Neutral Citation Number: [2024] EWHC 1197 (Fam)

Case No: BV22N00173

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE MATRIMONIAL CAUSES ACT 1973
IN THE MATTER OF THE HUMAN RIGHTS ACT 1998
IN THE MATTER OF THE SENIOR COURTS ACT 1980

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2024

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

AP	**Applicant**
- and -	
JP	**1st Respondent**
-and-	
SECRETARY OF STATE FOR JUSTICE	**2nd Respondent**

- -

P v P (Transgender Applicant for Decree of Nullity: Human Rights)

- -

Charles Hale KC, Michael Edwards and **Tom Tabori** (instructed by **Penningtons Manches Cooper LLP** *all acting pro bono*) for the Applicant
The First Respondent was present but not represented
Tom Cross (instructed by the **Government Legal Department**) for the **Secretary of State for Justice**
Sarah Hannett KC (appointed by **HM Attorney General**) Advocate to the Court

Hearing dates: 25-26 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in public.
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 parties must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court. A Reporting Restriction Order has been made.

The Honourable Mr Justice Cobb :

Introduction

1. By application dated 26 April 2022 AP seeks a decree of nullity in relation to his purported marriage in 2009 to JP, the First Respondent. This application was foreshadowed by the judgment concerning the same parties which I handed down more than four years ago: *AP v JP* [2019] EWHC 3105, *sub nom P v P (Transgender Applicant for Declaration of Valid Marriage)* (hereafter '*P v P*'). By his earlier application, issued in 2018, AP had sought a declaration that his 2009 marriage to JP was valid. For the reasons which I discussed in *P v P*, I held that the marriage was void.

2. Within these current proceedings, as in the previous proceedings, I invited the Attorney-General to appoint an Advocate to the Court, and she has helpfully done so. In February 2023, Ms Hannett KC was so appointed, and in the following month she delivered her Opinion. She has confirmed her Opinion, and commented briefly on the further arguments, in a recent note.

3. Following the delivery of the Advocate's Opinion, and in anticipation of a final hearing of the application (then listed for a date in July 2023), counsel for AP (Mr Hale KC, Mr Edwards and Mr Tabori, who shared the task of the oral advocacy) filed and served a Skeleton Argument which raised an explicit claim under section 3 and section 4 of the Human Rights Act 1998 ('HRA 1998'), asserting incompatibility of domestic matrimonial legislation with the rights of the Applicant under the European Convention of Human Rights ('ECHR'). In light of this, I gave the Crown the opportunity to intervene. In September 2023 it exercised its right to do so. I therefore joined the Secretary of State for Justice as a Second Respondent pursuant to section 5 HRA 1998 and rule 29.5(4) Family Procedure Rules 2010 ('FPR 2010'). The Secretary of State instructed Mr Cross. The application was re-listed.

4. AP's application for the decree of nullity is supported by JP, and opposed by the Secretary of State for Justice. The application is not supported by the Advocate to the Court.

5. On the first day of the hearing, I made a Reporting Restriction Order in order to protect the anonymity of the Applicant and First Respondent. I explain my reasoning for this order at §87 to §97 below.

The issues

6. It is common ground between the parties that as a matter of domestic law:

   i) It is not necessary for me to grant a decree of nullity in order to establish that the marriage celebrated between AP and JP in 2009 was void. I have in fact already made this clear in *P v P* at [74];

   ii) In any event, the court has no jurisdiction, under section 11 of the Matrimonial Causes Act 1973 ('MCA 1973'), to grant a decree of nullity in respect of this particular marriage. There is no longer provision within section 11 MCA 1973 for a decree of nullity to be granted where the parties were of the same legal sex (as these parties were) at the time of the ceremony of marriage.

7. The dispute between the parties has focused on AP's rights under the ECHR and their application to these facts. Thus, the specific questions which arise for determination are:

   i) Can section 11 of the MCA 1973 be read compatibly with Articles 8, 12, 14, and Article 1 of Protocol 1 ('A1P1') of the ECHR (pursuant to section 3 of the HRA 1998) so as to include a right for AP to apply for a decree of nullity? AP's proposal is that a transitional provision should be read into section 11 MCA 1973, so that section 11(c) (currently omitted) should be deemed to read "(c) for marriages celebrated before 13 March 2014, that the parties are not respectively male and female";

   If section 11 MCA 1973 cannot be 'read down' in that way:

   ii) Whether a declaration of incompatibility can or should be issued under section 4 of the HRA 1998 in respect of section 11 MCA 1973?

   Alternatively,

   iii) Whether section 11(a)(iii) MCA 1973 can be interpreted so as to apply to these facts, namely that AP and JP intermarried in disregard of certain requirements as to the formation of marriage.

Factual background

8. AP is now sixty eight years of age. He was born female. In early 1990, when he was thirty four years old, he underwent gender re-assignment surgery, transitioning from female to male. On 9 July 1990, he was provided with a letter from his general medical practitioner confirming his gender reassignment. Nineteen years later, on St Valentine's Day 2009, AP married JP. At the time of the marriage JP was a woman having been born a woman; she is now aged seventy two. I rehearsed the relevant background further in *P v P* as follows:

> "[2] … At the time of the marriage in 2009, AP had not obtained a Gender Recognition Certificate (referred to in this judgment as a 'GRC'), and [AP]'s his birth certificate had not been changed; his birth certificate showed him still as a female.

