Neutral Citation Number: [2024] EWHC 3211 (Fam)

Case No: FD24P00279

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION: DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2024

Before :

SIR ANDREW MCFARLANE PRESIDENT OF THE FAMILY DIVISION
HER HONOUR LYNN ROBERTS (as a Deputy High Court Judge)

- -

Between :

The Lord Chancellor	**Applicant**
- and -	
79 Divorced Couples	**Respondent**

- -
- -

Sir James Eadie KC, Sarah Hannett KC & Alexander Laing (instructed by **Government Legal department**) for The Lord Chancellor
79 Divorced Couples who were neither present nor represented.

Hearing dates: 30 & 31 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ANDREW MCFARLANE PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in private [and a reporting restrictions order OR transparency order is in force]. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Sir Andrew McFarlane P:

1. This is the judgment of the court to which both judges have contributed.

2. This is an application by the Lord Chancellor pursuant to s 55(1)(c) of the Family Law Act 1986 and the inherent jurisdiction for the court to make declarations in respect of 79 divorced couples that, on the date of the final order in their respective divorce proceedings, their marriages no longer subsisted. The Lord Chancellor's application is dated 21st June 2024 and at the first hearing on 5th July 2024 the court was satisfied that the Lord Chancellor had sufficient interest in the determination of the application to bring the application, and noted that the Attorney General had waived her entitlement to be given a month's notice of the application and did not wish to intervene.

3. The Lord Chancellor has made great efforts to serve the 79 couples who are the Respondents to this application, and has succeeded in serving most of the 158 people involved: service on one person was dispensed with, and a few people have not acknowledged service but it appears that nearly everyone has been served; the court did not require the Respondents to take an active part in the proceedings though some have written to the Lord Chancellor expressing their concern and distress at the position they find themselves to be in. None have contacted the Lord Chancellor or the court to suggest they are in any way opposed to the making of the declaration sought by the Lord Chancellor, and none attended the hearing of the application on 30th October 2024. The Lord Chancellor has established that at least 11 of the people affected have remarried; others have given notice of intention to remarry. 19 have commenced financial remedy proceedings and 17 final financial remedy orders have been made by the courts. It is not known what arrangements concerning finance and property have resulted from these orders or from agreements made by the Respondents. It is also not known whether children have been born whose status might be affected by the decisions of this court, or whether other rights relating to inheritance or immigration might also be impacted.

4. It is necessary to set out why the Lord Chancellor has found it necessary to make her application, and to do so, we need to go back to 2017. HMCTS began digitalising divorce petitions in that year, and over the next few years it became the norm, first for the litigant in person, and then for solicitors to apply on the divorce portal for a divorce. When the Divorce, Dissolution and Separation Act 2020 ("DDSA 2020")_was introduced on 6th April 2022, all divorces were to be managed digitally which meant that nearly all individuals and solicitors applied using the online portal, and the tiny minority of people who sent in their applications by paper had their applications scanned onto the online system. Since April 2022, just under 10,000 divorces a month have been issued and dealt with on the portal.

5. The DDSA 2020 introduced a major change in divorce law in England and Wales as it swept away the concept of fault, and, in all but a tiny minority of cases, the ability of a respondent to defend or delay the divorce or dissolution application. The DDSA 2020 introduced substantive changes to the Matrimonial Causes Act 1973 ("MCA 1973") so that, in relation to divorce, either party, or both together, could apply to the court for a divorce order, which dissolves the marriage, on the ground that the marriage has broken down irretrievably; the court dealing with the application must take the statement made by the applicant or applicants that the marriage has broken down irretrievably to be conclusive evidence of such and make a divorce order. Whilst removing the need to

prove any of the facts previously required to support the ground of divorce, the DDSA 2020 introduced a period of time for the parties to reflect on the decision to divorce, as well as to seek to agree the necessary arrangements for any children and for their finances; MCA 1973, s 1(5) as amended by the DDSA 2020 stipulates that an applicant or applicants cannot confirm that they wish the divorce application to continue, and apply for a conditional order to be granted, until a period of 20 weeks has elapsed from the start of the proceedings, which is the date of issue according to paragraph 7.6 of Practice Direction 41G of the Family Proceedings Rules 2010, as amended ("FPR").

6. The procedure to be followed for applications under the DDSA 2020 was set out in a new Part 7 of the FPR. In essence, an applicant or applicants initiates the process by uploading information onto the portal which forms the basis of the divorce application. Staff at the Courts and Tribunals Service Centre ("CTSC") then check the application, deal with any fee that has to be paid, issue the application and produce a document which constitutes the divorce application which is then served on the respondent (unless it is a joint application). We are confident that none of the 79 cases would have been issued on the day they were submitted: there is usually a period of between some days and a few weeks when cases wait to be issued. In these cases it was more likely to be weeks rather than days because of the volume of cases which needed to be issued in the first weeks following the introduction of the DDSA as many people had delayed applying for divorces under the old fault based system in the months leading up to April 2022. In standard cases, which all of the 79 cases were, the first time any judicial consideration of the application takes place is at the point of the application for the conditional order, when the legal adviser considers the case and, if all is in order, certifies that the applicant or applicants is or are entitled to a conditional order of divorce and directs that the application be listed before a judge for the making of that order.

