Trinity Term
[2018] UKSC 41
On appeal from: [2017] EWCA Civ 182

JUDGMENT

Owens (Appellant) *v* Owens (Respondent)

before

Lady Hale, President
Lord Mance
Lord Wilson
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

25 July 2018

Heard on 17 May 2018

Appellant
Philip J Marshall QC
Stephen Jarmain
Millicent Benson
(Instructed by Payne Hicks Beach)

Respondent
Nigel Dyer QC
Hamish Dunlop

(Instructed by Hughes Paddison)

Intervener (Resolution) (by written submissions only)
James Turner QC
Deepak Nagpal
(Instructed by Mills & Reeve LLP)

LORD WILSON: (with whom Lord Hodge and Lady Black agree)

The Background

1. Mrs Owens appeals against an order of the Court of Appeal dated 24 March 2017 (Sir James Munby, the President of the Family Division, and Hallett and Macur LJJ), [2017] EWCA Civ 182, [2017] 4 WLR 74, by which it dismissed her appeal against the dismissal of her petition for divorce by Judge Tolson QC ("the judge") on 25 January 2016 in the Central Family Court in London.

2. The petition of Mrs Owens was based upon section 1(2)(b) ("the subsection") of the Matrimonial Causes Act 1973 ("the 1973 Act"), which extends only to England and Wales: she alleged that her marriage to Mr Owens had broken down irretrievably and that he "has behaved in such a way that [she] cannot reasonably be expected to live with [him]".

3. It was in the belief that the appeal of Mrs Owens would raise a novel issue about the interpretation of the subsection that this court gave permission for it to be brought. Her principal ground of appeal had been that the subsection should now be interpreted as requiring not that *the behaviour* of Mr Owens had been such that she could not reasonably be expected to live with him but that *the effect of it on her* had been of that character. But, important though the effect on the petitioner of the respondent's behaviour is under the subsection, Mr Marshall QC on her behalf conceded at the hearing that the principal ground went too far. So issues about the interpretation of the subsection, at any rate as between Mr and Mrs Owens, have narrowed substantially. But our judgments may nevertheless remain of some value to those who in the future wish to invoke, or need to apply, the subsection. Resolution, the name by which the Solicitors Family Law Association is now known, intervenes in the appeal. It commends, by contrast, a re-interpretation of the subsection along the lines of that principal ground of appeal. The court is grateful for its presentation but in the circumstances will refer only briefly to it.

4. Mrs Owens is aged 68. Mr Owens is aged 80. They were married in 1978 and have two children, now adult. During the marriage, with the support of Mrs Owens, Mr Owens built a successful business and they each now have significant wealth. The matrimonial home, in which Mr Owens continues to live, is a substantial manor house in a village in Gloucestershire. Mrs Owens now lives next door, in a property which they also own.

5. It was in June 2012 that Mrs Owens first consulted her solicitors about a divorce. In about November 2012 she began an affair. It ended in August 2013, which was when (as Mrs Owens later discovered) Mr Owens learnt of it. Mrs Owens told the judge that the affair "was the result of a bad marriage, not the cause for divorce". The judge did not say whether he accepted what she said: he could not do so because, as I will explain, he did not receive evidence about the quality of the marriage prior to 2013.

6. In February 2015 Mrs Owens left the matrimonial home and, following five months in rented accommodation, began to occupy the property next door to the home. They have not lived together since her departure. The judge found as facts that the marriage had broken down; that Mrs Owens could not continue to live with Mr Owens; and that, in so far as he believed otherwise, Mr Owens was deluding himself.

7. Back in December 2012 Mrs Owens had handed to Mr Owens a letter written by her solicitors, with which was enclosed a draft petition for divorce based upon the subsection; and in the letter the solicitors had enquired of Mr Owens whether, if a petition were to be issued in the terms of the draft, he would defend it. As he accepts, Mr Owens then told Mrs Owens that, if she filed the petition, he would never speak to her again. The judge remarked that, like the petition which she filed much later, this initial draft "lacked beef". That should have been a compliment, not a criticism. Family lawyers are well aware of the damage caused by the requirement under the current law that, at the very start of proceedings based on the subsection, one spouse must make allegations of behaviour against the other. Such allegations often inflame their relationship, to the prejudice of any amicable resolution of the ensuing financial issues and to the disadvantage of any children. Thus for many years the advice of the Law Society, now contained in the second guideline of para 9.3.1 of the fourth edition (2015) of the Family Law Protocol, has been:

> "Where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court …"

8. In his judgment the judge observed that the draft petition was delivered to Mr Owens at the time when Mrs Owens had begun the affair. "The strong implication", he said, "is that there was no substance in the draft petition". Indeed at the hearing he had suggested that the existence of the affair "knocks out" the allegations made in it and provides an "ulterior motive" for the proposed petition. With respect, I suggest that it is wrong to infer that a spouse who aspires to present a petition while conducting an affair has no case under the subsection.

