had "been limited in its scope", and the court expressly regarded it as "unnecessary to consider whether the judge was wrong in refusing leave when he reconsidered the application" under Part III of the 1984 Act (see *Potanina (CA1)* at [88]) (i.e., the order summarised at §2(ii) above). The court expressed no views as to the merits of the substantive application under the 1984 Act (*Potanina (CA1)* also at [88]).

4. The husband successfully appealed the Court of Appeal's order to the Supreme Court. The judgments of that court are reported at *Potanina v Potanin* [2024] UKSC 3; [2024] AC 1063 (Lord Lloyd-Jones, Lord Leggatt and Lady Rose; Lord Briggs and Lord Stephens dissenting) ('*Potanina (SC)*'). The Supreme Court remitted the wife's appeal against the order summarised at §2(ii) back to this court by its order of 31 January 2024 (and see also *Potanina (SC)* at [108]).

5. Until now, the appeals in this case have focused upon the procedure which Cohen J had adopted when determining the wife's original application for leave under Part III (January 2019), the husband's application to set aside that grant of leave (October /

November 2019), and upon the court's correct approach to an application for set-aside. This appeal focuses upon the threshold test for leave, and specifically whether Cohen J was wrong, by his order of 8 November 2019 (see §2(ii) above), to refuse the wife's renewed application for leave to bring a claim under Part III of the 1984 Act.

6. For the reasons set out more fully below, I conclude that Cohen J was indeed wrong to refuse the wife's application for leave. I propose that the appeal be allowed and his order set aside.

7. In advancing the case from here, I do not regard it as either necessary or proportionate to remit the wife's application to the Family Division for re-determination: see §109 to §116 below. I am satisfied that on the evidence which was before Cohen J in November 2019, the wife had demonstrated that she had substantial ground for making the application; she should have been granted leave.

8. Accordingly, I would grant the wife leave to make her application under Part III of the 1984 Act, and direct that the application returns to the Family Division for further case management.

Summary of the legal principles discussed in this appeal

9. Section 12 of the 1984 Act gives the English court the power to grant financial relief after a marriage has been dissolved (or annulled) in a foreign country (see §20 below). For an application for leave to succeed under Part III of the 1984 Act, the court must consider a "jurisdictional requirements" test (see (i) to (iii) below), and what I shall refer to as a merits-based 'threshold' test (see (iv) to (x) below). We have received extensive written and oral argument relating to both limbs of the test as they apply generally in cases of this kind, and as they apply specifically to the facts of this case. I summarise my views as follows:

    i) In order for an application under Part III of the 1984 Act to be "entertained" in the English court, the applicant must show that they meet the statutory "jurisdictional requirements" (both quotes are from section 15 of the 1984 Act). In this particular case, this required consideration of both section 15(1) and section 15(1A) of the 1984 Act (as then in force); at the time of the decision, section 15(1A) led to Article 3 of the Council Regulation (EC) No 4/2009 of 18 December 2008 on 'Jurisdiction, Applicable law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations' (hereafter the 'Maintenance Regulation'). If the Maintenance Regulation did not apply (and it will in fact not apply to any case issued after 31 December 2020) then (subject to a more limited reservation – namely, article 18 of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance) section 15(1) of the 1984 Act will set the jurisdictional requirements. In that event, jurisdiction will be established by either:

        a) proof of domicile of either party in England and Wales on the date of the application for leave or on the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country;

b) habitual residence of either of the parties to the marriage in England and Wales throughout the period of one year ending with the date of the application for leave or throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or

c) the existence of a matrimonial home in which either party had a beneficial interest in possession in this jurisdiction on the date of the application for leave;

ii) It may well be that the court is not able to make any final determination of the jurisdictional requirements test at the leave stage, but (applying the "substantial ground" test discussed below) is sufficiently satisfied to allow the case to proceed, allowing full argument on this issue at the substantive hearing. In this regard, I note that section 14(2) of the 1984 Act contemplates that a final determination of the jurisdictional requirements test may not necessarily be reached at that stage;

iii) The jurisdictional requirements listed above are assessed as at "the date of the application for leave" under Part III, or the earlier date of divorce etc. (section 15(1) of the 1984 Act);

iv) As to the merits-based threshold test, the applicant must show that they have "substantial ground" (section 13 of the 1984 Act) for making "the application"; the word "substantial" is not defined in the 1984 Act and in this context it is accepted that it "means solid" (Lord Collins in *Agbaje v Agbaje* [2010] UKSC 13; [2010] 1 AC 628 ('*Agbaje*') at [33], confirmed by Lord Leggatt for the majority of the court in *Potanina (SC)* at [89]-[92], and endorsed by the minority at [110]); (see, for discussion, §73 below);

v) In considering 'substantial' or 'solid' ground, the court will consider a theoretically unlimited range of factors, including the applicant's fulfilment of the jurisdictional requirements test (above); the court will have regard to the matters set out in section 16 of the 1984 Act at this stage to assess whether the application is 'substantial' or 'solid';

vi) In this regard, the court will consider the prospect of it being shown to be "appropriate" for an order to be made by a court in England and Wales (section 16(1) of the 1984 Act). Section 16(1) expressly requires the court to have regard to "all the circumstances" of the case, including specifically the matters set out in section 16(2) ibid; although not part of the statutory checklist, hardship and injustice may well be relevant (see, for discussion, §81 below);

vii) There is no hierarchy of factors in section 16(2) of the 1984 Act. Among those factors, the court will consider "the connection which the parties to the marriage have with England and Wales"; it is not a statutory requirement that this should be a substantial connection. However, plainly the stronger the connection, the stronger the application; indeed as Lord Collins observed in *Agbaje*, "where the English connections of the case are very strong there may be no reason why the application should not be treated as if it were made in

purely English proceedings" (ibid at [73]); (see, for further discussion, §78-§80 below);

viii) Within the introductory words of section 16 of the 1984 Act there is a clear pointer to its further role in the determination of the application – namely, if the court grants leave and moves on to consider the case substantively (i.e., the section contemplates that the court will have regard to the factors "before making an order"). At that point, there is an obvious mutual interplay with section 18. For instance, section 16(2)(e) refers the court to the financial provision which has been made by the foreign court. Plainly that would be relevant under section 18. So also the direction in section 18(6) to the court, in considering the financial resources of a party, to have regard to whether an order of a foreign court has been complied with would plainly be relevant in considering whether England is the appropriate venue (see generally *Agbaje*);

ix) Overall, the applicant for leave needs to be able to show that they have something analogous to a real prospect of success in the substantive claim; this is said to require more than a demonstration that the prospective claim is not totally without merit or an abuse of process, but it is not as demanding a requirement as showing a good arguable case for the purposes of the jurisdictional gateways (*Potanina (SC)* at [89]-[90]); (see, for discussion, §77 below, and see also *Dos Santos v Unitel SA* [2024] EWCA Civ 1109));

x) In contrast to the position in relation to the jurisdictional requirements (see (iii) above), in an application for leave the court assesses the "substantial ground", "connection", and the other section 16 factors as they exist at the date of the hearing of that application, not as at the date of the application (see also in this regard *TY v XA* [2024] EWFC 96: Moor J at [58]). The court also looks forward to the future in making its assessment, and will consider whether there is a real prospect that further material supporting the applicant's case would emerge, through disclosure or otherwise, if the case were to proceed to a substantive hearing (see, for further discussion, §77 and §85 below).

Background facts

10. The background facts to this case can be found in each of the three previous reported judgments: namely, *Potanina (FD2)* at [3] to [10]; *Potanina (CA1)* at [5] to [17]; and *Potanina (SC)* at [11] to [17].

11. For ease of reference, I rehearse here briefly those facts which are particularly relevant to our determination.

12. The parties are now aged in their 60s; they are Russian nationals. They were married for approximately thirty years; they were divorced by court order in Russia in 2014. They have three adult children. Throughout the marriage the couple lived in Russia. The parties were not always wealthy, but they became "massively rich" (per Cohen J: *Potanina (FD2)* at [4]); indeed, the husband is said to be one of the richest men in Russia. Their lifestyle during the marriage (described by the wife's lawyers as "spectacular") was congruent with their extreme wealth.

13. Financial remedy proceedings in the Russian courts followed the breakdown of the marriage. These proceedings were bitterly contested and protracted; many of the orders were appealed to the highest Russian courts. The wife also launched proceedings relevant to her financial remedy claim (for disclosure and otherwise) in both Cyprus and the USA. It was said by Cohen J, with some justification, that in the aftermath of the divorce, there was "a blizzard of litigation" (*Potanina (FD2)* at [10]).