7. All such applications are listed before district judges sitting in Birmingham Family Court in lists comprising several hundred cases. The district judges make the conditional orders which are then sent out by the CTSC but the district judges are not expected, and do not have the time, to consider the individual cases. The applicant or applicants can apply to make the conditional order final on the portal once six weeks has expired from the making of the conditional order; the making of a final order is an administrative process, not involving a judge or a legal adviser in a standard case.

8. In the context of this case it is worth noting that the introduction of the changes brought about by the DDSA 2020 means that it is not possible to get divorced in less than six months (unless the court agrees to shorten the 20 week period which is wholly exceptional), whereas under the previous system it was possible for a divorce to be concluded considerably sooner. This is because of the period of reflection introduced by the DDSA. All of the 79 couples with whom we are concerned were granted conditional orders, and then final orders, after waiting for the 20 week period.

9. One part of the MCA 1973 which was not substantively changed by the DDSA 2020 other than in the terms used is section 3. That section now reads:

> "An application for a divorce order may not be made before the expiration of the period of one year from the date of the marriage".

10. The period of one year in this context has long been accepted to mean one year and one day, as explained for example by Lord Diplock in *Dodds v Walker* [1981] 1WLR 1027. This means that if a couple were married for example on 1st April 2021, an application for divorce cannot be made until 2nd April 2022. In the 79 cases with which we are concerned, the applicants all submitted their applications on the first anniversary of their marriages, in other words, a day early. The divorce portal was meant to prevent such a thing occurring but, as the evidence of Jason Latham, Development Director at HMCTS, sets out, a validation error in the system allowed such applications to be made from 6th April 2022 until the fault was discovered in November 2022. In November 2022 a judge identified one case which had been submitted a day early and alerted HMCTS. The computer system was fixed and the particular case was dealt with, but HMCTS did not interrogate the system any further to see if any other case had been commenced erroneously in the same way. It was only in mid-April 2024, when a legal adviser found another case which had been submitted a day early and referred it to a judge who in turn alerted HMCTS, that a proper search was undertaken and 96 cases were identified which had been submitted a day early. It appears that after the "fix" had been applied in November 2022, another 4 cases were issued; in these cases the applicant or applicants had provided an incorrect date of marriage; this was identified by staff at the CTSC who inserted the correct date of marriage but then failed to notice that the applications were premature and allowed the applications to proceed. The other 92 cases (apart from the two spotted by the judge and the legal adviser) had been submitted and issued between April 2022 and November 2022.

11. The cases which had not had final orders made were stopped, the parties written to and directed to start their applications again; the cases were expedited if the parties so requested, and in most of these cases fresh applications were submitted and conditional and some final orders have been made. The 79 cases now before the court are the ones where final orders had been made; the parties in these cases were also written to but as final orders had been made, the Lord Chancellor has made the present application. It is of note that if HMCTS had conducted a proper investigation in November 2022 when the problem was first drawn to their attention, it is likely that none, or almost none, of the 79 cases would have had final orders made and the present application would not have been necessary.

Void or Voidable: The Legal Context

12. In the course of their written and oral submissions, counsel for the Lord Chancellor and Secretary of State for Justice, Sir James Eadie KC, Sarah Hannett KC (who did not appear at the hearing) and Alexander Laing, described the legal context and structure within which the decision before this court falls to be taken. We found the arguments presented by the Lord Chancellor and the Secretary of State to be entirely convincing and we are grateful to counsel for the assistance that they have given to the court. In the circumstances, rather than simply summarising counsel's submissions and indicating our agreement, we propose to describe the approach that we have taken to the interpretation of the statutory provisions in determining this application.

13. Before doing so, it is right to acknowledge that the path through the previous authorities on whether a decree absolute of divorce, or, in modern terms, a final order of divorce, is 'void' or 'voidable' is not, at first blush, an easy one. There are a number of previous decisions, for example *Butler v Butler (Queens Proctor Intervening)* [1990] 1 FLR 114, in which Sir Stephen Brown P held that a petition presented before the expiration of

one year from the date of the marriage is 'null and void' and that 'a court has no jurisdiction to entertain it' as a result of the 'inescapable statutory bar' created by MCA 1973, s 3(1). It will be necessary for this court to form a view on whether *Butler* and other decisions to like effect must be followed, or, as the Lord Chancellor and the Secretary of State submitted, should not be followed as they are inconsistent with the overarching approach to interpretation established by decisions of the House of Lords in *R v Soneji and another* [2005] UKHL 49; [2006] 1 AC 340 ("*Soneji*") and the Supreme Court in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46; [2022] AC 461 ("*Majera")*.

14. We are satisfied that the correct approach to the interpretation of a provision such as MCA 1973, s 3(1), where the requirement stipulated in the sub-section is clear, but the statute does not expressly identify the consequences of non-compliance, is for the court to seek to discern and then impute an intention to Parliament as to those consequences. That is the approach that is clearly established and endorsed by the House of Lords and Supreme Court in *Soneji* and *Majera* and some of the earlier cases in the lower courts.

