

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

SIMONE BOW

Appellant

and

PAUL JOHN

Respondent

SKELETON ARGUMENT
ON BEHALF OF THE RESPONDENT

Introduction

1. This is the Appellant's appeal against the decision of the Court of Appeal (Civil Division) that the Divisional Court had been correct to make a decree nisi on the ground that her marriage to the Respondent had irretrievably broken down as per s1(2)(a) of the Matrimonial Causes Act 1973 ('MCA'). In the alternative, the Appellant contends that the MCA is incompatible with the European Convention on Human Rights ('ECHR') such that a declaration of incompatibility should be made pursuant to s.4 Human Rights Act 1998 ('HRA').
2. The following documents are relied upon in resisting this appeal:

Statutory Provisions:

The European Convention on Human Rights

The Matrimonial Causes Act 1973

Authorities:

Cleary v Cleary [1974] 1 WLR 73 (the conditions set out in s.(1)(2)(a) of the matrimonial causes act are not causally linked)

Balfour v Balfour [1919] 2 KB 571 (there cannot be an agreement if there was no intention to create legal relations)

Granatino v Radmacher (formerly Granatino) [2010] UKSC 42 [2011] 1 AC 534 (the facts are distinguishable in that the present matter does not relate to the regulation of financial affairs)

Dennis v Dennis [1955] P. 153 (adultery requires there to be some consensual sexual intercourse, involving some degree of penetration)

M v Secretary of State for Work and Pensions [2006] UKHL 11 [2006] 2 AC 91 (a tenuous link to Article 8 rights is not sufficient to fall within its ambit)

AL (Serbia) v Secretary of State for the Home Department; R (Rudi) v Secretary of State for the Home Department [2008] UKHL 42 [2008] 1 WLR 1434 (intent and motive are relevant to a consideration of whether a discriminatory measure is proportionate)

Background

3. The Appellant and the Respondent were married in 2015. Throughout the marriage they had an agreement that they could respectively have sex with other people as long as it was only when they were not in the same country (e.g. when one of them was on holiday).
4. The wife, the Appellant, had sexual intercourse with men on a fairly frequent basis both before and after the wedding. The husband, the Respondent, had only occasional encounters with other men.
5. The Respondent has fallen in love with a woman (with whom he has not had sex) and would like to divorce the Appellant. To that end, the Respondent initiated a text

conversation with the Appellant in which the Appellant confirmed that she had recently had penetrative sex with another man. It is accepted by the parties that this sexual act met the requirements to be considered adultery in accordance with Dennis v Dennis [1955] P. 153

6. Following that conversation, the Respondent moved out of their home and filed a petition for divorce on the ground that the marriage had irretrievably broken down as proven by the fact in s1(2)(a) MCA (the ‘adultery’ fact).
7. The Appellant defended the petition at first instance on the basis that the adultery fact in s1(2)(a) MCA was not made out because the parties had an agreement which effectively excluded the possibility of adultery. The learned judge rejected this argument and granted a decree nisi.

The grounds of appeal

8. Her appeal having been rejected by the Court of Appeal, the Appellant now appeals to the Supreme Court on the same grounds. She appeals on two bases:
 - (a) (**‘the first ground’**) that the judge at the first instance was wrong to conclude that the marriage had irretrievably broken down on the basis of the fact in s1(2)(a) of the Matrimonial Causes Act 1973 in circumstances where the petitioner had consented in advance to the sexual act with a person outside of the marriage, and consequently should not have made a decree nisi;
 - (b) (**‘the second ground’**) in the alternative, if the judge was not wrong in her interpretation of the Matrimonial Causes Act 1973 then a declaration of incompatibility should be made due to a breach of Article 14 in relation to Article 8 of the European Convention on Human Rights. She had been discriminated against either:
 - (i) on the basis of her sexual orientation (in that if she had been bisexual or a lesbian and had had sexual relations with a woman other than her spouse this would not have been adultery), or

- (ii) on the basis of her status as a wife rather than a civil partner (as had she been a civil partner the ground of adultery would not have been available).

The first ground: whether the marriage had irretrievably broken down

The Matrimonial Causes Act 1973

- 9. The Judge was correct to conclude that the marriage had irretrievably broken down, as the conditions of s(1)(2)(a) have been met:
 - (a) adultery has been committed following the sexual act committed by the Appellant with another man; and
 - (b) the Respondent finds it intolerable to live with the Appellant since he has fallen in love with another woman.
- 10. These two requirements are independent of each other: *Cleary v Cleary* [1974] 1 WLR 73 [at 76]. Accordingly, it is not necessary that the Respondent should find it intolerable to live with Ms Bowe in consequence of the adultery.

The agreement

- 11. The agreement cannot be used as evidence of the 'status quo' of the marriage. The mutual acceptance of adultery by both parties does not negate the irretrievable breakdown of the marriage.
- 12. Moreover, the agreement itself was not a binding agreement, since there was no intention to create legal relations as per *Balfour v Balfour* [1919] 2 KB 571 [at 578-579]. The agreement was merely a mutual promise in respect of the domestic relationship between the parties.

13. Alternatively, even if the court does consider it to be binding, it should not in any event give weight to such an agreement in considering whether there has been an irretrievable breakdown in the marriage.

Radmacher v Granatino

14. While ante-nuptial agreements were held to be effective in *Granatino v Radmacher* (formerly *Granatino*) [2010] UKSC 42 [2011] 1 AC 534, that decision should be distinguished from the present case:
 - (a) the issue in the present case relates to the grounds of divorce rather than ancillary relief; and
 - (b) the agreement in question was not a non-financial one.
15. Moreover, extending the applicability of *Radmacher* to such non-financial ante-nuptial agreements would be contrary to Parliamentary intention, as the legislation has clearly stated that adultery should be considered grounds for divorce.