14. By its final financial remedy order, the Russian court divided all of the "marital property" equally between the parties. In this regard, only those assets legally owned by one or both parties were included in that computation and division. Apart from some cash held in the husband's name, almost all of the wealth which he had accumulated during the marriage was/is held by various trusts and companies; the husband has acknowledged that he is indeed the ultimate beneficial owner of significant assets held in this way (see *Potanina (SC)* at [16]). It was the wife's case that she received less than 1% of the marital assets and had been denied an award of approximately US$6 billion. Lord Leggatt recognised that:

> "… the sum awarded by the Russian courts is only a tiny fraction of the sum which the wife would have received if the property divided had included assets beneficially owned by the husband." (*Potanina (SC)* at [17], and see §90 below).

15. In early 2014 the wife purchased a sizeable and valuable property in the USA, where the parties' youngest child was then studying. In June 2014, the wife obtained a United Kingdom investor visa, and later in the same year purchased a property in London.

16. At the first hearing of the wife's Part III 1984 Act application before Cohen J in January 2019, which was conducted without notice to the husband, the wife was represented by Mr Howard KC and Mr Nagpal. The Judge heard submissions and read the documentation filed. The Judge found on the facts as then presented that the wife had had her principal home in London since at least January 2016; in the judgment explaining his reasons for granting the wife leave (*Potanina (FD1)*), he added that: "I have not asked for any diarisation going further back before that date" (this part of the original judgment is reproduced at [56] of *Potanina (CA1)*). He added that "[the wife] has plainly established a connection with England and Wales. She did have a strong connection with Russia, but that connection now has been very largely severed…". Notably, these facts were not materially challenged by the husband at the later hearing.

17. The husband issued his application to set aside the grant of leave on 21 February 2019; the application was supported by written evidence. At a case management hearing on 5 June 2019, the wife applied to file further evidence to respond to the husband's case. The Judge limited her right to reply only to deal with asserted financial misrepresentations set out in the husband's recently filed witness evidence. The hearing of the husband's set-aside application was listed for three days in October 2019; it was accepted that the wife's application for leave would be re-considered in the event that the order obtained without notice was set aside.

Application to adduce fresh evidence

18. I pause here to note that the wife invited us on this appeal to admit a further witness statement containing her evidence. We read it *de bene esse*. It provided an update of her circumstances, and specifically her continuing connection to London. It is not in fact in dispute that the wife continues to live in London, and has done so since (at the latest) January 2016. We indicated that we would not admit that evidence unless we were minded to allow the appeal, and only then if necessary on the issue of disposal. As it happens, it has not been necessary to consider the fresh evidence.

The statutory scheme as at November 2019

19. The relevant provisions of the 1984 Act, as it applied in November 2019, are set out in full below. The 1984 Act has been amended since the order under appeal (see §23 and §24 below).

20. Part III of the 1984 Act opens with section 12 which provides:

> "(1) Where—
>
> (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and
>
> (b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,
>
> either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act".

21. Section 13 of the 1984 Act reads:

> "(1) No application for an order for financial relief shall be made under this Part of this Act unless the leave of the court has been obtained in accordance with rules of court; and the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order.
>
> (2) The court may grant leave under this section notwithstanding that an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property to the applicant or a child of the family.
>
> (3) Leave under this section may be granted subject to such conditions as the court thinks fit."

22. Section 15 deals with the jurisdiction of the court and identifies the "jurisdictional requirements" in section 15(1) as:

> "(a) …, or
>
> (b) either of the parties to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or
>
> (c) …"

23. In the version of the 1984 Act which was in force at the time of the hearing before Cohen J, section 15(1) was expressly subject to section 15(1A) which read:

> "(1A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, those requirements are to determine whether the court has jurisdiction to entertain the application or that part of it."

This subsection was amended after Brexit, by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019/519 Sch.1(1) para.13 ('the Jurisdiction (EU Exit) Regulations').

24. At the time of the 2019 hearing, section 16 continued, under the section heading: "Duty of the court to consider whether England and Wales is appropriate venue for application":

> "(1) Subject to subsection (3), before making an order for financial relief the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.
>
> (2) The court shall in particular have regard to the following matters—
>
> > (a) the connection which the parties to the marriage have with England and Wales;
> >
> > (b) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated;
> >
> > (c) the connection which those parties have with any other country outside England and Wales;

> (d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;
>
> (e) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;
>
> (f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right the reason for that omission;
>
> (g) the availability in England and Wales of any property in respect of which an order under this Part of this Act in favour of the applicant could be made;
>
> (h) the extent to which any order made under this Part of this Act is likely to be enforceable;
>
> (i) the length of time which has elapsed since the date of the divorce, annulment or legal separation.
>
> (3) If the court has jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not dismiss the application or that part of it on the ground mentioned in subsection (1) if to do so would be inconsistent with the jurisdictional requirements of that Regulation and that Schedule.
>
> (4) In this section, "the Maintenance Regulation" means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark."

Subsections 16(3) and (4) were repealed after Brexit by Schedule 1(1) para.13(3)(b) and (c) of the Jurisdiction (EU Exit) Regulations.

25. Section 17 of the 1984 Act sets out the range of potential orders for financial provision and property adjustment which can be made on an application under Part III

of the 1984 Act. Section 18 outlines the matters to which the court is to have regard in exercising its powers under section 17; this section specifically references section 25 of the Matrimonial Causes Act 1973.

26. The Maintenance Regulation was in force at the time of the application, and applied "to maintenance obligations arising from a family relationship, parentage, marriage or affinity" (Article 1). The Regulation aims to "preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union"; it mattered not that the defendant was habitually resident in a third state (see recital 15 to the Maintenance Regulation).

27. Article 3 of the Maintenance Regulation provides:

> "In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:
>
> (a) the court for the place where the defendant is habitually resident, or
>
> (b) the court for the place where the creditor is habitually resident, or
>
> (c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
>
> (d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

28. Section 15(1A) and 16(3) were inserted into the 1984 Act to give effect to the Maintenance Regulation by the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (SI 2011/1484) ('CJJ(M)R 2011') and came into effect on 18 June 2011, that is to say, after the Supreme Court decision in *Agbaje*.

29. The Maintenance Regulation no longer applies in the UK.

Agbaje v Agbaje [2010] UKSC 13

30. Before turning to the judgments in the instant case, it is appropriate and helpful to consider briefly the Supreme Court's judgment in *Agbaje*. It is not necessary for me to reproduce the background facts or litigation history of that case; this is, in any event, set out in some detail by Lord Leggatt at [46] to [57] of *Potanina (SC)*.

31. *Agbaje* remains the leading authority on the court's proper approach to deciding whether to make an order for financial relief under Part III of the 1984 Act. Lord Leggatt confirmed this (see *Potanina (SC)* at [55]).

32. In *Agbaje*, Lord Collins gave the judgment of the court. One of the key paragraphs of his judgment, often cited in Part III cases, is paragraph [33]. It is a paragraph of two halves. The first half of the paragraph contains the court's view about the threshold for an application for leave under Part III, as follows:

> "In the present context the principal object of the filter mechanism [in section 13] is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that in this context "substantial" means "solid"…"

While the final sentence of this section remains unchallenged (i.e., "substantial" means "solid"), the balance of this first half of the paragraph has now been materially supplanted by Lord Leggatt's comments in *Potanina (SC)*.

33. The second half of the same paragraph (*Agbaje* at [33]) contains the court's discussion of the procedure for Part III 1984 Act applications, and specifically the approach to setting aside leave. It reads as follows:

> "Once a judge has given reasons for deciding at the *ex parte* stage that the threshold has been crossed, the approach to setting aside leave should be the same as the approach to setting aside permission to appeal in the Civil Procedure Rules, where (by contrast with the Family Proceedings Rules) there is an express power to set aside, but which may only be exercised where there is a compelling reason to do so: CPR r 52.9(2). In practice in the Court of Appeal the power is only exercised where some decisive authority has been overlooked so that the appeal is bound to fail, or where the court has been misled: *Barings Bank plc v Coopers & Lybrand* [2002] EWCA Civ 1155; *Nathan v Smilovitch* [2007] EWCA Civ 759. In an application under section 13, unless it is clear that the respondent can deliver a knock-out blow, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application."

34. The approach laid out in this second half of paragraph [33] was successfully challenged by the husband in the appeal in this case in the Supreme Court (the point not having been previously taken in the appeal to this court) and is now effectively substituted by the majority judgment in *Potanina (SC)*. Lord Leggatt explained the basis for departing from the views of Lord Collins in the second half of [33] (reproduced at §33 above) as follows:

i) Lord Collins' remarks in that regard were *obiter*, (see *Potanina (SC)* at [2] and [63], confirmed by Lord Briggs at [114]);

ii) They were the result of a "misunderstanding" on the part of Lord Collins (ibid. at [57]) of what Thorpe LJ had said in *Jordan v Jordan* [2000] 1 WLR 210;

iii) They would in all probability never have been made had rule 18.11 of the Family Procedure Rules 2010 been in force at the time (ibid. at [63], [74] and [75]),

and

iv) They led to a result which was "unlawful", and which needed to be corrected (ibid. at [83] and [85]).