15. *Soneji* concerned a requirement that any confiscation order made under Criminal Justice Act 1988, s 72A(4) must be made within six months of the date of conviction save in exceptional circumstances. In the course of the leading judgment, Lord Steyn relied upon a description of the interpretative approach given by Lord Hailsham in *London & Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 883:

> 'When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what courts have to decide in a particular case is the legal consequences of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events.'

And

> 'In such cases, though language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purpose of convenient exposition.'

16. Lord Steyn (at paragraph 15) described Lord Hailsham's words as 'an important and influential dictum' which led to 'the adoption of a more flexible approach of focussing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity'. He also approved (at paragraph 16) the approach of Lord Slynn in a Privy Council case, *Wang v IRC* [1995] 1 All ER 367, where the question to be asked was identified as '… did the legislature intend that a failure to comply with such a time provision would deprive the decision-maker of jurisdiction and render any decision which he purported to make null and void'.

17. In *Soneji*, the other members of the House of Lords endorsed Lord Steyn's approach. Lord Carswell put the matter in context by explaining (at paragraphs 61 and 62):

> 'The distinction between mandatory and directory provisions, which was much discussed in judicial decisions over many years, has gone out of fashion and been replaced, as Lord Steyn has said, by a different analysis, directed to ascertaining what the legislature intended should happen if the provision in question were not fully observed'.

And

> 'It has long been appreciated that the essence of the search is the ascertainment of the intention of the legislature about the consequences of failure to observe the requirement contained in the provision in question'.

18. In *Majera*, the applicant had been detained under immigration powers pending his removal from the UK. He was granted bail by the First-tier Tribunal in an order that contravened the statute by failing to require the applicant to appear before an immigration officer. Contrary to the application of the Secretary of State, the Tribunal had not imposed a prohibition on unpaid work, but, after the hearing, the Secretary of State nevertheless made that prohibition. The question for the Supreme Court was whether the Government can lawfully act in a manner which is inconsistent with an order of a judge which is defective without that order first being varied or set aside. The unanimous judgment of the court was given by Lord Reed PSC. The significance of the relevant part of the reasoning is Lord Reed's analysis of an act or decision being held to be legally defective. At paragraph 31, he said that 'even where a court has decided that an act or decision was legally defective, that does not necessarily imply that it must be held to have had no legal effect'. Examples given by Lord Reed included cases where 'the result of treating the decision as legally non-existent may be inconsistent with legal certainty or with the public interest in orderly administration; it may, indeed, result in administrative chaos, or expose innocent third parties to legal liabilities (as where they have acted in reliance on the apparent validity of the unlawful decision)' – a description which has a direct application to the 79 cases that are before this court.

19. Whilst it was given focus and status by the judgments in *Soneji* and *Majera*, the approach described there was not new and, indeed, can be clearly found in the judgment of a former President of the Family Division, Sir Jocelyn Simon P in *F v F* [1971] P 1, where a decree absolute had been pronounced but without compliance with Matrimonial Causes Act 1965, s 33, which had stipulated that 'the court shall not make absolute a decree of divorce' unless certain criteria were met with respect to the care and upbringing of any relevant children. The President ruled that the decree was voidable, and not void:

> 'When Parliament enjoins something to be done as a step towards some transaction of legal significance, it is frequently questionable what effect failure to comply with the statutory injunction has on the validity of the subsequent transaction'.

> And

> 'It is trite law that it is the duty of the court, in construing a statute, to ascertain and implement the intention of Parliament as expressed therein. Where Parliament has used in non-technical legislation words which, in their ordinary meaning, cover the situation before the court, the court will in general apply them literally, provided no injustice or absurdity results. In such a case it is a reasonable presumption that

> Parliament or its draftsman has envisaged the actual forensic situation. *But in many cases (and the instant seems to be one) it will seem probable that Parliament and the draftsman have not envisaged the actual situation before the court; and the duty of the court in such circumstances will be to surmise, as best it can, what Parliament would, within the context of the words of the statute, have stipulated if it had done so.* A number of rules, founded on common sense, have been evolved to assist the courts in this task—for example, Parliament will be presumed not to intend injustice or absurdity or anomaly. But the most useful approach was laid down as long ago as *Heydon's Case* (1584) D 3 Co.Rep. 7a. The court will seek to ascertain what was the pre-existing "mischief" (that is to say, defect) which Parliament was endeavouring to remedy, this will often give a guide to what remedy Parliament has provided, and to its extent and its sanction.' [emphasis added]

20. The approach taken by Sir Jocelyn Simon to the issue before him, where a final divorce order was granted despite a failure to meet a pre-condition set by Parliament in mandatory terms, is relevant to the present case. He said:

> '… to treat the decree absolute as void will rarely promote the interest of the children of the family in question: and in some cases (for example, where a parent has "remarried" in reliance on an ostensibly valid decree absolute) it will actually do harm.'