The second ground: compatibility with the ECHR

16. It is common ground between the parties that the sexual act described by the Appellant meets the requirements to be considered adultery in accordance with *Dennis v Dennis* [1955] P 153. The Appellant contends that this is discriminatory, and accordingly a breach of Article 14 ECHR, in that:
 - (a) ('the sexual orientation basis') if she had been a lesbian and had had sexual relations with a woman other than a spouse, this would not have been adultery;
 - (b) ('the marital status basis') if she had been in a civil partnership, rather than a marriage, the ground of adultery would not have been available to the Respondent.

The interrelationship of the two bases

17. The two bases, which the Appellant contends indicate discriminatory treatment, are intertwined:
 - (a) the legal definition of adultery is based upon the historical and wholly heterosexual concept of sexual intercourse involving penile penetration of the vagina: see *Dennis v Dennis*;
 - (b) this definition of adultery does not encompass any form of homosexual sexual act;
 - (c) civil partnerships are restricted to same-sex couples; and
 - (d) there is accordingly an extremely limited scope for any 'adultery ground' in the Civil Partnership Act 2003.

18. As highlighted by the Appellant, the common law has instead developed the use of ground s.1(2)(b) MCA, 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent' to provide for the fact of 'homosexual adultery' as a ground of divorce. It is only on the most extreme facts, such as those which have founded this present appeal, that the two provisions would not have an identical applicability upon a petition for divorce.

Article 14 ECHR

19. The right to have one's partner constrained in their grounds for divorce (or dissolution in the case of a civil partnership) has not yet been codified in the ECHR. Nor can the Appellant reasonably claim that her Article 8 rights under the convention have been infringed. Rather the Appellant must rely on Article 14 to demonstrate that she has been subject to discriminatory treatment within the ambit of those Article 8 rights.

20. A claim of discrimination contrary to Article 14 will be made out if the Appellant can demonstrate that she has:

- (a) been treated differently within the ambit of her Article 8 rights;
- (b) that different treatment has arisen out of a prohibited ground; and
- (c) the state is unable to provide a reasonable and objective justification for such treatment.

21. As to (b), it is conceded that any discrimination suffered by the Appellant has arisen out of her sexual orientation, a prohibited ground. However, it is denied that the nature of this alleged discrimination falls within the ambit of the Appellant's Article 8 rights. Further and in the alternative, any discrimination falling within the ambit of those Article 8 grounds lies within the state's margin of appreciation and may be reasonably and objectively justified.

Within the ambit of her Article 8 rights

22. While it is conceded that the Appellant's relationship with the Respondent falls within the bounds of family life, the right conferred by Article 8 is a right to 'respect' for one's family life, not a right to that family life per se.
23. Any link between the historical definition of adultery and the government's 'respect' for the Appellant's heterosexual family life is tenuous however. As per the House of Lords in *M v Secretary of State for Work and Pensions* [2006] UKHL 11 [2006] 2 AC 91, a tenuous link to the core principle of 'respect' for family life is not sufficient for treatment to be regarded as falling within the ambit of Article 8: see Lord Bingham [at 4-5]; Lord Nicholls [at 14]; Lord Walker [at 60; 87-88]; Lord Mance [at 124].
24. Moreover, it is unclear that this differing treatment is in itself discriminatory such that it fails to accord respect. The Appellant has not been criminalised, threatened or humiliated as a result of her heterosexual orientation. She is complaining simply because she would prefer that her husband could not divorce her.

A reasonable and objective justification

25. In the alternative, if the court were to find that the definition of adultery and its repercussions does fall within the ambit of the Appellant's Article 8 rights, such a definition falls within the court's margin of appreciation in pursuit of a legitimate aim, namely the need for legal certainty.

26. As was noted above, the definition of adultery is intertwined with the definition of sexual intercourse. Such a definition could only be altered (and the slight disparity between the treatment of heterosexual and homosexual relationships as regards divorce grounds removed) if either the definition of adultery was decoupled from that of sexual intercourse, or the definition of sexual intercourse was itself altered. Either proposition should be viewed as deeply unattractive:
 - (a) to decouple these definitions would remove any legal certainty currently attached to the term 'adultery'; the courts would then face the unenviable task of determining which of a myriad of sexual activities could be deemed adulterous, most likely on a case-by-case basis;
 - (b) to alter the definition of sexual intercourse instead would have extremely far-reaching and potentially unwelcome ramifications in terms of both the civil and the criminal law.

27. Rather than affecting such change, the current legislative scheme should instead be preferred as striking a fair balance between the community's need for legal certainty and the equal treatment of differing sexual orientations given the usual availability of a 'homosexual adultery' based ground for divorce under s.1(2)(b) MCA and comparable sections of the Civil Partnership Act 2003. Indeed:
 - (a) as noted above it is only on the most extreme facts, such as those in the present case, where 'homosexual adultery' is not incorporated within s.1(2)(b) MCA;

- (b) this differing treatment is not the result of any deliberate targeting: see *AL (Serbia) v Secretary of State for the Home Department*; *R (Rudi) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 but rather the law's historical evolution upon a heterosexual conception of relationships.

CONCLUSION

28. For the reasons set out above, the court is asked to find for the Respondent on the basis that the judge at first instance was entitled to find that the marriage had irretrievably broken down in light of the adultery fact and that the Matrimonial Causes Act 1973 is not incompatible with the European Convention on Human Rights.

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