35. In other respects, the approach to Part III applications laid down by *Agbaje* has not always proved to be straightforward in practice; in that regard it is useful to look at this court's judgment in *Zimin v Zimina* [2017] EWCA Civ 1429 ('*Zimin*'), where King LJ summarised at [47] several key points from *Agbaje* which she identified as being relevant at least "for the purposes of [that] case". Among the points which she highlighted, of relevance to the instant case, were:

i) that Part III of the 1984 Act cannot be deployed to top up a foreign award in order to make it equate to an English award (see *Zimin* at [47(iii)]) – a reference to Lord Collins' judgment in *Agbaje* at [65] and [70];

ii) that "hardship" and "injustice" are not preconditions for an award under Part III (see *Zimin* at [47(iv)]) (but see further my comments at §81 below);

iii) that where possible the order should achieve the result that provision is made for the reasonable needs of each spouse (*Zimin* at [47(v)(c)]); in this regard, Lord Collins' judgment in *Agbaje* also makes clear that when considering the quantum of the award, the court has a broad discretion (see *Agbaje* at [73]).

Judgment of Cohen J: November 2019: (Potanina (FD2))

36. It will already be apparent that the judgment under review in this appeal was the second judgment to be delivered by Cohen J in this case; the first judgment had been delivered *ex tempore* on 25 January 2019 (unreported) at the conclusion of the without notice hearing (i.e., *Potanina (FD1)*). In that first short judgment, the Judge had explained why he had given leave to the wife to bring her claim under Part III of the 1984 Act.

37. Following the on notice hearing in October 2019, Cohen J delivered a reserved judgment (on 8 November 2019) in which he explained his reasons for: (a) granting the husband's application to set aside the grant of leave, and (b) dismissing the wife's renewed application for leave.

38. The judgment opens with an introduction to the claim, and a recital of the background history. In that narrative, Cohen J described the marriage as "a long one"; he described the wife as a "fully entitled wife", by which I understand that he regarded the wife as entitled to the full range of financial relief consequent upon divorce, without any discount or special factor limiting her claim (see, on the issue of entitlement in a Part III 1984 Act claim the more recent decision of *Unger and another (in substitution for Hasan) v Ul-Hasan (deceased) and another* [2023] UKSC 22 at [8]: "*Unger*").

39. The Judge dedicated the next, extended, section of his judgment to a discussion of the wife's case; he referenced her complaint about a "lacuna" in Russian law, by which she protested that the assets in which the husband had a beneficial but not a legal interest were omitted from account in the distribution of property on divorce (in this regard reference was made to Article 34 of the Russian Family Code). He discussed the wife's application for leave, before turning to 'Russian law', and 'the Russian legal proceedings'. In that latter regard, the Judge said – in terms ([35]) – that "it seems clear to me that in every instance the Russian courts have consistently and properly applied Russian law… Russia does not recognise beneficial ownership in the way that England does"; and later ([36]), "it is widely known that Russia … will only divide between the spouses what is held in their individual or joint names".

40. Later in the judgment, at *Potanina (FD2)* [52], Cohen J described how at the on notice hearing in October 2019 he had been shown a number of documents from the Russian court proceedings, in particular the Russian Code and the Russian judgments, which he said illustrated a number of misrepresentations which he felt had been made to him at the without notice hearing; these documents had (he said) explained why the wife's claims in Russia had failed. He repeated that the documents which had been produced: "… show a proper application of the [Russian] law" (ibid at [52(ii)]).

41. Cohen J's apparently unqualified acceptance that the Russian court had properly applied its domestic law was not, however, uncontroversial (see King LJ: *Potanina (CA1)* at [75] and [87]: §56 and §52 respectively below). Indeed in accepting the position taken by the Russian courts, the Judge had explicitly, or at least implicitly, rejected the arguments presented by the wife at the on notice hearing in at least four material respects:

    i) The wife "disputed" the assumption made in the Russian proceedings that "shares held outside the ownership of one or both of the spouses are not marital property" (*Potanina (FD2)* at [21]);

    ii) That the Russian Court should have applied the law as it would have been applied in England to her dispute and it did not (ibid at [35]);

    iii) That Article 34 of the Russian Family Code does not in fact exclude property which may be owned by a party beneficially but held in the name of another (ibid at [36]);

    iv) Her challenge to the notion that "the Russian courts have consistently and properly applied Russian law" (see above) (ibid at [35]) and her claim that she had not received "justice from a Russian court" (ibid at [39]).

42. The Judge turned to the approach of the English court on an application for leave to make a claim under Part III of the 1984 Act and specifically to the husband's application to set aside the grant of leave. He concluded this section of his judgment, explaining his reasons for setting aside the earlier grant of leave, by saying at [59]:

> "I am in no doubt that if I had had the full picture before me on 25th January 2019 I would not have granted the wife leave to make her application. I am further satisfied therefore that the grant of leave was given as a result of

> material misleading of the court, however unintentional that might have been" (Emphasis by underlining added).

43. Thus at [60], the Judge indicated his intention to set aside the grant of leave, "and determine the wife's application afresh".

44. It is necessary, for the present appeal, to consider in a little more detail the second section of the judgment which dealt with the wife's renewed application for leave (i.e., [65] to the end at [93]).

45. Early in this second section, Cohen J recorded the uncontentious fact that the wife could satisfy the jurisdictional ground in section 15(1) of the 1984 Act; it was agreed that she had been habitually resident in England and Wales "for one year ending with the date of her application" (see §22 above). Article 3 of the Maintenance Regulation was the dominant provision in relation to the wife's needs-based claim, and she satisfied this too.

46. Cohen J then discussed the wife's connection with England. He rightly pointed out that the wife's connection with England "since the breakdown of the marriage has not, of course, been the subject of any evidential investigation" (*Potanina (FD2)* at [68]). He made no reference in this context to the fact that the wife had successfully applied for a UK investor visa in 2014; he nonetheless commented that the wife had purchased a "small" property in London (worth then £2.5 million) in 2014. He concluded that the wife's:

> "… connection with England and Wales is both recent and modest. The parties' connection with Russia, the country where the parties were born, grew up, married, lived and divorced was infinitely greater" (ibid at [70]: emphasis by underlining added).

47. As for the Russian award to the wife, he said this at [85]:

> "This brings me to a consideration of the award that the wife received. I accept the wife's submission that what she has received is by English standards a paltry award bearing in mind the length of the marriage and the wealth accumulated by the husband during the marriage. If the wife and the husband had been England resident [sic] and had divorced in England, she would have received an award of a vastly higher sum. To that extent I accept that she has suffered hardship. Further, the award that the wife has received would probably not, in an English case based on these facts, be likely to meet her reasonable needs". (Emphasis by underlining added).

48. The Judge's discussion and analysis is to be found in the concluding six paragraphs of the judgment, as follows:

> "[88] … I have come to the view that this is a classic example of a spouse whose background and married life

was firmly fixed in her home country and who had no connection with England, whether by presence of the parties or their assets or business activities, seeking after the breakdown of the marriage to take advantage of what is a more generous approach to her claims than she has been able to achieve in her home country after the fullest possible use of its legal system. Mr Bishop is right to say that if this claim is allowed to proceed then there is effectively no limit to divorce tourism.

[89] Should I, therefore, allow this claim to proceed on a limited basis only, namely that of needs? Even if I were to put aside the weakness of the wife's connection with this jurisdiction and instead give full respect to her habitual residence in England and Wales, a survey of all the other s.16 matters counts heavily against the wife.

[90] I accept of course that if the wife was successful she would achieve a better standard of living and one to which she could easily argue she is entitled. But it is not the job of the English courts to correct what might be thought to be the deficiencies of the legal systems of another country in the circumstances which are shown when the s.16(2) matters are analysed. It would be arrogant for this court to assume that England and Wales is the sole arbiter of fairness. It is easy to imagine the offence that would be caused if the roles of England and Wales on the one hand and Russia on the other were the roles of the countries reversed.

[91] I do not consider it proper for the court to focus on needs to the exclusion of the other s.16 factors. To most people it would seem inconceivable that someone who has received an award of $40-80m could argue that reasonable needs have not been met, but each case is fact-specific and I accept that the wife could argue that her reasonable needs have not been met. However, the other s.16 factors militate strongly against her claim proceeding.

[92] Simply because the wife has suffered what she regards as a very significant injustice in that other country and has come to England after the breakdown of the marriage does not in itself make the case appropriate for determination in England and Wales.

[93] I am satisfied that there is no solid basis for making an award and I therefore accede to the husband's application and dismiss the application for leave to bring a claim under Part III of the 1984 Act". (Emphasis by underlining added).