9. In the event the draft petition was never issued. Mr and Mrs Owens continued to live in the matrimonial home, and to a substantial extent to live together, for a further two years. But Mrs Owens continued to keep a diary of incidents between herself and Mr Owens of which she might later wish to complain.

10. In May 2015 Mrs Owens issued the petition which is the subject of the proceedings. Like the earlier draft, it was based on the subsection and was cast in appropriately anodyne terms. The statement of case comprised five paragraphs. In them Mrs Owens alleged only that Mr Owens had prioritised his work over their life at home; that his treatment of her had lacked love or affection; that he had often been moody and argumentative; that he had disparaged her in front of others; and that as a result she had felt unhappy, unappreciated, upset and embarrassed and had over many years grown apart from him.

11. For some reason Mr Owens declined to instruct the solicitors who had been corresponding on his behalf with Mrs Owens' solicitors to accept service of the petition; so it was served upon him personally. He indicated an intention to defend the suit. By his answer, he denied that the marriage had broken down irretrievably and alleged, in the event incorrectly, that in bringing the suit Mrs Owens was motivated by a wish to continue the affair and that the other man was exercising a malign influence over her. At that stage Mr Owens largely denied the allegations about his behaviour and said that, although never emotionally intense, the marriage had been successful and that he and Mrs Owens had learnt how to "rub along".

12. In October 2015 a recorder conducted a case management hearing pursuant to rule 7.22(2) of the Family Procedure Rules 2010 ("the FPR"). In the light of Mr Owens' defence of the suit, Mrs Owens was granted permission to amend the petition so as to expand her allegations of behaviour. The recorder also directed that the parties should file short witness statements, which were to stand as their evidence in chief.

13. The recorder made two further significant directions. The first was that there should be no witness other than the parties themselves. It appears that, by counsel, Mrs Owens agreed to that direction. The second related to the requirement under the rule for the recorder to give directions for the conduct of the final hearing of the suit. The court is told that, by their respective counsel, the wife suggested that a hearing of one half day would suffice whereas the husband suggested that three days were required. In the event the recorder's direction was for a hearing of one day.

14. Why did the experienced legal advisers to Mrs Owens consider that the court would need only one half day in which to determine the issues raised by her petition

and that she would not need to call any witness to corroborate, for example, her allegation of disparaging comments on the part of Mr Owens in front of others?

15. The answer to this question is not in dispute. It lies in an understanding of the practical operation of the family court nowadays when determining a defended suit for divorce. Defended suits are exceedingly rare. In his judgment the President noted that, in relation to the 114,000 petitions for divorce which were filed in England and Wales in 2016, fewer than 800 answers were filed; and he estimated that the number of suits which proceeded to a final, contested hearing was 0.015% of the petitions filed, which amounts to about 17 in that whole year. The degree of conflict between the parties which is evident in a fully defended suit will of itself suggest to the family court that in all likelihood their marriage has broken down. While it recognises that, unless and until repealed by Parliament, section 1 of the 1973 Act must conscientiously be applied, the family court takes no satisfaction when obliged to rule that a marriage which has broken down must nevertheless continue in being.

16. In *No Contest: Defended Divorce in England and Wales*, published in 2018 by the Nuffield Foundation, Professor Trinder and Mark Sefton make a report on their detailed study of recently defended suits. In an admirable summary of the approach of the family court at pp 7-8, they say:

> "While respondents are typically focused on defence as a means to establish their 'truth' of why the marriage broke down, the family justice system is predicated on settlement and compromise. That settlement orientation applies even in cases where a formal defence has been issued, with encouragement to settle at each stage of proceedings, up to and including, contested hearings. The very active promotion of settlement at each stage, with lawyers and judges working in concert, reflects the dominant family justice perspective that agreed outcomes are less costly and damaging, that trying to apportion blame is a fruitless and inherently non-justiciable task and that defence is futile where one party has decided that the marriage is over."

17. For reasons which I will explain, the subsection nowadays sets at a low level the bar for the grant of a decree. The expectations therefore are that, even when defended to the bitter end, almost every petition under the subsection will succeed; that, in the interests again of minimising acrimony, the petitioner will be encouraged at the hearing to give no more than brief evidence in relation only to a few allegations of behaviour; and that then, after an equally short riposte on behalf of the respondent by cross-examination, oral evidence and submission, the court will deliver a brief judgment, almost certainly culminating in the pronouncement of a decree. As Mr Owens himself acknowledged when recounting the advice given to him, "Courts

rarely stand in the way of a party seeking a divorce". Indeed the authors of the *No Contest* report discovered no recent example, other than Mr Owens himself, of a respondent to a defended suit who successfully opposed the grant of a decree on some basis or other.