> [3] In 2017, AP contacted the Department for Work and Pensions ('DWP') raising queries about his pension entitlement. He was advised that his marital status could not be recognised. Despite a letter from AP's general practitioner in 1990 confirming that AP had "now had surgery and other treatment for gender reassignment", he was still legally female and was so at the time he purported to enter into the marriage with JP. AP understood the advice from the DWP to be that if he wished the marriage to be recognised as lawful, he would have to either obtain a declaration of validity or he would need to 're-marry' her, but legally as a man.
>
> [4] AP therefore applied to the court to have the 2009 marriage declared lawful:
>
> > "… so that I can continue to remain married to my wife. I do not wish to have my marriage declared void. This would be emotionally very distressing for us both.""

9. The application for a declaration of the validity of the marriage was issued in 2018 under section 55 of the Family Law Act 1986 ("FLA 1986"). I considered the case in November 2019; AP and JP represented themselves. In my reserved judgment delivered shortly after the hearing, I set out my reasons for declaring the marriage void.

10. Very soon thereafter, AP applied for a decree of nullity. For reasons which are not clear to me this application was not processed administratively. AP applied again for the same relief in April 2022; this application was regrettably significantly delayed as it passed from the Divorce Centre in Bury St Edmunds to the Central Family Court, and then to me.

11. In the meantime, on 28 February 2022 AP had been issued with a Gender Recognition Certificate ('GRC'), recognising his legal sex as male. Section 9 of the Gender Recognition Act 2004 ('GRA 2004') provides that where a full GRC is issued to a person, the person's gender becomes for all purposes the acquired gender (so that if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman). "All purposes" includes marriage. Pursuant to section 9(2) of the GRA 2004 the acquired gender does not apply retrospectively. The grant of the GRC enabled AP to marry someone of the opposite sex to his acquired gender.

12. In the application now listed before me, AP asserted that he seeks the decree of nullity as "confirmation" that the 2009 marriage was void, so that he and JP "can legally marry". In his supporting witness statement, he indicated that he believed (he now accepts mistakenly) that he needed a decree of nullity in order to marry; he adds:

> "… we may want to obtain [a decree of nullity] because it is a legal document confirming the status of our (void) marriage … our void marriage is a part of our life story, and we feel we need the nullity order to close this chapter. [JP] and I have experienced such confusion and upset over the past five

> years, we need certainty and an acknowledgment of what has happened by way of a decree of nullity … We may need a nullity order in the future e.g. in order to be able to marry 'again' … or to provide as evidence if our union is queried by any authority… Most people or organisations will not understand why our original marriage certificate is now void, and it may be necessary to have a nullity order to explain this… I want to be granted a decree of nullity to bring finality to this five-year ordeal. We want the certainty of a binding legal document that confirms the legal status of our first marriage". (Emphasis by underlining added).

13. In his more recent supporting witness statement, AP goes on to assert that "the absence of a nullity order has impeded my right to marry"; he references the fact that having given formal notice in 2023 of his intention to marry JP, the relevant registrar/official needed some persuasion (by reference to the documents generated in the 2018-2019 proceedings) that the 2009 marriage was indeed void. AP adds:

> "A Registrar needs confirmation that a marriage is void and without a nullity order I have had to make significant disclosures about my personal life that I am very unhappy about, and that have invaded my privacy. I had to disclose my trans status, explain the details of my private life, detail my unsuccessful court application to have our first marriage declared valid, provide a copy of the judgment and evidence confirming that [JP] and I are the anonymised parties". (Emphasis by underlining added).

14. The necessary confirmation (referred to above) was indeed provided. On 24 July 2023, the General Register Office wrote to AP's solicitor acknowledging receipt of the anonymised judgment in *P v P* together with letters from the court which confirmed the identities of the parties. The letter continues:

> "We accept, as stated in the judgment in this case of 20/11/19, that the abovenamed parties' marriage on 14/02/2009 was void at it's inception."

The letter, materially, neither breaches personal confidences, nor reveals the reasons for the status of the void marriage.

15. On St Valentine's Day 2024, precisely fifteen years to the day since their first ceremony and one month before the hearing of this application, AP and JP lawfully married.

16. Finally, by way of background, AP has referred in his evidence to his wish to be able to "enjoy the statutory financial rights and provisions" which a decree of nullity would provide "to enable one or both of us to make financial claims arising from our void marriage". He goes on:

> "We are worried that there are other couples where one person is trans who married before the Same Sex Marriage Act without a Gender Recognition Certificate who have

> already or might find themselves unwittingly in the same situation as us … I want to highlight that the law is discriminatory and I want to protect others who may find themselves in our situation, including those who require a nullity order to access the financial remedies that they should be entitled to".

P v P [2019]

17. For the reasons set out in my earlier judgment, I reached the conclusion (see in particular *P v P* at [60] and [73]) that at the time of the marriage in 2009, AP must be treated as being legally a woman. As such, the marriage entered into between AP and JP was contracted in law between two women. At that time, section 11(c) MCA 1973 provided that such a marriage was void (and void from its inception – see [62] of *P v P*). As I had observed at [61]:

> "The effect of a void marriage was described by Lord Greene MR in *De Reneville v. De Reneville* [1948] P 100 (CA) as:
>
> > "… one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of a decree annulling it." (at p.111)".