49. Finally for present purposes, it should be recorded that in dealing with the Maintenance Regulation, Cohen J rejected the arguments of both parties, and concluded that:

> "[79] In my judgment the effect of section 16(3) is to disentitle a judge from dismissing a claim by an applicant for maintenance (used in the sense of a needs-based claim, whether capital or income) solely on the basis of the absence of connection of such applicant. It would not be inconsistent to dismiss a claim, if appropriate, on grounds relating to matters other than the habitual residence/connection of the applicant with England and Wales. But, in applying the section 16(2) factors I must give weight to [the wife's] habitual residence in this jurisdiction" (Emphasis by underlining added).

50. The wife sought permission to appeal. When refusing permission to appeal, the Judge recorded his reasons (in writing) as follows:

i) The parties "had no connection of any kind" with England and Wales during the marriage;

ii) The wife had "achieved a large award" in Russia;

iii) He had earlier been misled ("I had not been given a full picture of the case when I granted permission…");

iv) He had concluded that there was an "absence of connection with England and Wales";

v) This application was an "attempt [by the wife] to achieve a top-up".

Judgment: Court of Appeal: May 2021: Potanina (CA1)

51. As I earlier indicated (see §5 above), the wife's appeal focused on the procedure and test applied by Cohen J when determining the husband's set aside application. King LJ was explicit that the appeal was only concerned with:

> "…the proper approach to an application made for the grant of leave and to any subsequent application to set aside an *ex parte* order for leave" (*Potanina (CA1)* at [3]).

52. King LJ aptly referred to the determination of the Part III application as "essentially summary" (ibid at [31]), and in that regard was critical of Cohen J for "making … serious adverse findings against the wife without the benefit of either oral evidence or any expert evidence as to Russian law that either party may have wished to call" (ibid at [87]).

53. King LJ addressed, and for the reasons which she gave rejected, the husband's case that the Judge had been materially misled at the January 2019 hearing; she further rejected the husband's argument that this had represented a compelling reason why the earlier grant of leave should be set aside (see her general comments about

misleading statements at [65]). Of the alleged misrepresentation by the wife that she had not told Cohen J in January 2019 that she had received advice from London divorce solicitors, King LJ said this:

> "[69] It is well established that no inferences can be drawn from the assertion of or refusal to waive privilege. The judge rightly said, when allowing the husband's application, that he (the judge) must 'resist any desire to surmise what the legal advice sought might have been' and that the wife could 'rest assured that I will be cautious about drawing conclusions from it'.
>
> [70] In my view, the judge' finding that the wife's failure to volunteer that she had sought legal advice from specialist matrimonial solicitors in London before she came to this country amounted to a 'factual misrepresentation' demonstrates that, despite having rightly urged caution on himself at the case management hearing, when it came to the set aside hearing he did regard the fact of the wife's attendance on her lawyers as relevant to the issue of her connection to this country and therefore as to whether leave should have been granted. In my judgment on the facts of this case, if the date when the wife first obtained English divorce advice is to have any materiality, it can only be as a consequence of inferring the nature of that advice, namely that it was for her to move to England as a 'divorce tourist'. The only way for the wife then to rebut that inference would be to disclose the content of the advice she had received, thereby effectively forcing her to waive her legal professional privilege.
>
> [71] In my judgment the date the wife sought advice is not material and failure to have disclosed that she had done so in the witness statement made in support of her application for leave cannot be regarded as a material non-disclosure." (Emphasis by underlining added).

54. King LJ went on to say (also at [71]) that

> "… that is not to say that the wife's motivation for coming to this country is not capable of being highly relevant, but rather that is a matter for evidence and particularly oral evidence and cross-examination. Disputed evidence as to motivation cannot be regarded as a 'knock-out blow'."

55. King LJ pointed out (at [74] and [75]) that Cohen J had failed to deal at the on notice hearing with the wife's case that there was a "lacuna" in the Russian law (i.e., that a beneficial interest in assets was not recognised in Russian matrimonial law); her view was that this lacuna argument would have required "detailed analysis in its own right" ([75]). King LJ's point in this regard was all the more striking given that Cohen J had originally granted leave to the wife in January 2019 on the basis of her lacuna

argument (as King LJ observed: see [76] and [82]). Cohen J had been specific in *Potanina (FD1)* that the wife's case was "that the only assets which the Russian court considered were those in the personal names of the parties and the Russian court did not look at all the husband's business interests which contain most of his fortune".

56. Furthermore, King LJ continued (at [75]):

> "In any event, it is unclear upon what basis the judge was able to conclude that the judgments [of the Russian Court] show a 'proper application of the law', absent agreement between the parties that that was the case, or alternatively having had the benefit of expert evidence to that effect."

Judgment: Supreme Court: January 2024: Potanina (SC)

57. Lord Leggatt delivered the leading judgment for the majority of the court. For the purposes of this appeal, it is unnecessary to rehearse the analysis and ruling on the main issue in that appeal; the conclusion of the majority on that issue is succinctly summarised at [98] in that judgment.

58. This appeal calls, instead, for consideration of what Lord Leggatt said (albeit, arguably, *obiter*), by way of 'clarification', about the threshold test for the grant of leave in an application under Part III of the 1984 Act. He addressed this at [86] – [97] of the judgment. Having referenced the first half of paragraph [33] of Lord Collins' judgment in *Agbaje* (see above at §32), he went on to address the threshold more fully at [89] – [92], in a passage which attracted the support of the entire court (see Lord Briggs for the minority at [110]) and which for ease of reference, I reproduce in its entirety:

> "[89] I would not wish to cast any doubt on the primary guidance given in *Agbaje* that in the context of section 13 the word "substantial" means "solid". Nor would I suggest that courts which have applied the test as stated by Lord Collins JSC have applied the law incorrectly. But I think that some clarification is called for of what was said in the first two sentences of the passage quoted at para 86 above [see my §32 above]. It should be made clear that the threshold is higher than merely satisfying the court that the claim is not totally without merit or abusive. It does not seem to me necessary, or advantageous, to further explain the test by comparing it with tests applied in other procedural contexts. If any such comparison is to be made, however, as it was by Lord Collins JSC, the closest analogy seems to me to be with other contexts in which a court has to decide whether a claim should be allowed to proceed to a full hearing or should be dismissed summarily. In ordinary civil proceedings such a question arises when an application is made for summary judgment against a claimant; or to set aside a judgment entered in default; or (as mentioned above) in deciding whether a claim is of sufficient merit that the court should permit service of the proceedings on a foreign

defendant. In each of these contexts the test applied is whether the claim has a "real prospect of success". That is also in substance the test which the court applies in deciding whether to give permission for a claim for judicial review to proceed to a full hearing.

[90] By contrast, the more demanding test of a "good arguable case" does not seem to me apposite. The reason why this higher threshold is appropriate in deciding whether a claim comes within one of the jurisdictional gateways listed in CPR Practice Direction 6B, para 3.1, is that the determination of that question one way or the other is definitive and cannot be considered again later in the litigation. As noted above, that is not the case where leave is granted under section 13, just as it is not the case where the court rejects an application for summary judgment.

[91] A comparison with the well-established approach in ordinary civil proceedings to deciding whether a claim has sufficient merit to avoid summary dismissal and proceed to trial may also assist in clarifying the scope of the inquiry in determining whether leave should be granted under section 13. It would, I think, be difficult to improve on the explanation given by Lord Hope of Craighead in *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16; [2003] 2 AC 1, para 95:

> "The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way …".

> [92] Applying this approach to applications for leave under section 13, the judge will need to consider whether, on the factual basis alleged unless it is clearly without substance, there is a substantial (in the sense of solid) basis for saying that in all the circumstances of the case, and having regard in particular to the matters specified in section 16(2), it would be appropriate for an order for financial relief to be made by a court in England and Wales. In making this assessment, it will be necessary to take into account whether there is a real prospect that further material supporting the applicant's case would emerge, through disclosure or otherwise, if the case were to proceed to a substantive hearing."

Grounds of Appeal

59. There are two residual grounds of appeal which are now before this court:

    i) [Ground 12] The learned judge wrongly dismissed the wife's application insofar as it related to 'maintenance' (i.e., her reasonable needs) given that:

        a) the learned judge misinterpreted and misapplied section 16(3) of the 1984 Act; and/or

        b) even *if* (emphasis in the original) his interpretation of section 16(3) was correct, the learned judge was wrong to conclude that the factors in section 16(2) that did not relate to the wife's connection supported the setting aside or rejection of leave (which was Ground 12 of the original grounds) ('Ground 12');

    ii) [Ground 13]: The learned judge:

        a) in deciding not to re-grant leave was wrongly influenced by his findings (which were erroneous, unfair and/or unnecessary) that he had been materially misled; and

        b) was in any event wrong not to re-grant leave (which was Ground 13 of the original grounds) ('Ground 13').