18. Mrs Owens duly amended her petition. By alleged reference to her diary, she gave 27 individual examples of the third and fourth allegations in her petition that Mr Owens had been moody and argumentative and had disparaged her in front of others. She cannot have thought that the time allowed for the hearing would enable her to give evidence of more than a few of them. The earliest of her examples was said to have occurred in 2013. So she chose not to give any specific example of Mr Owens' behaviour during the first 35 years of the marriage or prior to the date of the initial draft petition. Perhaps there was no such example which she could honestly give; or perhaps, on advice, she did not regard it as necessary to do so. In his amended answer Mr Owens admitted some of the alleged examples but sought to place them in a different context; described some as exaggerated; and professed not to remember others. He entered very few denials.

19. At the outset of the hearing before the judge, which took place ten days before he handed down his judgment, Mr Marshall QC, on behalf of Mrs Owens, said that, although in her witness statement she had confirmed the veracity of all 27 of the examples given in the amended petition, he proposed to focus only on a very few of them. Mr Marshall did so; and, at the judge's invitation, Mr Dunlop, on behalf of Mr Owens, did likewise. Indeed, during his final submission Mr Marshall, at the request of the judge, identified the four examples on which he most relied. The result was that no evidence was put before the judge in relation to most of the 27 examples, apart from the written confirmation of their veracity on the part of Mrs Owens and from the mixture of responses to them which Mr Owens had given in his amended answer and confirmed to be true in his witness statement. It also follows that, although at one point Mrs Owens told Mr Dunlop that Mr Owens had been making hurtful and disparaging remarks to her long before 2012, in effect no evidence was given in relation to the marriage prior to its two final years.

20. In a short judgment written on six pages, to which I will refer in more detail below, the judge announced at the outset that the petition was hopeless. Having concluded that the marriage had broken down, he found that:

a) all 27 of the pleaded examples of behaviour were at best flimsy;

b) Mrs Owens had significantly exaggerated their context and seriousness;

c) Mr Owens was "somewhat old-school";

d) Mrs Owens was more sensitive than most wives;

e) three of the examples on which Mr Marshall had in particular relied (the judge making no reference to the fourth) were isolated incidents, not part of a persistent course of conduct on the part of Mr Owens;

f) Mrs Owens had cherry-picked one of those examples, which illustrated her approach;

g) the three examples scarcely merited "criticism" of Mr Owens; and

h) much the same could be said of the other 24 examples.

The Law

21. This court, like the appellate committee of the House of Lords which preceded it, has never had occasion to consider what the law requires a petitioner to establish under the subsection. Its words largely speak for themselves. But there are six judgments delivered in the lower courts which helpfully illumine their effect. They are old authorities which date from a period when controversy surrounding the establishment of a case under the subsection was slightly less rare.

22. First, *Pheasant v Pheasant* [1972] Fam 202. A husband petitioned for divorce pursuant to section 2(1)(b) of the Divorce Reform Act 1969 ("the 1969 Act"), which came into force on 1 January 1971 and which was repealed when the 1973 Act came into force on 1 January 1974. Section 1(2)(b) of the 1973 Act is in the same terms as was section 2(1)(b) of the 1969 Act. The husband's case was that the wife had been unable to give him the demonstrative affection which he needed. Ormrod J dismissed the petition. At p 206 he observed that Parliament had not yet assimilated the law relating to marriage with the law of partnership, which made different provisions both for dissolution and for the resolution of financial issues consequent upon it. At pp 207-208 he construed section 2(1)(b) as placing primary emphasis on the respondent's behaviour rather than on the petitioner's personal idiosyncrasies. And at p 208 he asked himself whether it was:

> "reasonable to expect this petitioner to put up with the behaviour of this respondent, bearing in mind the characters

> and the difficulties of each of them, trying to be fair to both of them, and expecting [of them] neither heroic virtue nor selfless abnegation …"

23. Second, *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47. Dunn J upheld a wife's petition based on the subsection. At p 54 he suggested that it was unhelpful to analyse the conduct required by the subsection in terms of its gravity. While purporting to distance himself from the question posed in the *Pheasant* case, Dunn J seems there to have asked himself a closely similar question, namely:

> "Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?"

This question was approved and applied by the Court of Appeal in *O'Neill v O'Neill* [1975] 1 WLR 1118 at 1125.

24. Third, *Thurlow v Thurlow* [1976] Fam 32. A husband's petition under the subsection was based on the wife's failure to contribute to the running of the home and on her increasingly erratic behaviour, both of which were the result of a severe neurological condition. At p 41 Rees J noted that, before approving the form of words in section 2(1)(b) of the 1969 Act, Parliament had considered and rejected a form of words that "the conduct of the respondent has been so intolerable that the petitioner could not reasonably be expected to continue or resume cohabitation". At pp 41-43 he held that a respondent's failure to act could amount to behaviour for the purposes of the subsection. Even more significantly, he held at p 46 that behaviour caused by illness could fall within the subsection; and, in granting a decree to the husband, he added that "no blame of any kind can be nor is attributed to the wife".