18. A summary of my conclusions in *P v P* can be found at paragraph [73] of my judgment as follows:

> i) "In the absence of a GRC, under domestic law, AP's legal sex is and always has been female;
>
> ii) As such, domestic law regards the marriage entered into by AP and JP in 2009 as having been contracted by two legal women;
>
> iii) At the relevant time, a marriage between two persons of the same sex was void at its inception and the Court does not have the power to make the declaration sought under the FLA 1986;
>
> iv) The coming into force of the Marriage (Same Sex Couples) Act 2013 did not alter that position, as it does not have retrospective effect;
>
> v) The position in domestic law is not altered by anything in the jurisprudence of the ECtHR or the CJEU".

19. I went on to remark (at [74]) that section 55 of the FLA 1986 did not confer on the court a power to make a declaration that a marriage was void at its inception (see section 58(5)(a) ibid.) but I added that:

> "… in such cases the court may issue a decree of nullity (see section 58(6)). Whilst a decree of nullity is declaratory only, and cannot effect any change in the parties' status, there

> may be some advantages in these parties obtaining a decree: (i) it provides the parties with certainty, (ii) it is a judgment *in rem*, so that no-one may subsequently allege that the marriage is valid, and (iii) it empowers the court to make certain ancillary orders. It will be open to the parties now to apply for an order declaring their marriage a nullity; AP and JP have indicated at the hearing before me their intention to do so".

20. Materially, I added (at [75]):-

> "There is a potential impediment to this route. Having found that the marriage entered into between AP and JP is indeed void, if (as appears likely), AP and JP wish to apply for a decree of nullity, section 11 now (as amended by the M(SSC)A 2013) does not appear to empower the court to issue such a decree. Neither the MCA 1973, nor the M(SSC)A 2013, makes transitional provision for same sex couples who married prior to its implementation".

21. I suggested (at [76]) that the situation faced by AP and JP may give rise to issues under Articles 8 and/or Article 14 of the ECHR. If this were the case, I felt that the court may well need to consider whether section 11 of the MCA 1973 can be read compatibility with the ECHR pursuant to section 3 of the HRA 1998 and, if not, whether a declaration of incompatibility could or should be made under section 4 of the HRA 1998. I contemplated inviting further submissions from the Advocate to the Court, and giving due notice to the Secretary of State for Justice pursuant to the requirements of the legislation. This is, of course, exactly what has happened.

Legislative scheme: Matrimonial Causes Act 1973; Human Rights Act 1998

22. For ease in understanding the arguments and conclusions, it is I believe helpful to set out the relevant statutes. I turn first to section 11 MCA 1973 which provides as follows:

> **"Grounds on which a marriage is void.**
>
> 11. A marriage celebrated after 31st July 1971, other than a marriage to which section 12A applies, shall be void on the following grounds only, that is to say—
>
> (a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where—
>
> (i) the parties are within the prohibited degrees of relationship;
>
> (ii) either party is under the age of eighteen; or

(iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);

(b) that at the time of the marriage either party was already lawfully married or a civil partner;

(c) . . . . . .

(d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales."

23. Section 11(c) MCA 1973 was omitted by virtue of the Marriage (Same Sex Couples) Act 2013 ('M(SSC)A 2013'). This had provided that the marriage would be void if the "parties are not respectively male and female". This provision was in force at the time of the marriage of AP and JP in 2009 and they were caught by its terms. The provision was removed with effect from March 2014 when marriage between people of the same sex became lawful.

24. Section 3 of the HRA 1998 sets out the interpretative obligation within the Act, and is relied on in this case by the Applicant as the route by which I can or should 'read in' or 'read down' section 11 MCA 1973 in such a way as to give effect to his asserted right under the ECHR for a decree of nullity. The section provides:

"Interpretation of Legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

25. If it is not possible for me to 'read down' section 11 MCA 1973 in the way contended for, it is argued on behalf of AP that I should invoke section 4(1)/(2) HRA 1998 which reads:

"**Declaration of Incompatibility**

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility".

26. As to the establishment of rights, and their breach, I must consider section 6 HRA 1998 which provides:

"**Acts of Public Authorities**

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> > (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> >
> > (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
>
> > (a) a court or tribunal, and
> >
> > (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament".

27. This provision is buttressed by section 7(1) HRA 1998 which provides:

> "**Proceedings**
>
> A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> > (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> >
> > (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

Section 7(7) HRA 1998 provides important explanation:

> "(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act"

28. Article 34, referred to in section 7(7) above and which appears in Section II of the ECHR, provides that the court may receive applications from any person who claims "to be the victim of a violation" by one of the contracting parties of the rights in the ECHR or the protocols thereto. Guidance on the meaning of section 7 HRA 1998 is to be found in the case law of the European Court. It is relatively clear from the caselaw,

and from the way in which the submissions have been advanced before me, that the individual claimant must be able to claim:

i) To be personally and directly affected by the impugned measure such as to amount to a violation of their rights; in this way they are a 'direct victim'; or

ii) That they are at serious and imminent risk, or 'run the risk', of being directly affected by a violation of their rights; in this way, they are a 'potential victim'; or

iii) To be recognized as an 'indirect victim' who is directly affected by the violation of a third party's ECHR rights (i.e., a relative of a deceased victim), although an individual victim cannot claim in a representative capacity. The ECHR does not permit an *actio popularis* for the interpretation of the rights it contains or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the ECHR.