And

> '… to hold that non-compliance with section 33 renders the decree absolute void would sometimes cause hardship to innocent third parties: for example, a husband petitioner might without any fault be ignorant of the relevant child's birth; and if he has remarried on the faith of an apparently valid decree absolute his after-taken "wife" and their children might suffer. In my view, Parliament is to be presumed not to have intended such injustice, unless it is the consequence of the only reasonable meaning which suits the scope and object of the statute.'

21. In *P v P* [1971] P 217, each of the three members of the Court of Appeal expressly endorsed Sir Jocelyn Simon's judgment in *F v F*, with Phillimore LJ identifying the 'real basis for the issue here' as being that 'a court ought not lightly to treat a decree absolute as void'. A conclusion which was echoed by Sir George Baker P in *Dryden v Dryden* [1973] Fam 217 where he said that 'in my opinion, the court should strive to hold that a decree absolute is voidable rather than void, for this enables justice to be done to all parties'. It was also followed by Rees J in *Wright v Wright* [1976] Fam 114: 'Because of the possibly severely damaging effects upon the adults and the children who may be involved, I am of the opinion that a court should only hold a decree absolute to be void if driven by the terms of the relevant statute to so hold'.

22. More recently, in *M v P (Queen's Proctor Intervening)* [2019] EWFC 14, Sir James Munby also endorsed Sir Jocelyn Simon's 'meticulous and illuminating judgment'. In *M v P* a divorce petition based upon two years separation with consent had been presented only 21 months after the marriage. Sir James' judgment is important and, characteristically, flowed from a thorough consideration of the existing case law, we therefore set out his analysis in some detail:

'[100] That apart, there are, I think, three general conclusions to be drawn from this survey of the jurisprudence:

(i) First, a general lack of appetite to find that the consequence of 'irregularity' – I use the word in a loose general sense and not as a term of art – is that a decree is void rather than voidable. That is something one finds sometimes stated in terms – as by Phillimore LJ in *P v P* [1971] P 217 at 225, [1971] 1 All ER 616 at 622, by Sir George Baker P in *Dryden v Dryden* [1973] Fam 217 at 236, [1973] 3 All ER 526 at 539, by Rees J in *Wright v Wright* [1976] Fam 114 at 124, [1976] 1 All ER 796 at 804, and by Holman J (who, as we have seen, knows a lot about these things) in *Krenge v Krenge* [1999] 1 FLR 969 at 978 – and it is, in truth, implicit in much of the analysis which underpins all these cases. And the language used is typically robust. If Phillimore LJ confined himself to the proposition that a court 'ought not lightly to treat a decree absolute as void', Sir George Baker P, followed by Holman J, said that the court 'should strive to hold that a decree absolute is voidable rather than void', while Rees J said that the court 'should only hold a decree absolute to be void if driven by the terms of the relevant statute so to hold'.

(ii) Secondly, a general recognition that only if the decree is held to be voidable, and not void, will the court be able to do justice to all those whose interests are affected and having regard to the particular circumstances of the case.

(iii) Thirdly, recognition of the public interest, where matters of personal status are concerned, in not disturbing the apparent status quo flowing from the decree and the certainty which normally attaches to it. This, as Ms Bazley points out, is a general principle extending across matrimonial law and including such matters as the recognition in this jurisdiction of foreign divorces. In addition to the authorities I have already cited, Ms Bazley helpfully referred me to others, including, for example, the dicta of Scott LJ in *Meier v Meier* [1948] P 89 at 93, [1948] 1 All ER 161 at 162, quoted by Sir Jocelyn Simon P in *F v F* [1971] P 1 at 13, [1970] 1 All ER 200 at 205; of Sir Jocelyn himself on the same page ('the importance that Parliament attaches to the certainty of the change of status arising out of a decree absolute'); of Hughes J in *El Fadl v El Fadl* [2000] 1 FLR 175 at 191; of Stephen Wildblood QC in *H v H (Queen's Proctor Intervening) (Validity of Japanese Divorce)* [2006] EWHC 2989 (Fam), [2007] 1 FLR 1318, [2007] 2 FCR 39 (para [183]); and of Parker J in *NP v KRP (Recognition of Foreign Divorce)* [2013] EWHC 694 (Fam), [2014] 2 FLR 1 (para [131]).

[101] Putting the issue in its wider context, Mr Murray helpfully took me to the discussion, in the eighth edition of *De Smith's Judicial Review*, paras 4–058 to 4–074, of current thinking about the distinction in public law (that is, public law as the expression would be understood by administrative lawyers, rather than as it might be understood by family lawyers) between acts or decisions which are void and those which are voidable. It is reassuring to see that family lawyers are not the only ones who struggle with the distinction, for the authors observe (para 4–058) that 'Behind the simple dichotomy … lurk terminological and conceptual problems of excruciating complexity' and go on to cite (para 4–070) a dispute within the Academy where the view of one corner is denounced by the other as 'a tissue of pseudo-conceptualism behind which lurks what is in reality a pragmatic conclusion.' Grateful though I am to Mr Murray, it is neither necessary nor appropriate for me to chart these difficult waters, though I note the view of the

> authors (para 4–062) that in the public law context the distinction has been 'eroded' by the courts, which 'have become increasingly impatient with the distinction.'