25. Fourth, *Stevens v Stevens* [1979] 1 WLR 885. The facts were unusual and, for present purposes, of interest. In March 1976 a judge had dismissed the wife's petition under the subsection. He had held that the marriage had irretrievably broken down; that the wife had not established her case of behaviour against the husband; and that the cause of the breakdown had been her own behaviour. Thereupon the parties had continued to live under the same roof. In due course the wife presented a second petition, again under the subsection but relying only on the husband's behaviour occurring after March 1976. Sheldon J granted her a decree. He adhered at p 887 to the earlier findings that the marriage had irretrievably broken down prior to March 1976 and that the wife's behaviour had caused it to do so. He held that he had to consider "the totality of the evidence of the matrimonial history" and "the

cumulative conduct" of the husband. He found that following March 1976 the husband had behaved in such a way that the wife could not reasonably be expected to live with him; and he held that it was irrelevant that the husband's behaviour was not the cause of the breakdown of the marriage.

26. Fifth, *Balraj v Balraj* (1981) 11 Fam Law 110. The husband's petition was based not on the subsection but on section 1(2)(e) of the 1973 Act, namely that he and the wife had lived apart for at least five years. The Court of Appeal upheld the judge's rejection of the wife's opposition to the grant of a decree, which was that it would result in grave hardship to her within the meaning of section 5 of the 1973 Act. She had argued that the judge had failed to pay sufficient regard to her subjective reaction, as a Hindu wife, to the grant of a decree. In giving the leading judgment Cumming-Bruce LJ at p 112 offered an analogy:

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

27. And sixth, *Buffery v Buffery* [1988] 2 FLR 365. A recorder had dismissed a wife's petition under the subsection on the basis that she had failed to establish either that the husband's behaviour had been grave and weighty or that it had caused the breakdown of the marriage. The Court of Appeal held that behaviour under the subsection did not have to be grave or weighty. At p 367 May LJ said that "the gravity or otherwise of the conduct complained of is of itself immaterial". The court also reiterated what Sheldon J had held in the *Stevens* case, namely that the 1973 Act did not require the respondent's behaviour to have caused the breakdown of the marriage. The wife's appeal was nevertheless dismissed on the basis that, even when judged by reference to correct principles, her petition failed.

28. As in effect the Court of Appeal in the present case has held, and as Mrs Owens now concedes, these six old authorities continue to provide a correct interpretation of the subsection. The inquiry has three stages: first (a), by reference to the allegations of behaviour in the petition, to determine what the respondent did or did not do; second (b), to assess the effect which the behaviour had upon this

particular petitioner in the light of the latter's personality and disposition and of all the circumstances in which it occurred; and third (c), to make an evaluation whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation that the petitioner should continue to live with the respondent would be unreasonable.

29. Resolution explains that its members are gravely concerned about the continued existence of a law which in substantial part links entitlement to divorce to the making of allegations by one spouse against the other. It argues that the State thereby actively precipitates dispute. Pending wholesale reform of section 1 of the 1973 Act, it clearly wishes to mitigate what it regards as the malign effect of the subsection. It therefore submits that historically the lower courts have placed a flawed construction on it. It contends, as in effect Mrs Owens contended in her grounds of appeal but no longer contends, that "the entire focus should be on the reaction of the petitioner to the respondent's behaviour"; and that, if the petitioner genuinely cannot continue to live with the respondent, "it might well be thought that the petitioner cannot *reasonably* be expected to live with the respondent". But the question posed by the subsection is more narrow than whether the petitioner cannot reasonably be expected to live with the respondent; it is whether the respondent's behaviour has been such that the petitioner cannot reasonably be expected to do so. In determining whether a continuation of life with the respondent cannot reasonably be expected of the petitioner, it is therefore impossible to avoid focus on the respondent's behaviour, albeit assessed in the light of its effect on the petitioner. With respect to Resolution, its suggested interpretation of the subsection is incorrect. So also, for the reasons given by the President in paras 76 to 81 of his judgment, is its suggestion (not further maintained by Mrs Owens in her grounds of appeal to this court) that either the subsection if taken alone or section 1 of the 1973 Act if taken as a whole might be incompatible with the rights of petitioners under article 8 of the European Convention on Human Rights.

30. But, although its interpretation by these courts remains correct even after 40 years, the application of the subsection to the facts of an individual case is likely to change with the passage of the years. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, Lord Bingham of Cornhill said:

> "9. There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of 'cruel and unusual punishments' has not changed over the years since 1689, but many punishments

> which were not then thought to fall within that category would now be held to do so."