29. There are specific articles of the ECHR which are said to be engaged in this application, they are as follows:

i) *Article 8: Right to Respect for Private and Family Life*:

> (1) "Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

ii) *Article 12: the Right to Marry*:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right

iii) *Article 14: Prohibition of Discrimination*:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

iv) *The First Protocol, Article 1: ('A1P1'): Protection of Property*:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his

> possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

Akhter v Khan [2020]

30. Before turning to the detailed arguments raised by counsel in this application, it is convenient to consider first the judgment of the Court of Appeal (Sir Terence Etherton MR, King LJ and Moylan LJ) in *Akhter v Khan (AG & others intervening)* [2020] EWCA Civ 122; [2020] 2 WLR 1183 ('*Akhter v Khan*') to which extensive reference was made by all counsel. The judgment in *Akhter v Khan* was handed down less than three months after my judgment in *P v P*.

31. The facts of *Akhter v Khan* are quite different from the instant case. In *Akhter v Khan* a Muslim couple had celebrated an Islamic marriage ceremony (Nikah) conducted by an Imam in the United Kingdom in 1998. The parties had apparently intended to follow this with a civil marriage ceremony, but this never happened; it was accepted that they knew that the Nikah was of no legal effect. The parties lived together for eighteen years, and had four children. When the relationship broke down, the 'wife' presented a petition for divorce and consequently sought financial relief. She accepted that the Nikah was not a marriage, but she argued that the fact that the parties went through the Nikah enabled her to claim that this was a 'void' marriage which was susceptible to a decree of nullity. Williams J accepted this argument, and granted the decree of nullity, taking what he himself described as a "flexible approach" (see [69] of the Court of Appeal's judgment) to the interpretation of section 11(a)(iii) MCA 1973 (a marriage entered into in disregard of certain requirements as to the formation of marriage: see above), having regard to the 'wife's' rights under Article 8 and Article 12 of the ECHR. The Attorney General appealed.

32. The Court of Appeal allowed the appeal, holding that a ceremony which had taken place which corresponded neither with Part II of the Marriage Act 1949 (Marriage according to the Rites of the Church of England) nor Part III ibid. (Marriage under Marriage Schedule) did not create a marriage, even a void marriage for the purposes of section 11(a)(iii) of the MCA 1973. The parties were therefore not entitled to a decree of nullity. Importantly for present purposes, the Court of Appeal confirmed that the ECHR could not be relied upon to support any departure from that construction since the right to respect for private and family life (Article 8) and the right to marry (Article 12), and the right to peaceful enjoyment of possessions (A1P1) were not engaged by the State's failure to accede to an application for a decree of nullity.

33. The Court of Appeal was clear (at [51]) in confirming that "whether the court can grant a decree of nullity because a marriage is void is to be determined by the provisions of section 11 and, through section 11(a)(iii), by the provisions of the 1949 Act". The Court of Appeal described the status of the void marriage as follows [46]:

> "A void marriage is "strictly speaking a contradiction in terms": *Bromley's Family Law* 11th Ed., 2015 … at p. 67.

> This is because it has no legal effect on the status of the parties. A decree of nullity could, therefore, be said to be only declaratory because it does not make the marriage void. The grant of a decree of nullity is, however, significant because, as referred to above, it entitles the parties to apply for financial remedy orders under the [MCA 1973]".

34. The second half of the judgment in *Akhter v Khan* is dedicated to a consideration of the impact, as relevant, of the ECHR on the interpretation and application of section 11 MCA 1973 in domestic law. In this regard, the court considered a number of relevant ECHR rights. I summarise the Court of Appeal's conclusions in the order in which it set them out, as follows:

A1P1

i) It would be to put the 'cart before the horse' ([72]) to consider whether the 'wife's' asserted breach of A1P1 had been established by an inability to obtain a decree of nullity, because:

> "… even if a wife's claim to a share of what would otherwise be matrimonial assets amounts to "property rights" (and this is far from clear…) the gateway to those property rights is the right to a decree of either divorce or nullity" ([72]).

In this regard, the Court of Appeal explicitly agreed with Williams J's view ([73]) that:

> "… the unascertained right to a share of the matrimonial property seems to me dependent upon establishing that there is either a valid or a void marriage and thus there is no potential property right infringed until that is established".

The Court of Appeal added: "A1P1 cannot be used as a basis for, or to bolster other, human rights arguments" ([73]).

Article 12

ii) The Court of Appeal considered whether Article 12 was engaged in the circumstances of *Akhter v Khan*. It looked (at [79]) to the judgment in *Johnston v Ireland* (1986) 9 EHRR 203, in which it had been held that:

> "… the ordinary meaning of the words 'right to marry' is clear, in the sense that they cover the formation of marital relationships but not their dissolution…. In the Court's view, the travaux préparatoires disclose no intention to include in Article 12 (art. 12) any guarantee of a right to have the ties of marriage dissolved by divorce." (*Johnston* at [52] ibid.).

