THE STATE OF DIVORCE LAW

OWENS v Owens [2018] UKSC 41 is a landmark case that has drawn a great deal of public attention to the current legal framework for divorce in England and Wales, not least on account of the fact that what began as a simple divorce petition here culminated in the Supreme Court's pronouncement that the parties "must remain married for the time being" (at [44]). The case raises fundamental questions about the state of divorce law and, in particular, about whether it should be possible for parties to be compelled by the state to remain in an unhappy marriage. As such, it has intensified the broader and ongoing debate about the reform of divorce law in England and Wales; and within a matter of weeks of the Supreme Court giving its judgment in this case, the Government had launched a public consultation on the reform of the legal requirements for divorce.

Mr. and Mrs. Owens were married in 1978. In February 2015, Mrs. Owens moved out of the matrimonial home; and in May 2015, she issued a petition for divorce. Under Section 1(1) of the Matrimonial Causes Act 1973 [the MCA], there is only one ground on which a petition for divorce may be presented to the court: "that the marriage has broken down irretrievably". Section 1(2) of the MCA stipulates that the petitioner must satisfy the court of one or more of five facts for it to hold that the marriage has broken down irretrievably. These include, in particular, the behaviour by the respondent in such a way that the petitioner cannot reasonably be expected to live with the respondent in section 1(2)(b). This fact is by far the most commonly relied-upon fact in the divorce petitions of opposite-sex couples (Office for National Statistics, *Divorces in England and Wales: 2017* (September 2018), Part 6), and so it was also in Mrs. Owens" case. The statement of her case was that Mr. Owens had prioritised his work life over their home life; that he had not treated her with love, attention, or affection; that his mood swings caused distressing and hurtful arguments; that he had been unpleasant and disparaging about her in front of others and that she had felt upset and embarrassed about this; and that for years they had been living separate lives under the same roof and were now living apart (*Owens v Owens* [2017] EWCA Civ 182, at [4]).

Mr. Owens denied that the marriage had broken down irretrievably, and he proceeded to defend the suit. Defended divorces are incredibly rare: as pointed out in a recent study, fewer than 1% of divorce petitions are formally defended every year, and fewer still reach a final hearing (L. Trinder and M. Sefton, *No Contest: Defended Divorce in England and Wales*

(London 2018), 25-27). The case of Mr. and Mrs. Owens was accordingly already highly unusual in being a defended divorce. That the defence proved successful – as it did when the case came before Judge Tolson Q.C. in January 2016 – made it all the more so.

Judge Tolson dismissed Mrs. Owens' petition, casting it as "hopeless", "anodyne", and "scraping the barrel" (*Owens v Owens* [2017] EWCA Civ 182, at [42]). Although he found as fact that the marriage here had broken down, he found that Mrs. Owens had failed to prove that Mr. Owens had behaved in such a way that she could not reasonably be expected to live with him. Section 1(2)(b) of the MCA is, importantly, approached objectively and subjectively: in assessing what is reasonable, the court will consider the history of the marriage and the particular spouses. In dismissing Mrs. Owens' petition, Judge Tolson described the 27 specific examples of behaviour that Mrs. Owens had invoked in elaborating her petition as "at best flimsy" (at [46]), and he considered that the three most serious examples submitted by Mrs. Owens – and that largely involved allegations of Mr. Owens publicly disparaging her – were "isolated incidents" and not part of "a consistent and persistent course of conduct" (at [49]). Rather, they were "merely examples of events in a marriage which scarcely attract criticism of one party over the other", and in a context also in which Mr. Owens, he found, was "somewhat old-school" and Mrs. Owens was "more sensitive than most wives" (at [49]).

Mrs. Owens appealed the refusal of Judge Tolson to grant her a decree nisi of divorce on grounds of process (that the Judge had not been thorough enough with respect to the 27 examples of behaviour, that he had failed to assess her subjective characteristics, and that he had failed to assess the cumulative impact on her of Mr. Owens' behaviour) and on the ground that the law here was inconsistent with her rights under the European Convention on Human Rights. The Court of Appeal dismissed the appeal, holding that Judge Tolson had applied the law correctly and that his conclusions could not be interfered with. As Munby P. pointed out, this meant that unless Mrs. Owens could bring herself within the separation provisions of Section 1(2)(d) and (e) of the MCA (two years' separation with consent and five years' separation, respectively), "she must remain trapped in her loveless marriage" (at [84]). That was the law that the trial judge and the Court of Appeal had been obliged to apply, despite its unhappy consequences; for "Parliament has decreed that it is not a ground for divorce that you find yourself in a wretchedly unhappy marriage" (at [84]).

The case then reached the Supreme Court, with permission to appeal against the Court of Appeal's order having been granted to Mrs. Owens on the basis that her principal ground of

appeal would raise a novel issue about the interpretation of Section 1(2)(b) of the MCA. This was 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" (*Owens v Owens* [2018] UKSC 41, at [3]). In the event, the point was dropped at the hearing; and it was held that, as per the authorities and as the Court of Appeal had held, the correct approach to Section 1(2)(b) was a three-stage inquiry: "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" (at [28]). The latter evaluation was to be "informed by changing social norms" (at [30]), including that of equality between the sexes (at [34]).

This being the legal position, Mrs. Owens' appeal was dismissed, despite the "uneasy feelings" that it engendered (at [42]). Concern was expressed, in particular, about whether the trial judge had engaged sufficiently with the question of the cumulative impact of Mr. Owens' behaviour, taken as a whole, on Mrs. Owens; as Lady Hale emphasised in her separate opinion, "[t]his 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" and there was a need to understand just "how destructive such conduct can be of the trust and confidence which should exist in any marriage" (at [50]). Lady Hale's initial preference had in fact been for the case to go back for a rehearing; she was only persuaded otherwise on account of the arguments that had been made that it was in nobody's interest for there to be a further contested hearing and that by February 2020 Mrs. Owens would be able to petition for divorce under Section 1(2)(e) (five years' separation). Lord Wilson meanwhile concluded his leading judgment with an invitation to Parliament: "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" (at [45]).

In September 2018, the Government launched a public consultation on its proposals for the reform of divorce law (Ministry of Justice, *Reducing family conflict: Reform of the legal requirements for divorce* (September 2018)). There are two main strands to the proposals: the

replacement of the five facts currently set out in Section 1(2) of the MCA with a notification process whereby one or both parties notify the court of the irretrievable breakdown of their marriage; and the removal of the ability of a spouse to defend the divorce. The consultation closed in mid-December 2018 and the Government's response is due in March 2019. We shall have to wait and see, therefore, where divorce law in England and Wales goes next. The contribution of *Owens v Owens* in this context has been to heighten the urgency of the reform debate by intensifying attention to two fundamental questions that any divorce law must address. What is the point of divorce law? And who should decide on whether a marriage has ended: the parties to that marriage or the state?

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