60. In their written and oral submissions, counsel sensibly addressed Ground 13 prior to Ground 12. I propose to deal with the appeal in the same order.

The arguments on this appeal

61. In respect of Ground 13(a), Mr Howard KC argued that the Judge's finding that he had been materially misled at the without notice hearing had wrongly and irredeemably prejudiced (he used the word "polluted") his consideration of the wife's application for leave. This led to an outcome which was obviously wrong, especially as this court had subsequently found that the Judge was not in fact materially misled, and that finding was unaffected by the Supreme Court's later decision. He drew our attention to the serious adverse findings against the wife in *Potanina (FD2)*, all of which were made without oral or expert evidence.

62. Mr Howard highlighted Cohen J's use of the term 'divorce tourist'; it is agreed that this is a phrase which the Judge himself had first coined at the case management hearing on 5 June 2019. Mr Howard argued that this phrase was not just grossly unfair to the wife, but was also plainly factually wrong. Tourism connotes a temporary visit, yet on the Judge's own uncontroverted finding, the wife had been habitually resident in England for at least one year as at the date of her application, and had held a UK investor visa for more than five years prior to the determination of the application. Mr Howard argued that the 'real prospect of success' test described by Lord Leggatt at *Potanina (SC)* at [89]/[92] was a lower test than the 'good arguable case' which had been set in *Agbaje*; it was argued that Cohen J's decision was all the less secure in view of the lower threshold which the wife would now have to cross.

63. Lord Faulks KC argued that the 'real prospect of success' test described by Lord Leggatt was higher than the test which had been discussed by Lord Collins in *Agbaje*. He dismissed as irrelevant Cohen J's comments about being misled; the Judge had not referred to these when dismissing the wife's application for leave, and that what was relevant was the judge's *de novo* decision.

64. It was argued on behalf of the husband that the Judge had used the term 'divorce tourist' as shorthand to sum up his conclusions; it was mere "characterisation" of his conclusions, did not constitute a factual finding, and could safely be ignored.

65. As to Ground 13(b), Mr Howard emphasised the wife's firm connections with England by November 2019, and argued that the Judge was wrong to dismiss the wife's case on the basis of a weak (or indeed "an absence" of) connection; Mr Howard emphasised that connection did not have to be substantial, and it was necessary only for there to have been a connection between one of the parties and this country. The connection did not have to be a connection of the marriage with this country, as Lord Faulks had appeared to argue. He argued that the Judge had not weighed sufficiently that the wife had lived in London since at least January 2016 and/or that her connection with Russia had been "very largely severed" (in the Judge's own words in *Potanina (FD1)*) by the time of her application. Mr Howard argued that the Judge had failed to look forward to the likely position at trial, which is the relevant time to assess the "substantial ground"; he argued that the wife's connection to England would in all likelihood be stronger at that stage.

66. He argued that the wife would suffer an injustice as a result of the Russian award, which had not taken account of the assets held beneficially by the husband; this was the lacuna described by King LJ at [74] - [76] in *Potanina (CA1)*. Such was the level of the award that, as the Judge himself had earlier found, it would be unlikely to meet her reasonable needs.

67. The Judge was wrong, argued Mr Howard, to say that the 'other' section 16 factors (i.e., other than 'connection') "militate strongly against [the wife's] claim"; on the contrary they supported the wife's position, or were at least neutral. It was a positive factor that she had sought to exhaust her remedies in Russia and elsewhere, not a negative factor as the Judge assumed.

68. Lord Faulks argued that the Judge was right to regard the wife's connection with England as not altogether strong. He disputed the existence of any lacuna, and in any

event suggested that to allow the lacuna argument to succeed would be to characterise the Russian courts, indeed all civil law jurisdictions, as unjust. It was argued that it cannot be the purpose of the Part III procedure to allow an applicant with a limited connection to this jurisdiction to point to an alleged deficit in the law of another jurisdiction in order to "top-up" the award made overseas (in this regard Lord Faulks referenced paragraph [70] in *Agbaje*). The wife's argument that she only seeks a supplemental award, and not a "top-up", was, it was said, unconvincing.

69. Turning to Ground 12, Mr Nagpal KC (who led on this aspect for the wife) argued that the Judge misconstrued section 16(3) of the 1984 Act; he submitted that the point of this section was to give effect to the Maintenance Regulation. Supported by the Supreme Court's comments in *Villiers v Villiers* [2020] UKSC 30 he argued that in terms section 16(3) prohibited the dismissal of a claim on the basis that England and Wales is not the appropriate jurisdiction if any of the jurisdictional criteria of the Maintenance Regulation is satisfied. He argued that the Maintenance Regulation governed both the *existence* and the *exercise* of jurisdiction; section 15 governs the existence of jurisdiction, whereas section 16 governs exercise (i.e., the court cannot refuse to exercise jurisdiction in the sense that it must be a merits-based, and not a forum-based, decision if the applicant satisfies the jurisdiction requirements in section 15(1A) of the 1984 Act).

70. Mr Nagpal accepted that regardless of the effect of section 16(3), it was still incumbent on the wife to satisfy the 'substantial ground' test in section 13 of the 1984 Act, from a merits perspective, in order to obtain leave. The Judge was wrong to dismiss the wife's maintenance (i.e., needs-based) claim.

71. Lord Faulks accepted the wife's argument that the Maintenance Regulation gave the court jurisdiction at the time of the application, and prevented a party arguing that the dispute should be heard in another forum. He argued that the jurisdictional requirement is supplemented in the case of Part III applications by the requirement to obtain leave. He agreed that the court had jurisdiction to grant leave by reason of the wife's habitual residence, but this did not mean the judge was required to grant leave: in doing that, he needed to have regard to the section 16(2) factors.

The test for leave under section 13 of the 1984 Act

72. Before turning to my discussion and analysis of Cohen J's judgment (*Potanina (FD2)*), I wish to discuss briefly the import of section 13 of the 1984 Act, and the test for leave.

73. As I have earlier outlined in this judgment (§9) section 13 provides that there must be "substantial ground" for the making of an application before leave will be granted. "Substantial" in this regard means "solid" (per *Agbaje*), and the Supreme Court in *Potanina (SC)* casts no doubt upon what it described as "the primary guidance" in this regard, contained within the first half of [33] of *Agbaje*.

74. That said, at *Potanina (SC)* at [89] – [92], Lord Leggatt (speaking for the whole court in this regard: see the support offered by the minority at [110]) offered "clarification" of the threshold test in *Agbaje*. As I have indicated above, this led to a predictable debate at the hearing of this appeal as to whether, in light of the views expressed by Lord Leggatt on behalf of the Supreme Court, the test of what is substantial or solid is

now to be regarded as higher or lower than that discussed in *Agbaje* and widely used since (see §62 and §63 above).

75. Lord Leggatt at [89] of *Potanina (SC)* confirmed that he did not wish to cast doubt on the reference to the use of the word 'solid' to describe 'substantial'; he positioned the threshold as "higher than merely satisfying the court that the claim is not totally without merit or abusive" (ibid at [89]). It will be remembered that at [33] of *Agbaje* (see §32 above) Lord Collins had described the test of what is 'solid' by indicating that it was higher than establishing a good arguable case; Lord Leggatt questioned that (at [90]) by indicating that he did not regard it as "apposite" to apply the "higher threshold" namely "the more demanding test of a "good arguable case"" (emphasis added). For this reason, Mr Howard felt fortified, and with some justification it seems to me, in arguing that the threshold test under section 13 of the 1984 Act described by Lord Leggatt sets a slightly lower bar than the test originally advanced by Lord Collins in *Agbaje*.

76. This analysis is, to my mind, reinforced by Lord Leggatt's further comparison (at *Potanina (SC)* at [91]) with the reverse summary judgment test which "may also assist in clarifying the scope of the inquiry in determining whether leave should be granted under section 13". In this regard, he had referenced Lord Hope's speech in the case of *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16; [2003] 2 AC 1 at [95] ('*Three Rivers*': (see the extract at §58 above).

77. His view was that the test to be applied is akin to "whether the claim has a 'real prospect of success'" (*Potanina (SC)* at [89]). He suggested (also at [89]) that the closest analogy:

> "… seems to me to be with other contexts in which a court has to decide whether a claim should be allowed to proceed to a full hearing or should be dismissed summarily".

Lord Briggs described this as the "reverse summary judgment test" (at [109]). Lord Leggatt contemplated ([92]) that the court would consider whether there was a real prospect that more evidence would be available at trial through disclosure "or otherwise", and in this sense there is an element of forward perspective on an application for leave.