That said, the Court of Appeal in *Akhter v Khan* recognised ([80]) that:

> "Article 12 *could* be engaged if the domestic divorce provisions, for example, created "insurmountable legal

> impediments on the possibility to remarry after divorce": *Babiarz v Poland* [2017] ECHR 13, [2017] 2 FLR 613." (Emphasis by italics in the original).

iii) *Johnston v Ireland* had previously been considered by the Court of Appeal in *Owens v Owens* [2017] 4 WLR 74 (see [76-81] of that judgment). In *Owens,* the Court of Appeal had concluded that there is no ECHR right to be divorced – "a proposition not thereafter challenged in the Supreme Court [2018] AC 899, para 29" (see *Akhter v Khan* [80]). In *Akhter v Khan* the Court of Appeal added (materially for present purposes, and having considered *Owens v Owens*):

> "[81] It being "irrefutable" that there is no absolute right to be divorced under article 12, the question is whether article 12 applies to nullity. In our judgment it does not. Logic alone would dictate this to be the case but, in any event, casting back to the ECtHR's words in *Johnston*, <u>if article 12 cannot cover "the dissolution of a marriage" it cannot cover a situation where a marriage is declared null and void ab initio</u>.
>
> [82] … In our judgment, counsel at first instance were right in their joint view that article 12 has no place in this case". (Emphasis by underlining added).

Article 8

iv) The Court of Appeal addressed Article 8 at [90]-[106] in *Akhter v Khan*. At [104], it turned again to its earlier judgment in *Owens v Owens* (at [79]), and specifically to a passage which was confirmed by the Supreme Court ([2018] UKSC 41 at [29]) wherein Sir James Munby P had quoted with approval from *Johnston* in these terms:

> "… the Convention must be read as a whole and the Court does not consider that a right to divorce, which it has found to be excluded from Article 12, can, with consistency, be derived from Article 8, a provision of more general purpose and scope".

The Court of Appeal in *Akhter v Khan* added the following observation at [105]:

> "If failure to grant a divorce is excluded from the scope of the ECHR, including Article 8, it follows in our judgment that a failure to grant a right to a decree of nullity must also be excluded."

And concluded this section of their judgment at [106] with these unambiguous statements:

> "i) Whilst the Petitioner's Article 8 right to respect to family life is undoubtedly engaged, the failure of the state to recognise the Nikah as a legal marriage is not in breach of those rights;

ii) The right or otherwise to the grant of a decree of nullity does not in itself engage Article 8".

Article 14

v) Article 14 of the ECHR was expressly and deliberately not considered in the appeal in *Akhter v Khan*, as there had been little consideration or analysis of it in the judgment below (see [120]).

The Applicant as 'victim': section 7 HRA 1998; the arguments

35. In order for AP to succeed in his claim that the court is acting or proposing to act in a way which is incompatible with his right(s) under the ECHR, he needs to demonstrate that he is a 'victim' of the unlawful act or the proposed act (section 7(1)/(7) HRA 1998: see §27 above).

36. As I have earlier indicated, he can claim to be a 'direct' victim, a 'potential victim' or an 'indirect victim'.

AP's case

37. On behalf of AP it is argued that I was right to advertise at the conclusion of my judgment the potential value to AP of a decree of nullity. Mr Hale takes as his starting point the three advantages of a decree which I referred to at [74]-[76] of *P v P*, which I have reproduced at §18-20 above. Adapting those points, he has argued in this application that a decree of nullity would bring:

i) Certainty: In order to correct the marriage register or other records, so that there is no ambiguity or lack of clarity about the status of the 2009 marriage; effectively, a judgment *in rem*. It is said that a decree of nullity would make it clear beyond peradventure, when/if faceless officialdom so demands, that the parties were not validly married in 2009;

ii) Identity: Confirming AP's right to self-determination and identity, as one of the aspects of his right to respect for his private and family life; the notion of personal autonomy is an important principle underlying the interpretation of the ECHR;

iii) Recognition: AP's case was initially framed as a need to ensure that he and JP could marry without legal impediment. As this legal union has now been accomplished, the application is re-framed on the basis that the decree of nullity would enable people in an analogous situation to AP and JP to obtain relief, including, should occasion arise, ancillary (i.e., financial) orders consequent upon relationship breakdown.

38. The claim is only tentatively framed on the basis that AP has been 'directly affected' as a 'victim' by the measure complained of in that, it is said, he faces "real detriment", because "it is far from clear that his marriage to JP … will be universally recognised". It is further accepted that AP is not a 'direct' victim in the sense that he has no claim for financial relief, nor is he likely to have one; I was told that AP does not plan to

separate from JP, and therefore has no need (and will not have a need) to seek financial remedies. However, Mr Hale contends that were the marriage of AP and JP to fail now, AP would be adversely affected in any claim for financial relief by reference to section 25(2)(d) MCA 1973 (consideration of 'duration of the marriage').

39. The case is more assertively advanced on the basis that AP is a potential victim. Relying on the dicta of *Norris v Ireland* (1991) 13 EHRR 186 ('*Norris*') at §31-34, Mr Tabori submits (per the Applicant's written case, amplified in oral argument) that:

> "To be victims for purposes of section 7 HRA 1998, AP and JP do not have to have suffered the consequence or application to them of the law that they allege is incompatible with their rights, so long as they run the risk of being directly affected by it." (Emphasis by underlining added).

40. *Norris* was a case concerning the criminalising of certain homosexual activity. The European Court there held that the applicant was a victim even though he had not been prosecuted, because he "ran the risk" of being so affected. In this regard, Mr Tabori argues that AP might have experienced greater difficulties than he did in (re-)marrying; it was said that: "a different registrar might have relied on the fact that there remains a marriage on the record that has not been dissolved". Mr Tabori further argues that a registrar may have sought to rely on the lack of certainty about marital status to exercise their prejudice against AP as a transgender person.