31. In *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, the appellate committee developed a new approach to the exercise of the discretionary jurisdiction under the 1973 Act to make financial orders following divorce. It was in that context, somewhat similar to the present, that both Lord Nicholls of Birkenhead at para 4 and Lord Hope of Craighead at para 115 justified the new approach by reference to the change in social and moral values from one generation to the next.

32. I cannot readily think of a decision which more obviously requires to be informed by changing social norms than an evaluation whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation of continued life together would be unreasonable.

33. In *Ash v Ash* [1972] Fam 135 Bagnall J suggested at p 140:

> "that a violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted; … and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other."

The judge's suggestion now seems almost comical. In the two specific examples quoted, surely each spouse would nowadays be entitled to a decree against the other under the subsection.

34. But the relevant social norm which has changed most obviously during the last 40 years has, I suggest, related to our society's insistence upon equality between the sexes; to its recognition that marriage is a partnership of equals; and, specifically, to its assessment of the moment when a husband's behaviour, in the light of its effect on his wife, begins to make it unreasonable to expect her to continue to live with him. For a wife that moment now arrives earlier than it did before; it now arrives at the same time for both sexes in equivalent situations. In *Priday v Priday* [1970] 3 All ER 554, which was decided months before section 2(1)(b) of the 1969 Act came into force, Cumming-Bruce J dismissed a husband's petition for divorce on the ground of the wife's cruelty under section 1(1)(a)(iii) of the Matrimonial Causes Act 1965. But, in recounting the history of the marriage, the judge also commented at p 557 on the conduct of the husband towards the wife:

> "Up to 1968 [the husband] sometimes attempted intercourse by force in the hope that if he succeeded in intercourse, even by such method, that ... might stimulate her again emotionally to return to reality, but that was unsuccessful and he naturally abstained from such attempts. I am satisfied that his recourse to force in intercourse was not in any sense culpable but was a desperate attempt on his part to re-establish what might have been an important element in matrimonial consortium."

Today such an assessment would be inconceivable.

35. Eight years ago, in *Miller Smith v Miller Smith* in the Court of Appeal, [2009] EWCA Civ 1297, [2010] 1 FLR 1402, I observed at para 15:

> "Our society in England and Wales now urgently demands a second attempt by Parliament, better than in the ill-fated Part II of the [Family Law Act 1996], to reform the five ancient bases of divorce; meanwhile, in default, the courts have set the unreasonableness of the behaviour required to secure the success of a petition on the second basis, namely pursuant to section 1(2)(b) of the Act of 1973, even when defended, at an increasingly low level."

36. The ease with which a petitioner can nowadays establish a case under the subsection, if undefended, led the President in his judgment to speak of its widespread dishonest and collusive manipulation. If the allegations of behaviour are not true, there is indeed dishonesty and, by not challenging them, a respondent might loosely be said to collude with it; and unfortunately such dishonesty is unlikely to be uncovered when, by reference only to the papers filed, the court decides pursuant to rule 7.20(2)(a) of the FPR whether to certify that the petitioner is entitled to a decree. But my reference in the *Miller Smith* case to the greater availability of a decree under the subsection was intended to recognise not its abuse in some cases but a legitimate enlargement of its application reflective of changing social norms in other cases.

37. Nevertheless, in making that reference, I used a phrase which I regret: for I referred to the "unreasonableness of the behaviour". "Unreasonable behaviour" has always been the family lawyer's shorthand description for the content of the subsection. But it is wrong. The subsection requires not that the behaviour should have been unreasonable but that the expectation of continued life together should be unreasonable. Within about a year of the advent of the 1969 Act, the error inherent in the shorthand description was exposed: *Katz v Katz* [1972] 1 WLR 955, 960.

Indeed, in *Bannister v Bannister* (1980) 10 Fam Law 240, in which the Court of Appeal allowed a wife's appeal against the dismissal of her petition for divorce, Ormrod LJ observed at p 240:

> "The learned judge, I am afraid, fell into the linguistic trap which is waiting for all of us when we speak of 'unreasonable behaviour' in relation to section 1(2)(b) cases. The basis of this subsection is not 'unreasonable behaviour' but behaving in such a way that the petitioner 'cannot reasonably be expected to live with the respondent', a significantly different concept. It is difficult to find an alternative shorthand expression for this subsection, so we all talk, inaccurately, of 'unreasonable behaviour'."

The Judgment

38. In the course of his short judgment in the present case the judge referred five times to "unreasonable behaviour". Questions arise. Was he looking for behaviour objectively worse than what the law requires? What lay behind his search for "beef"? Was he looking for behaviour for which he might "blame" Mr Owens, contrary to the decision in the *Thurlow* case cited at para 24 above? Was he looking for behaviour of "gravity", contrary to the decision in the *Buffery* case cited at para 27 above? No doubt blameworthy or grave behaviour often makes it more likely that the third-stage evaluation under the subsection will be that an expectation of continued life together would be unreasonable. But such is not a pre-requisite of a successful petition under the subsection.