In noting, as he did in the final sentence of paragraph 101, that, in the public law field, the distinction between void and voidable had become eroded, Sir James was in tune with the analysis that Lord Reed was yet to give in *Majera*.

23. We have, thus far, considered the two, effectively parallel, lines of authority in the Family Division and, more widely, in the House of Lords and the Supreme Court, which are to like effect, namely that the existence of an apparently prohibitive provision is the start, rather than the terminus, of the court's determination as to the consequences of a breach. The court's aim is to discern the intention of Parliament, focussing upon the underlying policy of the provision and the effect on the public and private interests that are in play when court orders are made despite non-compliance with the specific provision.

24. Separately, the approach that has been taken to a failure to comply with Divorce Reform Act 1969, s 6(2)-(3) ['DRA 1969'] and MCA 1973, s 1(2) (prior to the amendments made by DDSA 2020) is to like effect. The DRA 1969, which was repealed in its entirety, and replaced by the MCA 1973, provided by s 6(2)-(3) that 'the court shall not make absolute the decree of divorce unless it is satisfied' that adequate financial provision has been made for the respondent. In *Wright v Wright*, Rees J concluded that non-compliance made the decree voidable, rather than void, as doing so would leave discretion in the court to do justice to all concerned.

25. By MCA 1973, s 1(2) (prior to the 2020 amendment) mandated the facts that must be found to establish that a marriage has broken down irretrievably. In *Callaghan v Hanson-Fox* [1992] Fam 1, Sir Stephen Brown P dismissed the claim of a husband who sought to have decree absolute set aside on the ground that the petitioner wife had sworn a false affidavit in support of the petition. The former President held that a decree absolute should be unimpeachable where no question arises as to the jurisdiction of the court pronouncing it and there has been compliance with the correct procedural requirements.

26. In *M v P*, to which we have already made extensive reference, Sir James Munby held that non-compliance with s 1(2)(d) [two years separation and consent] did not cause a decree absolute to be null and void, but merely voidable. He explained the conclusion in *Callaghan* on the basis that the alleged perjury went to the court's 'jurisdiction to grant the decree', rather than the 'jurisdiction to entertain the petition'.

27. In *Shahzad v Mazher* [2020] EWCA Civ 1740, the judge at first instance had set aside the decree absolute, rescinded the decree nisi and set aside the certificate of entitlement to a decree that had been granted on a husband's petition in circumstances where, firstly, the husband had lied as to the date of the parties' separation and, secondly, where the court, in breach of the rules, had failed to hear the respondent wife's application to set the decree nisi aside. The Court of Appeal dismissed the husband's appeal. In the course of the leading judgment, Moylan LJ summarised the approach to be taken to a challenge to a decree absolute [at paragraph 67]:

> '[67] I have set out above the key authorities which have considered the circumstances in which a decree absolute can be set aside. It is clear from these

> authorities that these circumstances are limited. They are limited because a decree absolute is a declaratory judgment which conclusively determines a person's marital status. In addition to the parties, all public authorities and all other individuals are entitled to rely on the declaratory effect of the decree. This can have significant consequences across a wide range of issues including, for example, the right to marry. To take that example, if a prior decree absolute were set aside, any subsequent marriage would be void under s 11(b) of the 1973 Act.'

And at paragraph 69:

> '[69] The authorities make clear that, as stated by Sir Stephen Brown P in *Callaghan v Hanson-Fox and Another*, a decree absolute is 'unimpeachable where no question arises as to the jurisdiction of the court pronouncing it or as to the procedural regularity which led to it being made'. As set out above, he was plainly referring to the court's jurisdiction to entertain a petition and not the court's power under s 1 of the 1973 Act to grant a decree of divorce. This is consistent with the decision of *Bater v Bater* and the submissions made by the Queen's Proctor in *Callaghan v Hanson-Fox and Another* as to the circumstances in which a decree absolute had been held to be either void or voidable, which Sir Stephen Brown P accepted. It is further supported by the decision of *Rapisarda v Colladon.*'

28. Sir James Eadie KC was clear in submitting that, where Sir James Munby in *Rapisarda v Colladon; Re 180 Irregular Divorces* [2014] EWFC 35 and in *M v P* and the Court of Appeal in *Shahzad* sought to determine the consequences of non-compliance with a statutory requirement by reference to the concept of the court's jurisdiction, or fine distinctions between different categories of jurisdiction, that approach was 'highly problematic in principle' and, when measured against *Soneji,* it is simply not the right approach. The House of Lords' decision in *Soneji* is not referred to in the judgments in either *M v P* or *Shahzad*, and the approach taken by the court in these two cases was not, in Sir James Eadie's submission, compatible with the later Supreme Court decision in *Majera*. We have already accepted that this court must follow the approach in *Soneji* and *Majera* and it is therefore necessary to depart from the reasoning in *Rapisarda*, *M v P* and *Shahzad* insofar as it is not compatible with that higher authority.