41. In this regard, reliance was further placed on *Shortall v Ireland* (application no. 50272/18) (2022) 74 EHRR SE3 ('*Shortall*') in which it was said that:

> "… it is open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risks being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation" ([46]) (Emphasis by underlining added).

42. While rightly accepting that article 34 of the convention does not allow complaints *in abstracto* alleging a violation of the convention, Mr Tabori argues that "there are likely to be (possibly many) others who (a) fall into the same category as he and JP do and, (b) by reason of the breakdown of their relationship, are likely to suffer real hardship if they are denied financial remedies". He later asserts that whilst AP and JP are not separating (and may not have any current need for recourse to applications for financial provision or property adjustment), others whose marriage is found to be void as theirs has been, may present with circumstances which do merit consideration of financial relief.

43. In his opening remarks, Mr Hale argued that unintended consequences have flowed from the repeal of section 11(c) of the MCA 1973, in excluding from the categories of those who could petition for nullity couples who 'are not respectively male and female.' The removal of that provision has created a lacuna in the law. This, argues Mr Hale, leaves AP – and anyone else in the same category – apparently unable to obtain a decree of nullity and that AP is thus a 'victim' for the purposes of section 7 HRA 1998. He observes that it is ironic that legislation which was intended to increase the rights of a

minority group – i.e., same sex couples – has had the effect of removing existing/available rights from another minority group, members of the transgender community. That was, he argues, never the intention of Parliament.

The Secretary of State's case

44. Mr Cross first points out that AP's status is not affected by whether the decree of nullity is granted or not: his 2009 marriage is void without the need for a decree of nullity. For this proposition, he relies:

i) On my earlier judgment in *P v P* at [61], [62], [73(iii)], and [75];

and

ii) On the historic judgment of the Court of Appeal in *De Reneville v De Reneville* which I cited in *P v P* at [61] and which is reproduced at §17 above.

45. He therefore rejects the argument that a decree of nullity is necessary, and that AP is a 'victim' within the meaning of section 7 HRA 1998 without one. He points out that the fact that AP and JP have now validly married demonstrates that a decree of nullity was not required for this purpose; in the event, he says, that the marriage were to fail, neither AP nor JP would be prevented from accessing financial relief in Part II of the MCA 1973. He argues that AP has not been able to demonstrate any other need for a decree. Mr Cross contends that if AP could ever be said to be a victim under section 7 HRA 1998 prior to his 2024 marriage (which is denied) he has undoubtedly lost this status now.

46. He points out that the "unlawful act" of a public authority relied on is said to be, apparently, that of a registrar in refusing to marry the couple. But AP has not issued any proceedings against a registrar alleging either that the registrar has breached or proposes to breach their rights. The pleaded concern is rather that there is, absent a decree of nullity from the Court, a "risk of registrars refusing to marry a person in AP and JP's position", which is said to represent "an unreasonable restriction" on the right to marry. But Mr Cross points out that in AP's case, the registrar evidently imposed no such restriction.

47. He argues that AP cannot claim 'victim' status on the basis that there may be others who are affected by the repeal of section 11(c) MCA 1973. The victim rule entails that only persons whose own human rights have been or risk being breached may rely on the ECHR. He goes on to argue that the ECHR "does not envisage the bringing of an *actio popularis* for the interpretation of the rights it contains or permit individuals to complain about a provision of national law simply because they consider … that it may contravene the Convention": see *Shortall* again at [46]. Although victim status can arise from a risk of being directly affected by the act, that will only be if the party before the court "is a member of a class of people who risk being directly affected" (*Shortall*, [46]). Further, to demonstrate this risk, a person "must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient": *Senator Lines GmbH v Fifteen Member States of the European Union* (2004) 39 EHRR SE3 at pp.20-21. Mr Cross disputes that AP can show that he is now (or ever was) a member of a class of people

who risk being directly affected as a 'victim' of an ECHR violation by the inability to obtain a decree of nullity following a finding that their marriage was void.

The Advocate to the Court

48. The arguments of Ms Hannett align with the arguments advanced on behalf of the Secretary of State for Justice. Ms Hannett additionally drew my attention to the Court of Appeal's decision in *R (Reprieve & Others) v Prime Minister* [2021] EWCA Civ 972; [2022] QB 447. This was a case in which the claimants, a human rights organisation and two Members of Parliament, had sought judicial review of the Prime Minister's decision not to hold a public inquiry into allegations that the United Kingdom's intelligence services had been complicit in the unlawful detention, mistreatment and rendition of individuals by other states. It was said that the Prime Minister had breached section 6(1) of the HRA 1998 by acting in a way which was incompatible with Article 3 of the ECHR, and that the procedure adopted in the application breached Article 6 (ibid.). The Divisional Court dismissed the claim, and the Court of Appeal dismissed the appeal on the basis that the claimants were not 'victims' of any violation under Article 3. Ms Hannett drew my specific attention to [39]:

> "Convention rights are not free-floating entities which are available to and enforceable by anyone who disagrees with a decision of a public authority on the grounds that it breaches, or may breach, somebody's Convention rights. Convention rights have effect in the law of England and Wales to the extent provided for by the 1998 Act. … The clear purpose of section 7 of the 1998 Act is to permit, and only to permit, a victim to litigate an alleged breach of Convention rights".