78. It has been often said that the legislative purpose of Part III of the 1984 Act is to alleviate the adverse consequences of no, or no adequate, financial provision having been made by a foreign court in a situation where the parties or one of them have a recognisable jurisdictional status (habitual residence or domicile) in England and Wales, and where there is a connection with England and Wales (see section 16(2)(a) of the 1984 Act) (see *Agbaje* at [71] and *Potanina (SC)* at [6]). It will be noted that in *Agbaje* itself at [71], and in *Zimin* at [47] the adjective 'substantial' found its way into the test to qualify the word 'connection'. In the 1984 Act, the adjective 'substantial' qualifies 'ground' in section 13, but it does *not* qualify 'connection' in section 16 (ibid). This contrasts with the position under Part IV of the 1984 Act (which sets out the mirror provision for financial provision in Scotland following a foreign divorce), where the phrase 'substantial connection' does in fact appear (see section 28(3)(e) of the 1984 Act).

79. Lord Collins' use of the phrase 'substantial connection' in paragraph [71] of *Agbaje* appears in fact to hark back to an earlier discussion in his judgment about the rule in *Indyka v Indyka* [1969] 1 AC 33; this rule actually relates to something quite different – i.e., recognition of a foreign divorce where the marriage had a 'real and substantial connection' with the *foreign* country. When the Supreme Court recently looked at the issue of 'connection' in this case, it did not qualify the term with the use of the word 'substantial', except when quoting directly from [71] in *Agbaje*.

80. In my judgment, the adjective 'substantial' should not attach as a matter of course to the noun 'connection' when considering section 16 of the 1984 Act; this is not the language of the 1984 Act as it applies in England and Wales. Were 'substantial' routinely to qualify 'connection', this would in my judgment significantly constrain the "flexible approach" of the court to Part III cases which Lord Collins discussed and indeed supported at [70] in *Agbaje*. Flexibility is key; as he himself said:

> "The whole point of the factors in section 16(2) is to enable the court to weigh the connections of England against the connections with the foreign jurisdiction" (*Agbaje* at [52]);

and

> "There will be some cases, with a strong English connection, where it will be appropriate to ask what provision would have been made had the divorce been granted in England. There will be other cases where the connection is not strong and a spouse has received adequate provision from the foreign court. Then it will not be appropriate for Part III to be used simply as a tool to "top-up" that provision to that which she would have received in an English divorce." (*Agbaje* at [70]).

Put shortly, this flexibility does not work if 'substantial' is routinely placed before 'connection'.

81. Finally, while I acknowledge that hardship and injustice are not preconditions to the satisfaction of the test for leave (see §35(ii) above), it is long established that they may well be relevant. In no fewer than three separate places in Lord Collins' judgment in *Agbaje* (i.e., at [44], [61] and [72]) he acknowledged the relevance of hardship and injustice to a Part III claim, and accepted that they "may be taken into account" for the purpose of determining whether it is appropriate that the English court should make an order (section 16 of the 1984 Act), just as they can be taken into account under section 18 of the 1984 Act. Lord Collins in *Agbaje* at [72] said that if either injustice or hardship is "present, it may make it appropriate, in the light of all the circumstances, for an order to be made"; the Supreme Court in the instant case did not challenge this. Interestingly, and of course acknowledging the fact-specific nature of all these cases, it is notable that in *Agbaje* the large disparity between what the wife had received in Nigeria and what she would have received in England, coupled with the large disparity between what the husband received and what the wife received, were such, in the Supreme Court's finding, "as to create real hardship and a serious injustice" for the wife which justified the intervention of the court in that case (see Lord Collins at [76]).

Ground of Appeal [13]: Discussion

82. This was, for one dominant reason, a highly unusual case: the sums in issue in this application far exceed those considered in any previous application under Part III of the 1984 Act. The closest comparable case offered by counsel was *Juffali v Juffali* [2016] EWHC 1684 (Fam); [2017] 1 FLR 729; even in that extraordinary case, there was significantly less at stake financially. Regrettably, I suspect that the unusual nature of the case caused Cohen J to fall into error in a number of material respects when dismissing the wife's application for leave to make a Part III application. Whether the exercise which Cohen J had undertaken was a discretionary or evaluative one (in respect of which we heard some limited argument), the decision was in my judgment wrong for a number of reasons.

83. First, I turn to Cohen J's treatment of section 16(2)(a) of the 1984 Act, and specifically the wife's connection with England. Cohen J's dismissal of the wife's claim was largely based, it appears, on a finding that her connection with England and Wales was "recent and modest" (see §46 above). This finding was unfair to the wife for a number of reasons.

84. Although the Judge had found that as a matter of history the wife's "background and married life was firmly fixed in her home country" with "no connection with England" (see §48 above; *Potanina (FD2)* at [88]), it should be noted that he had also accepted and recorded the uncontroverted fact that the wife had been habitually resident in England since (at the very latest) January 2016. The Judge had specifically not requested any "diarisation" of the wife's global movements *prior* to 2016 (indeed *Potanina (FD1)* so refers: see §16 above). Thus he had fairly and accurately noted in his judgment that the "wife's connection" prior to 2016 "…has not of course been the subject of any evidential investigation". In light of this, it was unfair for the Judge to find (particularly with adverse implication) that "before 2015/2016" there was "no evidence" that the wife had "spent any significant time in England" (*Potanina (FD2)* at [63]); put bluntly, there was no evidence about her home circumstances in that period one way or another. No evidence in this regard had been called for, or permitted, and none had been given. Indeed, as I have earlier observed, at the case management hearing on 5 June 2019 the Judge had rejected the wife's application to file additional evidence which would, it is reasonable to assume, have been likely to address this issue.

85. The court should assess the issue of "substantial ground" and "connection" as it appears at the date of the hearing of the application for leave, with a forward eye to the likely situation as at the date of the prospective substantive hearing. It is not assessed as at the date of the application. Section 16 of the 1984 Act is drafted in the present tense (in contradistinction to section 15 which specifically references the date of the application: see also *Unger* at [90]). In this case, one year had elapsed between the date of the application and the date of the hearing which led to the judgment under review. The finding of a "recent and modest" connection (judgment [70]: see §46 above) appeared to take no account of the fact that the wife had held a UK investor visa for more than five years by the date of the hearing, and only passing mention was made of the wife's property ownership in London for a similar length of time. The Judge commented in his judgment that the husband had "roundly challenged" these facts relevant to connection (among others), but the Judge was wrong about this; the

husband had not challenged the timing of the acquisition of either the visa or the London property.

86. When refusing permission to appeal, the judge referred to the wife's "absence of connection with England and Wales" (emphasis by underlining added). Even allowing for a degree of judicial shorthand in expression, this suggested a further retreat from what the Judge had earlier described as a "weakness" of connection (*Potanina (FD2)* at [86]). The Judge's phrase "absence of connection" reveals to my mind a lack of real appreciation of the actual connections to which the wife could uncontroversially point in support of her case that she satisfied sufficiently the statutory test.

87. In a similar vein, the Judge found in November 2019 that the wife's links with Russia were "infinitely greater" (*Potanina (FD2)* at [70]: see §46 above). While historically she plainly had strong links to Russia, there was proper cause to believe on the evidence before the Judge that by the time of the hearing of her application in the autumn of 2019 the situation had materially changed. Indeed, ten months earlier the Judge had made a directly contrary finding in *Potanina (FD1)*, that is to say that by the time of her application the wife had "very largely severed" her links with Russia; this had not been challenged to any significant degree by the husband.

88. The effect of downplaying the wife's connection with England, wittingly or unwittingly, caused the Judge erroneously to treat her claim as an attempt to achieve a top-up award through the English courts (i.e., to top-up her Russian provision to that which she would have received in an English divorce); doubtless the Judge would have had in mind that such an approach would "not be appropriate" under Part III (see *Agbaje* at [70]).

89. Secondly, at the on notice hearing of the wife's application, Cohen J formed an adverse view about the wife's motivation for taking up residence in this country, namely in order to make a financial remedy claim. His finding that her application represented a "classic example" of a spouse who had settled here in order to "take advantage" of the "more generous approach" in the English Court (phrases directly lifted from *Agbaje* at [72]) led him to accept the suggestion of the husband's counsel that to allow the wife's claim would "effectively" place "no limit to divorce tourism" (see §48 above). This conclusion is unfair to the wife, and indeed unsound, for at least two reasons:

    i) It is based in large measure on the inference which the Judge had drawn from the fact of the wife's visit to an English matrimonial lawyer in London in 2014, and her reluctance to disclose the attendance note of the same. The Judge was not entitled to draw this adverse inference (see King LJ at *Potanina (CA1)* at [69]/[70]): "It is well established that no inferences can be drawn from the assertion of or refusal to waive privilege";

    and

    ii) While the wife's motivation in coming to England was capable of being relevant to the determination of the application, this was properly a matter to be considered after hearing oral evidence and cross-examination at trial (see *Potanina (CA1)* at [67]-[70]). This was not a factual finding which the Judge

could or should have made at a summary hearing without having the evidence tested – all the more so given that the Judge had characterised her conduct as falling at the worst end of "divorce tourism" (i.e., "there is effectively no limit"), a phrase which was (and was intended to be) disparaging of this wife in her application to the English court.