29. Two further cases, which were to a degree relied upon in the judgments in *M v P* and *Shahzad*, are *Woolfenden v Woolfenden* [1948] P 27 [Barnard J] and *Manchanda v Manchanda* [1995] 2 FLR 590 [CA: Leggatt and Thorpe LJJ]. Both cases focussed upon MCA 1973, s 9(2) (or its predecessor) which provides that a respondent can, three months from the making of a conditional order, and if the applicant has not themselves applied, apply for a final divorce order. In *Woolfenden*, Barnard J simply held that a failure to comply must lead to the final order being a nullity. That approach can no longer stand in the light of *Soneji* and *Majera*.

30. Detailed written submissions were made to us on *Manchanda* on behalf of the Lord Chancellor and the Secretary of State as follows:

> '45. Leggatt LJ (with whom Thorpe J agreed) articulated the essential distinction, "between cases in which the court lacks jurisdiction because it has no power to grant a decree absolute in the circumstances in which it has purported to do so", in which case the divorce is void; and "cases in which though the court enjoys jurisdiction, it has through the inadvertence of one of the parties failed to observe

a statutory provision against the exercise of it, or there has been a procedural irregularity in the process of exercising it" (p.595) [56]. The court concluded that non-compliance with s.9(2) involved the former.

As to the reasoning:

a. The reasoning was limited: "as is shown by *Callaghan v Hanson-Fox (Andrew)* [1992] Fam 1… in which Sir Stephen Brown P specifically approved *Woolfenden*" [56]. But this appears to be inaccurate. The sole mention of *Woolfenden* in *Callaghan* is (or appears to be) a summary of counsel (amicus curiae's) submissions at pp.526–527. It does not appear to be "specifically approved".

b. The use of jurisdiction as the determinant feature of the analysis is inherently very problematic. It narrows the analysis in a way that cannot sit with *Soneji* and *Majera*. It is also extremely difficult to see how it could usefully, still less consistently, be applied as a yardstick or even a factor. Its use simply throws up a series of imponderable and unanswerable questions as to when a statutory requirement does and does not have the effect of depriving the court of jurisdiction to take a step – in circumstances in which the statutory requirement makes no such mention of the court's jurisdiction. The use of the concept becomes all the more problematic if its use then depends on trying to work out what type or character of jurisdiction is in issue. The sort of distinction drawn by Leggatt LJ, and on which his analysis seemed to turn, is esoteric and unworkable. It does that which Lord Hailsham in *London & Clydeside Estates Ltd v Aberdeen DC* warned against. It places, as the passage from Lord Hailsham cited in *Soneji* cautions, particular circumstances "into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition", *Soneji* at §14. That is the opposite of the "more flexible approach" that *Soneji* mandates, at §15 [66].

c. Both judges mentioned the practical importance of the s.9(2) rule: Leggatt LJ at p.591 [51] and Thorpe J at p.596 [56], describing it as "protection". However, that might be considered simply to justify the statutory requirement, providing limited if any real assistance on the question of the intention to be imputed to Parliament as to the consequences of non-compliance. In any event, even if this reference to protection (and thus its removal in the event of non-compliance) is a form of analysis of the consequences, that analysis is minimal and too narrow in its focus.

d. Whilst Sir Joceyln's decision in *F v F* and the Court of Appeal's decision in *P v P* were cited, in neither the judgment of Leggatt LJ or Thorpe J are the relevant principles set out or applied to determine the consequence of non-compliance.

46. Most importantly, the analysis in *Manchanda* cannot be squared with the correct analysis now identified in *Soneji* and *Majera*. The Court of Appeal applied what is now evidently the wrong analytical framework. Moreover, as just noted, they did not consider in their judgments the analysis (broadly reflective as it turned out of *Soneji/Majera*) in *F v F* and *P v P* (despite the latter being Court of Appeal authority).'

31. We have set out the Lord Chancellor and the Secretary of State's submissions on *Manchanda* in full because we agree with them. We are satisfied that the approach taken

by the Court of Appeal in *Manchanda* is not compatible with the later House of Lords/Supreme Court authorities of *Soneji* and *Majera*. Moreover, as paragraph 46 of counsel's submissions asserts, we agree that the court in *Manchanda* failed to engage with the principle behind the approach taken by Sir Jocelyn Simon P and the Court of Appeal in *F v F* and *P v P*. The passage in which those two cases were considered in the judgments in *Manchanda* is in the judgment of Leggatt LJ – with whom Thorpe J agreed - (at page 593):

> 'Both counsel referred to a number of cases, which it is right to mention briefly, although I shall do so by category rather than (as counsel did) chronologically. First came eight cases in each of which the order in question was held voidable. The first three are cases in which though the court enjoyed jurisdiction, it inadvertently failed to observe a statutory prohibition against the exercise of it. In *F v F* [1971] P 1 the decree nisi was made absolute before the court was satisfied as to the arrangements for care and upbringing of one of the children. Sir Jocelyn Simon P held that, because the failure to comply with the relevant statutory provisions rendered the decree absolute voidable and innocent third parties had acquired rights and interests in pursuance of its ostensible validity, it was too late to set it aside. It is to be noted in reaching that conclusion the President relied heavily on *McPherson v McPherson* (above). Another such case was *P v P* [1971] P 217 in which it was held that the statutory requirement that a decree shall not be made absolute until the court is satisfied as to the arrangements for the children, although mandatory, is a procedural rule, breach of which would not make the resulting decree absolute void.'