49. The Court of Appeal went on to recognise that there are other categories of case where persons who cannot show that they have directly suffered an ECHR breach can nonetheless make a claim; it is clear to me that none of these categories apply here. The court emphasised (at [46]) that it has "set its face" ("save in very limited circumstances") against the rights of individuals generally to bring applications in the public interest.

Human Rights Act 1998: The arguments

The case for AP

50. Mr Hale argues that AP's rights have been, or are at risk of being, breached in a number of ways if he is refused a decree of nullity. He argues that *Akhter v Khan* is distinguishable on its facts: in that case, the applicant knew that she had only ever taken part in a ceremonial celebration (Nikah), and had never taken part in a civil legal marriage, whereas in this case, by contrast, AP and JP believed that they had been legally married following their attendance before the registrar in 2009. In this regard, it is submitted, AP has a stronger claim than the applicant in *Akhter v Khan* for the recognition of the rights which AP and JP believed flow from this event.

51. Mr Hale accepts that while the Court of Appeal in *Akhter v Khan* decided that Article 12 could not be relied upon to establish a right to dissolution of marriage, in fact AP

does not here seek dissolution of his marriage; he accepts that this has happened. AP seeks formal recognition and/or legal acknowledgement of the status of the marriage, and of the ability to form a new marriage (which, he argues, is captured by Article 12 and/or Article 8). It is argued that the State owes a 'positive obligation' to facilitate the grant of a nullity decree in circumstances such as these; in this regard, Mr Tabori picked up the argument relying on *Hamer v UK* (1979) 4 EHRR 139 ('*Hamer*') in which it was said that "positive action is required … to make the rights effective" (in this case, the right of prisoners to marry: see [68]) and that, in that case, the State's failure to make administrative arrangements to enable a prisoner to marry constituted an interference with the exercise of the Article 12 right of the complainant prisoner. Mr Tabori argues that the delay of three weeks while the registrar considered the documents generated from the 2018 proceedings represented an "unreasonable restriction" of AP's right to marry; in this regard he relies on the comment at [106] from the ECtHR judgment in *VK v Croatia* (App. No. 38380/08); [2013] 2 FLR 1045 ('*VK*'). In *VK* the delay in processing the dissolution of the complainant's marriage (thereby affecting his right to re-marry without restriction) was nearly six years.

52. In support of the contention that AP's Article 8 rights have been or may be breached by the lack of recognition of his status (see §38 above), Mr Tabori relies on *Dadouch v Malta* (2014) 59 EHRR 34 ('*Dadouch*'), a case in which it was found that a State's refusal to register a marriage was in violation of the article 8 rights of the citizen. It was said in *Dadouch*, at [48] that:

> "The Court finds no reason why a state's acknowledgment of the real marital status of a person, be it, inter alia, married, single, divorced, widow or widower, should not form part of his or her personal and social identity, and indeed psychological integrity protected by art 8. It therefore considers that registration of a marriage, being a recognition of an individual's legal civil status, which undoubtedly concerns both private and family life, comes within the scope of art 8(1)." (Emphasis by underlining added).

53. Specifically, Mr Tabori argues that the 'certainty' which would be achieved by the grant of a decree (see §37(i) above) will be achieved by the formal 'acknowledgement' (*Dadouch*) of his status which that order would deliver. In support of this proposition Mr Hale had earlier drawn my attention to the decision of *R (Miller) v Prime Minister (and others)* [2019] UKSC 41 at [69-70]; the advice to prorogue Parliament had been "unlawful" and the advice was "null and of no effect" ([69]). This led "to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed". The Supreme Court continued at [70]:

> "It follows that Parliament has not been prorogued and that this court should make declarations to that effect". (Emphasis by underlining added).

Mr Hale relies on this passage to emphasise the importance of the court issuing a formal declaration of an apparent legal status, so as to avoid ambiguity or uncertainty.

54. Counsel for AP go on to argue that the State owes AP a positive obligation to promote respect for his private and family life, and to protect him from discrimination by virtue

of the fact that he is transgender. In this regard, Mr Tabori referred me to *Van Kuck v Germany* (2003) 37 EHRR 51, and specifically to the fact that "private life" encompasses the right of transsexuals to human dignity, freedom and sexual self-determination, and the acknowledged "repercussions" for the transgender complainant in relation to the "fundamental aspect of her right to respect for private life, namely her right to gender identity and personal development" ([75] / [78], and see §37(ii) above). Mr Tabori further specifically drew my attention to *Goodwin v The United Kingdom* [2002] 35 EHRR 18 at [77] and the acknowledgement there that "serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity" and that this is particularly relevant to transgender community (see *Goodwin* at [90]).

55. It is argued on behalf of AP that the claims under Articles 12 and 8 are buttressed by the discrimination which AP is suffering as a result of the fact that he is transgender. Reliance for this proposition was placed on *R (SC) v SSWP* [2022] UKSC 223 which provides ([37]) (following *Carson v United Kingdom* (2010) 51 EHRR 13, para 61) that:

> "…only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14… Such a difference of treatment is discriminatory if it has no objective and reasonable justification.", and that "…[t]he contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment".