90. Thirdly, the Judge had earlier found the wife to be (and had so described her) a "fully entitled wife" as that phrase is understood in the field of matrimonial finance litigation (see §38 above). Yet, the wife had received an award in Russia which was "by English standards", in the Judge's own finding, "paltry"; "to that extent" he accepted that she has suffered "hardship" (*Potanina (FD2)* at [85]). Moreover, as the Judge himself recognised, the wife could argue that the award would not meet her reasonable needs (see [91]). King LJ had formed a similar view in this regard (*Potanina (CA1)* at [16]: "a tiny proportion"), as did Lord Leggatt who described the wife's award (in relative terms) as a "tiny fraction" (*Potanina (SC)* at [17]). The disparity in the award to the wife compared to the assets retained by the husband was attributable (on the wife's case) to a lacuna in the Russian law. These points expose two material shortcomings of the judgment:

i) The Judge failed to address the argument that the wife had suffered an injustice by receiving such an insignificant fraction of the husband's wealth, which (it was common ground) had accrued during the marriage. As Lord Collins had made clear in *Agbaje*, injustice may well be relevant in a Part III claim, and "it may make it appropriate, in the light of all the circumstances, for an order to be made" (*Agbaje* at [72]: see again §81 above);

and

ii) The Judge failed to address the issue of the alleged lacuna; this issue, as King LJ had earlier observed (see §55 above), required "detailed analysis in its own right" and should materially have informed the Judge's assessment of the wife's prospects of success. The Judge simply did not deal with this.

91. Fourthly, the Judge's finding that he had been materially "misled" by the wife at the without notice hearing in January 2019 featured large in his reasoning when granting the husband's application to set aside the order granting leave (see *Potanina (FD2)* at [45]-[61]); this reflected the fact that as the Judge observed "much of the [on notice] hearing" had been taken up with this issue. However, only in limited respects indeed had the husband alleged that the misrepresentations were relevant to the wife's fresh application generally (and the relevant section 16 factors), and her connection with England specifically. When refusing the wife permission to appeal against the dismissal of her application for leave, the Judge repeated that he "had not been given a full picture of the case…" at the without notice hearing. Yet:

i) The Judge's finding that he had been misled at the first hearing implies that by the end of the second hearing he had reached firm conclusions in respect of particular disputed facts; yet he had no proper basis for reaching firm conclusions in respect of those particular disputed facts at this effectively summary hearing (see Lord Hope in *Three Rivers* at [95], and Lord Leggatt at *Potanina (SC)* at [91]-[92]). In short, in his summary determination of the wife's application, the Judge had not heard any oral evidence or cross-

examination in relation to the matters on which he found that he had been misled (see in this regard, this court's comments at *Potanina (CA1)* at [51]);

and

ii) In any event, the Judge's finding that the wife had misled him in material respects was, in the view of this court in 2021, wrongly made (see *Potanina (CA1)* at [66], [73], [83], and [87]). This court's conclusions on this issue were challenged by the husband in his appeal to the Supreme Court (albeit not one of his grounds of appeal), and were not disturbed by their judgments; indeed the Supreme Court had confirmed that an application should proceed "on the factual basis alleged unless it is clearly without substance" (see *Potanina (SC)* at [92]).

92. Fifthly, I find it difficult to see how the Judge could conclude that, having effectively dismissed the wife's connection with this country, the "other" section 16 factors "count heavily" against her (*Potanina (FD2)* at [89]); this was in my judgment a misleading characterisation of their application to these particular facts. The Judge had already found that the "financial benefit" (section 16(2)(d) of the 1984 Act) which the wife had received in Russia was relatively "paltry". It was therefore unfair for him to suggest that it was only "the wife" who regarded herself as having suffered "a very significant injustice" ([92]), when he himself had found that she had an argument for saying that she had "suffered hardship" and that the Russian award would not (by English Court standards) be likely "to meet her reasonable needs". Objectively viewed, there was a reasonable case that the outcome of the Russian proceedings had been unjust to the wife. That the wife had sought to pursue her remedies in Russia and elsewhere was (I accept Mr Howard's argument in this regard) a point in her favour when considering section 16(2)(f) of the 1984 Act; moreover, as this court earlier observed, the wife could not mount a maintenance (alimony) claim in Russia (*Potanina (CA1)* at [13]).

93. Finally, it is difficult to ascertain precisely how the Judge had applied the merits-based threshold test from *Agbaje*. He reproduced the entirety of paragraph [33] of *Agbaje* within the first half of his judgment (when determining the husband's application: see *Potanina (FD2)* at [43]); in the concluding words of the judgment he referred to there being "no solid basis for making an award", which I have assumed was an allusion to Lord Collins' merits-based threshold test. But I find no other analysis of the wife's case by reference to the threshold test and the caselaw on its interpretation which then applied. In my judgment, it was incumbent on the Judge to have addressed in full the issues which I myself have commented upon at §83 to §92 above so as to demonstrate why the wife did not have sufficiently substantial or solid grounds for making the application. He did not do so.

94. Of course, with the benefit of Lord Leggatt's clarifying remarks in the instant case, it was for the wife to show that her prospective claim enjoys something akin to a real prospect of success in achieving some measure of further financial relief under Part III. I accept that this test sets the bar to a degree lower than that set by Lord Collins said in *Agbaje*. Furthermore, the wife did not have to demonstrate that she was entitled to all forms of financial relief; as Lord Collins said in *Agbaje* at [73]:

> "The amount of financial provision will depend on all the circumstances of the case and there is no rule that it should be the minimum amount required to overcome injustice. … the grant of leave [under Part III of the 1984 Act] does not inevitably trigger a full blown claim for all forms of ancillary relief".

For the reasons which I set out below in relation to disposal (§109 to §115 below) the wife had, in my judgment, amply established that there was substantial ground for her claim for some financial relief, even if not a "full blown" award.

95. I would allow the appeal on Ground 13.

Ground of Appeal [12]: Discussion

96. Although the Maintenance Regulation had direct effect in English law, various consequential amendments were introduced in some haste by Schedule 7 to the CJJ(M)R 2011 so as to make existing domestic legislation consistent with the Maintenance Regulation. In a different context, Lord Wilson referred to the CJJ(M)R 2011 as an "unsatisfactory piece of legislation" (*Villiers v Villiers* [2020] UKSC 30; [2021] AC 838 ('*Villiers*') at [120]). Our consideration of section 15(1A) and section 16(1)/(3) of the 1984 Act in this appeal entirely tallies with that view. As I have mentioned above, the Maintenance Regulation has no current or continuing impact in domestic law. It is however agreed that it applied to the instant case at the time of the decision under review.

97. By the close of the argument on this appeal, there was not a great deal between the parties in relation to the application of the Maintenance Regulation to the needs element in this case. It was in particular agreed that:

    i) section 16(3) of the 1984 Act and the Maintenance Regulation were applicable only in relation to the wife's claim, or that part of her claim, that relates to her reasonable needs; and

    ii) neither section 16(3) of the 1984 Act nor the Maintenance Regulation applied to any element of the wife's claim in excess of her reasonable needs.

98. First, it is reasonably clear that the wife is/was a 'maintenance creditor' within the meaning of the Maintenance Regulation; the regulation can apply to first time applicants (see, for example, Sir James Munby P in *Re C (A Child) (Maintenance Regulation)* [2021] EWFC 32; [2022] 1 FLR 543). Insofar as Lord Leggatt appeared to express a contrary view at [101] of *Potanina (SC)*, he did so (as he made clear) having heard no argument on the point. The term 'maintenance' is not defined in the regulation, but it has been held to be wide enough to include payment of a lump sum and/or transfer of ownership of property (*C-220/95: Van Den Boogaard v Laumen* [1997] QB 759), and maintenance obligation is interpreted autonomously (see recital 11).

99. Secondly, in applying the inter-connecting provisions of the 1984 Act and the Maintenance Regulation, it is necessary to start with section 15(1A) of the 1984 Act. Where maintenance obligations arose under the Maintenance Regulation (i.e., 'in

Member States'), jurisdiction lay with the court identifiable by either Article 3 (a), (b), (c), *or* (d) ibid.; these are, in some respects similar to, but in other respects different from, the qualifying criteria in the 1984 Act. Article 3 of the Maintenance Regulation established a mandatory rule regarding jurisdiction ("jurisdiction shall lie with…": emphasis added). If the Maintenance Regulation did not apply to a given case, then the court applied the jurisdictional test contained in section 15(1) of the 1984 Act.