32. It is clear from that passage that, by focussing on the outcome of the two cases, so that they were categorised as cases where the outcome was 'voidable', and doing so briefly, the court failed to engage with the underlying principle of interpretation identified by Sir Jocelyn Simon in *F v F*. Further, it is not correct, with respect, to identify the then President's reasoning as simply being that 'it was too late' to set the order aside. As the passages that we have set out at paragraph 20 make plain, the judgment was driven by a quest to determine the intention of Parliament in the event of a failure to comply with the statutory requirement. In the circumstances, we are persuaded that the approach in *Manchanda*, which is not compatible with the higher authority of *Soneji* and *Majera*, should not be followed.

33. Finally, it is necessary to consider two decisions which turn directly on MCA 1973, s 3(1), which is the provision in focus in the present application and prevents an application for a divorce order being made 'before the expiration of the period of one year from the date of the marriage'. The first is *Butler v Butler (Queens Proctor Intervening)* [1990] 1 FLR 114. In *Butler*, a petition (originally for judicial separation but subsequently amended to divorce) was issued 11 months after the marriage and therefore in breach of the requirement in s 3(1). Sir Stephen Brown P held that a petition presented before the expiration of one year from the date of the marriage is 'null and void and a court therefore has no jurisdiction to entertain it'. The President described s 3(1) as 'an inescapable statutory bar which prevents a court from exercising a discretion to alleviate a situation which might nevertheless appear to brought about by genuine and honest mistake'. The President went on to endorse that approach by reference to the case of *Nissim*:

> '[Counsel for the Queen's Proctor] has also referred to the case of *Nissim v Nissim* [1988] Fam. Law 254 which, whilst not dealing with the same situation, provides an example of a defect arising as a result of a breach of a statutory provision. This shows that although it may be looked upon as being highly technical, nevertheless a breach of a statutory provision is fundamental and, unhappily, has the effect of rendering decrees pronounced in apparent good faith null and void.'

34. We accept the Lord Chancellor and the Secretary of State's submission that the approach taken in *Butler*, which is that the mere fact of non-compliance with s 3(1) renders a decree void, is not tenable. Describing the statutory bar as 'inescapable' suggests that the court was treating non-compliance on its own as being the factor that prevents the court from exercising any discretion. Such an approach is not compatible with *Soneji* and *Majera*. The short judgment did not contain any reference to, or reconciliation with, the line of cases, including *F v F*, in which non-compliance with materially similar statutory requirements had led to decrees being held to be merely voidable. Further, to hold that an order is null and void and 'therefore' the court lacks jurisdiction to entertain it, clearly reverses the logical sequence. This court is bound to apply the approach to interpretation now laid down by the House of Lords and Supreme Court in *Soneji* and *Majera*, and must hold that the decision in *Butler* is not to be followed.

35. In *Baron v Baron (Queens Proctor Intervening)* [2019] EWFC 26, Sir James Munby P considered four cases in which a divorce petition had been issued before the expiration of one year from the date of the marriage, contrary to s 3(1). The Queen's Proctor, intervening, had applied to set aside the decree nisi and absolute in each case on the ground that the decrees were void, as nullities, by reason of non-compliance with section 3(1) of the 1973 Act. The Queen's Proctor submission was that the underlying defective petitions were not open to remedy by amendment and the court had no power to grant discretionary relief. Sir James Munby granted the applications in three of the cases on the basis that he was bound by the decision in *Butler* holding that, if it was correctly decided, it was determinative of the applications before him. Sir Jame's conclusion is at paragraph 9:

> '9 In my judgment, *Butler v Butler* was correctly decided and I must follow it: (i) First, and focusing on Sir Stephen Brown P's judgment itself, it is clear, compellingly articulated and, in my judgment, plainly correct for the reasons Sir Stephen Brown P gave. (ii) Secondly, that conclusion is reinforced if one locates it within the entire jurisprudence as I analysed it in *M v P*, paras 47–103; Sir Stephen Brown P's analysis and conclusions fit very comfortably within the jurisprudence and, in particular, accord with the distinction drawn by Leggatt LJ in *Manchanda v Manchanda* [1995] 2 FLR 590 in the passage, at p 595, which I quoted in *M v P*, para 79. (iii) Thirdly, and as I noted in *M v P*, para 79, "although Leggatt LJ expressed doubt about the decision in *Batchelor v Batchelor* [1983] 1 WLR 1328, he did not question the correctness of the decision in *Butler v Butler*". Nor has anyone else.'

36. It is clear that Sir James Munby did not have the benefit of detailed argument on the soundness of the decision in *Butler*. His conclusion that the judgment in *Butler* is clear, compellingly articulated and plainly correct is not one that stands up to scrutiny for the reasons that we have given. Although, as Sir James Munby observed, the decision in *Butler* may fit with that in *Manchanda*, the correctness of *Butler* was taken as read in

Manchanda and, for the reasons that we have given, *Manchanda* itself is not compatible with *Soneji* and *Majera*.