39. It seems, however, that the judge gave himself a correct self-direction, so far as it went. He said:

> "In determining the question whether this respondent has behaved in such a way I apply an objective test - what would the hypothetical reasonable observer make of the allegations - but with subjective elements. I have to take into account the individual circumstances of the spouses and the marriage …"

The judge then proceeded to repeat the question which Dunn J had asked himself in the *Livingstone-Stallard* case, set out at para 23 above.

40. The President described the judge's self-direction as "entirely adequate". But did it go far enough? Did he remind himself of the need, noted in the *Stevens* case

cited at para 25 above, to consider the behaviour of Mr Owens as a whole? Or equally, of the need to consider the effect of all of it on Mrs Owens cumulatively? In *Jamieson v Jamieson* [1952] AC 525 the appellate committee reversed the decision of the Court of Session that a wife's allegations of cruelty should be struck out as irrelevant and insufficient. Lord Normand suggested at pp 535-536:

> "that it does not do justice to the averments to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel … The relationship of marriage is not just the sum of a number of incidents …"

Equally, as Hallett LJ pointed out in the present case, behaviour which the other spouse may consider trivial in the context of a happy marriage may bear more heavily upon a spouse trapped in an unhappy marriage. In his judgment the President noted that the judge had failed to make explicit reference to the cumulative effect of Mr Owens' behaviour on Mrs Owens, of which indeed she had given copious evidence. He said, however, that once he had surveyed the whole of the judge's judgment, including in particular the reference to "the whole of the circumstances" in the question first articulated by Dunn J, he had become satisfied that the judge had paid sufficient regard to the cumulative effect of it on Mrs Owens, whom he had acknowledged to be more sensitive than most wives. But had the judge heard enough evidence to be able to appraise the cumulative effect on Mrs Owens of the conduct, taken as a whole, upon which she relied? How could he find the three examples of behaviour to which he made specific reference to be no more than isolated incidents, not part of a persistent course of conduct, in circumstances in which it had been agreed to be convenient to place so many other pleaded examples, albeit verified in writing by Mrs Owens, to one side? This, says Mrs Owens, represents appealable error even in this court.

41. It was this court itself which, at the hearing, raised with counsel another possible cause for concern about the judgment. It is clear from the cases of *Stevens* and *Buffery*, cited in paras 25 and 27 above, that section 1 of the 1973 Act does not require the behaviour under the subsection to have caused the breakdown of the marriage. Nevertheless Mr Owens and his advisers energetically denied that any behaviour on his part had caused the breakdown of the marriage. In his witness statement Mr Owens twice averred that if, which he did not accept, the marriage had broken down, the breakdown had not been the result of his behaviour; and his counsel's skeleton argument before the judge spoke of the possibility "that the marriage was at an end but not due to [Mr Owens'] fault". This court's question to counsel was whether these no doubt innocent misrepresentations of the nature of the inquiry under the subsection had misled the judge into considering that Mrs Owens needed to establish that the alleged behaviour of Mr Owens had caused the marriage to break down. For, in adverting briefly to the allegation in the petition, never particularised, that Mr Owens had prioritised his work over life at home, the judge

first pointed out that Mr Owens had in effect been retired for many years; and then, in a passage which Mr Dyer QC on behalf of Mr Owens acknowledged to be unfortunate and difficult for him to interpret, continued:

> "The idea that the lifestyle, whatever it may have been, now contributes to the breakdown of the marriage is fanciful. The ground is no more than a conventional form of words with no application to the present or the breakdown of the marriage at all."

Moreover, at the end of his judgment, the judge explained his crucial conclusion in the following few words:

> "I find no behaviour such that the wife cannot reasonably be expected to live with the husband. *The fact that she does not live with the husband has other causes.* The petition will be dismissed." (italics supplied)

The facts remain, however, that Mr Marshall on behalf of Mrs Owens never argued in the Court of Appeal that the judge had fallen into this possible error; that the Court of Appeal did not see fit to raise it of its own motion; and that, even after it was raised at the hearing in this court, Mr Marshall did not squarely rely on it. The judge has long experience of family law (albeit, as he said, that he had previously tried only one defended suit for divorce) and the view must have been taken that the quoted passages represent too weak a foundation for a conclusion that he had fallen into elementary error. In such circumstances it is inappropriate for this court further to consider the point.