100. Thirdly, the effect of Article 3 in a case such as this was that in matters relating to maintenance obligations in Member States the maintenance creditor had the choice of where to sue; they could sue for maintenance in the creditor's member state or pursue the debtor in the debtor's member state. As Lord Sales said in *Villiers* at [29]:

> "The object of the mandatory rule of jurisdiction in article 3 of the Maintenance Regulation is to afford special protection for a maintenance creditor by giving him or her the right to choose the jurisdiction most beneficial for them out of the range of options specified in that article".

101. Section 16(3) of the 1984 Act provided that if the court had jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation, the court could not dismiss the application or that part of it on the ground mentioned in section 16(1) of the 1984 Act "if to do so would be inconsistent with the jurisdictional requirements of that Regulation". As I have said above, the Maintenance Regulation was so crafted as to make it easier for a maintenance creditor (traditionally the weaker party) to enforce his or her rights, by giving them the right to choose where to sue the maintenance debtor. Section 16(3) does not in terms disapply section 16(1) and (2) entirely where one of the qualifying criteria of the Maintenance Regulation is satisfied, but in order to give effect to its obvious statutory purpose of ensuring that the application of the Maintenance Regulation takes precedence, the court must be precluded from deciding that it was not "appropriate" (section 16(1) ibid) for the case to proceed in England and Wales if that would frustrate the maintenance creditor's right to choose where to enforce their rights.

102. The scheme of this form of EU legislation is inconsistent with the court of a member state retaining any discretionary power to stay proceedings on the grounds of *forum non conveniens* (see the decision of the Grand Chamber of the ECJ in *Owusu v Jackson* (Case C-281/02) [2005] QB 801, *R v P* (Case C-468/18) [2020] 4WLR 8, and again see *Villiers*). As Lady Black said in *Villiers* at [63] (drawing from the CJEU decision in *R v P*):

> "The Maintenance Regulation must be considered "exhaustive", … and it does not permit a court which has jurisdiction under one of the provisions of the Maintenance Regulation to decline jurisdiction on the basis that another court would be better placed to hear the case".

And as Lord Wilson put it at [167] ibid:

> "… if conferred with jurisdiction under the Maintenance Regulation, a member state could not decline to exercise it by reference to any principle of the less appropriate forum.".

103. In this case, it was uncontroversial that by the time of her application the wife was habitually resident in England and Wales. She therefore satisfied Article 3(b) of the Maintenance Regulation. In addition, as she had been habitually resident for at least one year preceding the date of her application for leave, she also satisfied section 15(1) of the 1984 Act. It was not therefore open to the Judge to dismiss the 'maintenance' aspect of the application on essentially *forum non conveniens* grounds. It is clear from what he said in *Potanina (FD2)* at [79] that he applied a narrow construction of section 16(3) which did not reflect its proper scope. I would agree with Mr Nagpal that "connection" is irrelevant once jurisdiction is established by reason of the Maintenance Regulation; additionally, the fact that an applicant could apply for maintenance against the other party in another country (section 16(2)(f)) would be an irrelevant consideration because, as Lord Sales said in *Villiers* at [29], a maintenance creditor has "the right to choose the jurisdiction most beneficial for them".

104. Cohen J treated section 16(3) as limited to precluding dismissal of the claim solely on the basis of an absence of connection. In my judgment, he was wrong to do so. His error was vividly exposed by his reference to attaching "weight" to the finding that the wife was habitually resident in this country, notwithstanding that this was jurisdictionally determinative. In this way, the wife was wrongly denied the choice to bring her maintenance / needs claim in this country, notwithstanding that she satisfied the jurisdictional requirements of the Maintenance Regulation. This is what section 16(3) of the 1984 Act was designed to prevent.

105. For the avoidance of doubt, I am satisfied (as both parties argued) that the jurisdictional issues discussed above only arose if the applicant could satisfy the test of 'substantial ground' for making a needs-based application under section 13 of the 1984 Act. As I have indicated above, I have concluded that she did even without reference to section 16(3). The court must therefore determine the application on its merits.

106. Finally, I should add that by a Respondent's Notice dated 15 April 2020, the husband had originally sought to argue that the Maintenance Regulation is not engaged at all in the instant case because, he suggested, the wife's claim was a sharing claim. However, by the time of this appeal, this point was no longer pursued by the husband. I further reject, for the reasons outlined at §104 above, the separate alternative ground that in a case involving the Maintenance Regulation it was enough for the court merely to "accommodate the jurisdictional requirements of the Maintenance Regulation" in its consideration of section 16(1)/(2) if that resulted in not giving proper effect to its aims.

107. I would allow the appeal on Ground 12.

Outcome of the appeal

108. For the reasons set out above, I would allow the appeal on both Grounds 12 and 13 and set aside Cohen J's dismissal of the wife's application for leave under Part III of the 1984 Act.

109. This case has already consumed very substantial resources of the parties and the court. It is notable that the wife made her Part III 1984 Act application nearly seven years ago, and it has not yet even satisfactorily completed the leave stage. It seems to me that this court is in a good position to determine the wife's application, and I consider it appropriate to do so. It is not necessary in this regard to take any account of the wife's fresh evidence.

110. It was never in dispute that the wife was habitually resident in England in October 2018 when she made her application, and had been so for at least one year at that point (Article 3(b) of the Maintenance Regulation and section 15(1) of the 1984 Act); the agreed evidence was that she had lived in England since January 2016 at the latest.

111. Having regard to the evidence which was before Cohen J in 2019, I have little difficulty in concluding that she had substantial, solid, ground for making an application for financial relief under Part III of the 1984 Act (section 13 of the 1984 Act). I say so for the following reasons.

112. Even in 2019, the wife had a connection with this country (section 16(2) of the 1984 Act); this was, in my judgment, a real and meaningful connection. I repeat that she had held a UK investor visa, she owned property here, she was (it was agreed by the husband) habitually resident here and had been so for at least one year even at that time. Indeed, the evidence before Cohen J (which had not been materially challenged) was that she had made her base here from January 2016 at the latest. Looking forward from November 2019, there was a reasonable prospect of her remaining in this country for the foreseeable future. There was evidence before the court (which was, as I have earlier mentioned, accepted by Cohen J in January 2019 and not materially challenged by the husband) that the wife had very largely severed her ties with Russia. Her connection to her former home country was increasingly tenuous.

113. For present purposes I share Cohen J's view that the wife would probably be able to argue that she is/was "fully entitled" to a wide range of financial relief consequent upon divorce, without any discount or special factor limiting her claim. In the circumstances, she was well placed to present a persuasive argument in 2019 that the outcome of the Russian matrimonial proceedings had been unjust to her; this may well have been the result of what she had called the lacuna in the law (i.e., assets of which the husband had a beneficial interest but not a legal interest were omitted from account in the distribution of marital property). Further, the wife did not accept that the Russian court had properly applied the law (see §41 above), and as King LJ had earlier remarked this required detailed analysis in its own right (see §55 above).

114. Lord Leggatt had fairly observed (see §90 above) that the sum awarded by the Russian courts was only a "tiny fraction" of the sum which the wife would have received if the marital assets divided had included assets beneficially owned by the husband. The discrepancy between her award of the marital assets and the husband's retained share was significant; the discrepancy between what she had recovered in Russia compared with what she would have recovered had the case been heard in this

jurisdiction was equally significant. The wife could also persuasively argue that, having regard to the lavish lifestyle which she had enjoyed while married, her reasonable needs would not be met by the Russian award. Indeed, as Cohen J himself recognised, given the size of her award in these circumstances, the wife "could argue that her reasonable needs have not been met" (*Potanina (FD2)* at [91]). In my judgment, the wife was in a strong position to argue in all of these circumstances, that it would be "appropriate" for the court in this country to make an award (section 16 of the 1984 Act).

115. The wife's claim is a potentially complex one, not giving of simple or summary disposal (see Lord Hope's final comments in the extract from *Three Rivers*, cited at §58 above); it is a claim for which there is a well-recognised remedy, and there is of course ample precedent for the outcome she seeks. There was a reasonable basis to conclude that the claim is neither highly speculative nor (as I have demonstrated above) is it without substance. Insofar as the longer extract from Lord Hope's judgment in *Three Rivers* adds to the test in this regard (see [91] of *Potanina (SC)*), which I believe in general terms it does, it seems to me that the wife's application amply falls within the criteria suggested therein. Moreover, there is a real prospect that further material supporting the wife's case will emerge, through disclosure "or otherwise", if the case proceeds to full hearing (see Lord Leggatt in *Potanina (SC)* at [92]: §77 above).

116. I would therefore grant the wife leave to bring her claim under Part III of the 1984 Act, and remit her application to the Family Division of the High Court in the first instance for Peel J (the National Lead Judge of the Financial Remedies Court) to allocate as appropriate to a judge of the Family Court, in the first instance for a case management hearing.

Lady Justice Falk

117. I agree.

Lord Justice Moylan

118. I also agree.