37. It follows that we are obliged to depart from the approach to non-compliance with s 3(1) taken by the Family Division at first instance in *Butler* and in *Baron* for the reasons that we have given. For a Divisional Court to do so is legally permissible [*R v Greater Manchester Coroner, ex parte Tal* [1985] QB 67] and it is necessary in order to comply with *Soneji* and *Majera*. In doing so, we should be plain that our departure relates to the approach that the court should take, rather than to the particular conclusion reached by the respective courts in *Butler* and *Baron*. The decision in *Baron* was based on strong policy grounds and we expressly do not seek to suggest that the outcome in the case was wrong.

Conclusion

38. The central question before this court is to determine the legal consequence that follows from a failure to comply with the time threshold required by MCA 1973, s 3(1). The approach to be taken has been determined by the House of Lords and the Supreme Court in *Soneji* and *Majera*, and this court is bound to apply it in determining the present application. The approach in *Soneji* and *Majera* is, in any event, reflected by earlier authority in the matrimonial context, namely *F v F* and *P v P*. In the absence of express provision in the statute, the central question is to be answered by the court imputing to Parliament an intention as to the consequences of non-compliance. The focus is on the underlying policy of s 3(1) and on the effect on the public and private interests involved if final declaratory orders made following non-compliance were to be treated as legally non-existent or void.

39. In the light of *Soneji* and *Majera*, previous attempts to discern the consequences of non-compliance by focusing on the court's jurisdiction must now be seen to have been adopting the wrong approach. As the agile, and at times contorted, judicial attempts to categorise or reconcile previous decisions into specific categories based on jurisdiction demonstrate, such an approach is, in any event, highly problematic in principle.

40. In the present case, the *Soneji* and *Majera* approach provides a clear route to the court's decision. For the following reasons, it is inconceivable that Parliament would have intended that the consequences of submitting an application for divorce one day early, which, by administrative/computer error was processed through to a final order of divorce being granted, would be that that final order must automatically be set aside as void and having no legal standing:

    i) To hold that non-compliance with s 3(1), even by one day, must automatically lead to the setting aside of a final order of divorce that had been made, without any of the normal elasticity of judicial discretion:

        a) would be to impute an intention of a very high order to Parliament which, in cases such as those presently before the court, is wholly disproportionate;

        b) would be likely to do damage to the public interest which is in achieving clarity and legal certainty as to the marital status of a citizen following

the making of an apparently valid final order of divorce which would have subsequently to be set aside;

ii) In imputing the intention of Parliament, it must be the case that, the more problematic the outcome of holding that a final order of divorce must be void, the less likely it is that Parliament will have intended that outcome. The problems that are likely to ensue, subject to the circumstances of each case, include:

a) A couple, who had believed that they were divorced, finding that they are still married to each other;

b) Any subsequent remarriage would be void and harm may be caused to innocent third parties;

c) The status of children born after the supposed divorce would be in doubt;

d) Financial remedy orders that had been made on divorce, including orders for the sale of the matrimonial home, division of pensions and the distribution of other assets, would be set aside and of no legal consequence;

e) More generally, every divorce is likely to mark a period of unhappiness for the spouses, in some the relationship may have been abusive and harmful. Discovery that the marriage is subsisting may be a cause of trauma to one or both parties.

41. More generally, the factors relating to divorce orders identified by Sir Jocelyn Simon in *F v F* (see paragraph 20 above) remain as sound today as they were in 1971, as do those more general consequences highlighted by Lord Reed in *Majera* (see paragraph 18 above).

42. These strong policy drivers justify holding that the intention of Parliament cannot have been that non-compliance with the time threshold in MCA 1973, s 3(1) must in every case render any resulting divorce order void, rather than voidable. We have therefore concluded that each of the 79 final divorce orders now before the court is voidable, rather than void.

43. During the hearing it was agreed that the application would be dealt with in two stages; the first stage being to determine whether the 79 final divorce orders were void or voidable. The second stage will be to determine whether declarations should be made that the specific marriages did not subsist from the date of the final order of divorce. In other words, having decided that the final orders of divorce in each of the 79 cases are voidable and not void, the court must now decide whether the final orders of divorce should be upheld or set aside.

44. None of the 158 respondents has indicated a desire to oppose the application or to participate in the first stage of the proceedings. However, it was made clear in the order of 5th July 2024 that that did not preclude any of the respondents from choosing to participate in the second stage. Now that this court has determined that the final orders of divorce are voidable and not void, the court will give the respondents the opportunity

to set out in a statement whether they wish the court to determine that their final divorce order should be found to be void, and if so, on what grounds. If a respondent does not wish their divorce order to be set aside, then they should take no action.

45. Each respondent will be given until the end of January 2025 to file such a statement. If, at the end of that period, no respondent wishes to argue that the final divorce order in their case should be found to be void, we will make the declarations sought by the Lord Chancellor in each case. Alternatively, if any of the respondents argues for a different outcome, we will make the declarations in the majority of the cases and consider what directions are necessary to conclude the outstanding cases.