42. There is no denying that the appeal of Mrs Owens generates uneasy feelings: an uneasy feeling that the procedure now conventionally adopted for the almost summary despatch of a defended suit for divorce was inapt for a case which was said to depend on a remorseless course of authoritarian conduct and which was acknowledged to appear unconvincing if analysed only in terms of a few individual incidents; an uneasy feeling about the judge's finding that the three incidents which he analysed were isolated in circumstances in which he had not received oral evidence of so many other pleaded incidents; and an uneasy feeling about his finding that Mrs Owens had significantly exaggerated her entire case in circumstances in which Mr Owens had not disputed much of what she said.

43. But uneasy feelings are of no consequence in this court, nor indeed in any other appellate court. The advantages of the judge in reaching the relevant

conclusions need no rehearsal. The complaints of Mrs Owens about his judgment have already been analysed and dismissed by members of the Court of Appeal who have unrivalled authority in this sphere. Permission for her further appeal to this court was founded upon a novel interpretation of the subsection which at the hearing - and in the event correctly - she abandoned. As the above paragraphs testify, this court is not precluded from proceeding to address her remaining complaints, in particular in relation to the judge's evaluation at the third stage of the inquiry; but in the above circumstances it is most unlikely to be appropriate for it to intervene.

The Conclusion

44. The appeal of Mrs Owens must be dismissed. She must remain married to Mr Owens for the time being. Were she to continue to live apart from Mr Owens until 2020, he would surely have no defence to a petition then brought under section 1(2)(e) of the 1973 Act on the basis that they had lived apart for a continuous period of five years.

45. Parliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances.

LADY HALE:

46. I have found this a very troubling case. It is not for us to change the law laid down by Parliament - our role is only to interpret and apply the law that Parliament has given us.

47. Lord Wilson has explained very clearly what that law requires. He sets out the three stages of the inquiry at para 28. He explains at para 30 that the application of that inquiry to the facts of an individual case is likely to change with the passage of the years. Expectations of whether it is reasonable to expect one spouse to continue to live with the other, in the light of the way the latter has behaved and its effect upon the former, have indeed changed over the 47 years since the Divorce Reform Act 1969 came into force. As Lord Wilson observes at para 34, the social norm which has changed most obviously over that time is the recognition that marriage is a partnership of equals. Indeed, the equality of the sexes is now also a legal norm, reflected in developments not only in family law but also in equality and anti-discrimination law.

48. With that statement of the law in mind, I have several misgivings about the trial judge's judgment in this case. The first is his repeated reference to

"unreasonable behaviour". This is a convenient but deeply misleading shorthand for a very different concept. And it can so easily lead into error. In particular, it can lead to a search for "blame", which is not required. Indeed, those of us who have made or supported proposals for reform of the law over the years may not have helped by referring to "no-fault" divorce when the current law does not require fault. Worse still, referring to "unreasonable behaviour" can also lead to a search for who is the more to blame, which is also irrelevant. The Divorce Reform Act 1969 swept away the concepts in the old law relating to matrimonial "offences" which did make an attempt, however crude, to work out who was the more to blame. The current law simply does not do this. It is, for example, no answer to a petition based on adultery that the petitioner had been unfaithful and unloving for years or that the couple had not lived together for a long time. We should be referring to the "facts" in section 1(2)(a) and (b) as "conduct-based" rather than "fault-based".

49. My second misgiving is that the judge appears, at least from the passages quoted by Lord Wilson in para 41, to have thought that the behaviour complained of had to be the cause of the breakdown of the marriage. That is, as Lord Wilson has explained, simply not the law. The marriage has to have broken down irretrievably. One of the five "facts" prescribed in section 1(2)(a) to (e) of the 1973 Act has to be proved. But the Act does not require that there be a causal connection between them. It is, for example, most unlikely that the fact that a couple have been living apart for five years (fact (e)) is the cause of the breakdown of their marriage: it will have broken down for other reasons - often attributable to the petitioner - and long ago.

50. But my third misgiving is the most troubling of all. This was a case which depended upon the cumulative effect of a great many small incidents said to be indicative of authoritarian, demeaning and humiliating conduct over a period of time. Those who have never experienced such humiliation may find it difficult to understand how destructive such conduct can be of the trust and confidence which should exist in any marriage. There is an analogy here with constructive dismissal cases in employment law. As Langstaff J (President) in the Employment Appeal Tribunal has put it (in *Ukegheson v London Borough of Haringey*, UKEAT/0312/14/RN, at paras 30-31):

> "The meaning that correspondence or observations have when they are directed by one person to another may often depend very much on the context of the relationship between the two ... [Looking at incidents in isolation] is perhaps to fail to see the eloquence of the story painted by the whole of the series of events and to focus instead upon events taken individually as though they were in silos. In a constructive dismissal case arising out of a poisoned relationship between parties, what matters is the totality of the picture rather than any individual point along the way."

The problem, as Lord Wilson has shown, is that this hearing was not set up or conducted in a way which would enable the full flavour of such conduct to be properly evaluated. But what are we to do about it?

51. This court is not a court of error. If the law is clear, permission to appeal is not normally given, either by this court or the court below, simply because the law may have been misapplied in the individual case. In this case, as Lord Wilson has explained, permission to appeal was given because it was argued that it was the effect of the respondent's behaviour, rather than the behaviour itself, which should make it unreasonable to expect the petitioner to live with the respondent. That argument is no longer pursued.

52. However, permission having been given to come to this court, we would in my view be failing in our duty if we were not to correct any error into which we found that the courts below had fallen. I am concerned that the trial court did indeed fall into error in the three respects identified earlier. Are we then to do nothing? Or are we to allow the appeal? And if so can we decide it ourselves or should we send it back to be heard again? Given that the principal problem is that the hearing did not enable the court to evaluate the petition as a whole and in context, it seems to me that the case would have to go back for a rehearing. We cannot assume that a properly instructed and constructed hearing would inevitably lead to a decree being granted.

53. In my view therefore, the correct disposal of this appeal would be to allow the appeal and send the case back to be tried again. However, in the appellant's written case, it was argued that "it cannot be in the interests of the parties or in accordance with the overriding objective for there to be a further contested hearing" (para 94). Orally, counsel viewed such a prospect with "dread". It would place the appellant in an unenviable dilemma, given that, in February 2020, five years will have elapsed from their separation and, should the petitioner still wish to be divorced, it is difficult to see that there would be any obstacle standing in her way.

54. I am therefore reluctantly persuaded that this appeal should be dismissed.

LORD MANCE:

55. I agree that this appeal should be dismissed. As to the law, I agree with paras 21-37 of Lord Wilson's judgment. As to its application to the facts, my reasons can be put in like terms to those contained in Lord Wilson's summary in para 43. I also agree with his conclusions and observations in paras 44-45.

56. The judge stated and explained the legal test correctly in his para 10. His references, when summarising or referring to the evidence, to allegations of "unreasonable behaviour" adopted an inaccurate shorthand which is evidently, though regrettably, common in the profession. But there is no reason to think that the judge did not ultimately apply the correct test to the allegations. He expressly applied it when reaching his conclusions in his para 15.

57. The judge, in the course of explaining the correct test in para 10, identified the need to take into account the individual circumstances of the spouses and the marriage - "the whole of the circumstances and the characters and personalities of the parties". He went on find that "all" of the allegations were at best flimsy, and, having heard both parties give evidence, that Mrs Owens had exaggerated their context and seriousness to a significant extent. He then considered various batches of allegations and three allegations which counsel for Mrs Owens ranked foremost in terms of seriousness. He concluded that these were all insignificant and that much the same could be said of all the other allegations and of Mrs Owens' case generally. It appears fanciful to suppose that it would have made any difference to the judge's assessment if he had also expressly put and answered the question whether, even if the allegations were individually insignificant, they were cumulatively significant. The judge clearly formed the view that there was nothing in the case overall.

58. I share Lord Wilson's unease in paras 13-19 and 42 about an apparently conventional procedure, whereby this defended divorce petition was listed for what, in common law terms, might be regarded as a relatively short period - in this case one day. But it was Mrs Owens who through counsel submitted that even that period was not required, and that only half a day would suffice, while Mr Owens' case was that three days were required. The case was conducted, and the judge was invited to decide it, on the basis of his direction for a hearing of one day, not appealed as such. I do not think that we can now interfere to say that it was not possible in the circumstances to have a fair determination or for the judge to reach the overall conclusions which he did.

59. Finally, I do not think that the judge's judgment is open to the construction (raised with counsel by the Supreme Court) that he thought that the husband's conduct had to cause the breakdown. Considering the allegation that the husband's working lifestyle had caused Mrs Owens "much unhappiness and made her feel unloved", the judge said (para 7) that:

> "The idea that the lifestyle, whatever it may have been, now contributes to the breakdown of the marriage is fanciful."

In his conclusions in para 15, he said:

> "I find no behaviour such that the wife cannot reasonably be expected to live with the husband. The fact that she does not live with the husband has other causes."

60. The judge's use of the word "contributes" in the first passage is consistent with his recognising that, even though the actual breakdown may have had some other cause, the husband's behaviour may still have been such that the petitioner could not be expected to live with him. After expressly rejecting, in the first sentence quoted above from para 15, Mrs Owens' case that the husband's behaviour had been such, the judge was in my view doing no more in the second quoted sentence than responding to the obvious factual or evidential question: if the husband's conduct was not such as the wife could not reasonably be expected to put up with, why is she living apart from him? There is to my mind no inference that he thought that the husband's behaviour must not only be such that the wife could not reasonably be expected to live with him as a matter of fact, but also that it must as a matter of law be the actual reason why she had determined to live, or was living, apart from him.