56. Finally it was argued that (a) AP was led to believe by reason of his 2009 marriage that, should he ever have need of the provisions for void marriages, he would be able to rely on them and obtain orders for financial provision and property adjustment; this amounted to 'possession' under A1P1, and that (b) denial of that expectation would amount to interference with his A1P1 rights. In formulating this submission Mr Tabori relied upon *Čakarević v Croatia (App. No. 48921/13)* ("*Čakarević*") a case concerning the payment (and subsequent withdrawal and claim for the recoupment of) employment benefits to an unskilled worker. My attention was specifically drawn to [51]:

> "Although Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not create a right to acquire property in certain circumstances a "legitimate expectation" of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1."

It was argued that the State is under a positive obligation to provide a judicial mechanism for settling property disputes, and this is not now available to AP.

The case for the Secretary of State

57. The primary argument of the Secretary of State is, as recorded above, that AP is not a 'victim' of any unlawful act or potential act (see §§44-45 above). Mr Cross argues that no breach of AP's rights under the ECHR arises, either on these facts or at all. He accepts that while there may indeed be, or have been, "some advantages" (see [74] of

P v P) to AP in having a decree of nullity, that is not the same as saying that a decree of nullity is needed in order for the State to avoid acting incompatibly with AP's rights. Mr Cross pointed to the letter from the General Register Office (24 July 2023: see §14 above), which he argues is, to all intents and purposes, the equivalent to the decree which is now sought by AP, albeit that it is in a different form.

58. He relies on the Court of Appeal's decision in *Akhter v Khan* to demonstrate that AP's claim for a decree of nullity founded on ECHR rights is misconceived; he says that *Akhter v Khan* makes clear, in its various pronouncements, that there is no right to a decree of nullity under the ECHR.

59. Specifically, he relies on the Court of Appeal's rejection in *Akhter v Khan* of the argument that Article 12 gives rise to any right to a dissolution of marriage. The fact that AP has never had a decree of nullity has not, as recent history relates, prevented the parties from marrying in February 2024; a decree was not necessary to establish their entitlement to marry. Mr Cross argues that Article 12 does not provide a right to marry in all circumstances, provided the law does not "injure the substance" of the right (*Hamer* above at [61]) or "impair its very essence" (*F v Switzerland* (1987) 10 EHRR 411 ("*F v Switzerland*") at [32]); in those cases, the interference was principally one of delay.

60. Mr Cross contends that *Johnston v Ireland* [1986] (see §34(ii) above) provides an important component to the answer, for there the court held that the claimant's inability to obtain a divorce, which served as the restriction to his marrying the new partner, was not in breach of Article 12, or any other provision of the ECHR, because - having regard to the background materials to the ECHR - Article 12 "cover[s] the formation of marital relationships but not their dissolution" [52]. In this respect Mr Cross relied on the passage in *Akhter v Khan* at paragraph [81] which I have reproduced above at §34(iii). There is no human right under Article 12, or otherwise, to a decree of nullity.

61. If Article 12 is not engaged, Mr Cross argues that Article 8 is no more likely to be so. For this proposition he relies on *Day v Governor of the Cayman Islands* [2022] UKPC 6 at [45]-[49]. If the right to marry, for instance, is not contained in Article 12, then it cannot be derived from another article under the ECHR. Applying that principle to the facts of this case, just as there is no right to a decree of nullity in order to marry under Article 12, no such right can consistently be derived from the more general provisions elsewhere in the ECHR. It is argued that there is no indication that AP will *need* to produce a decree of nullity in the future in order to prove that the marriage in 2009 was void; this is all the less likely now that he has in fact lawfully married JP.

62. Mr Cross relied on *Akhter v Khan* at [104] (see §34(iv) above) to drive home the point that the grant (or otherwise) of a decree of nullity does not engage Article 8. While *Akhter v Khan* is acknowledged to be different on its facts, on this point in relation to Article 8 it is both applicable and binding. There has been no complaint about the ECHR-compatibility (Article 8) of my earlier decision that the marriage was void. Even if there was a minor delay in providing the relevant documentation to satisfy the registrar of the status of the 2009 'marriage', this did not interfere with AP's Article 8 rights; the interferences found in *Dadouch* were materially different.

63. On A1P1, Mr Cross contends that the argument advanced by AP in this case is similar to the argument advanced by the applicant in *Akhter v Khan*, and can/should be rejected

on the same grounds – namely AP cannot have a legitimate expectation of financial relief amounting to 'possession' until/unless he has a decree of nullity; this is, once again, putting the 'cart before the horse'. Moreover, the fact that the registrar in 2009 did not stop AP from participating in the ceremony did not mean AP obtained an entitlement under A1P1 to have a decree of nullity. In other words there is no "possession". In order to qualify as a "possession", a "legitimate expectation" must be, inter alia, a "currently enforceable claim that was sufficiently established" in domestic law and is "of a nature more concrete than mere hope": see e.g. *Kopecky v Slovakia* (2005) 41 EHRR 43. He responded to the arguments raised in reliance on *Čakarević*. The situation in that case is far removed, argued Mr Cross, from the present case: AP does not have an established enforceable right such as the claimant in *Čakarević*. Moreover, there is no need to unlock the financial benefits which may be available on a decree of nullity; AP and JP are now validly married and, if relevant, now have unencumbered access to Part II MCA 1973 ('Financial Relief for Parties to Marriage'). Even if others are affected by the repeal of section 11(c) MCA 1973, AP and JP are not, or are no longer, in that group.

64. Finally, it was argued that Article 14 adds nothing to the applicant's case on these facts. AP has not been discriminated against at all, and in as far as he may claim to have been, it is not because he is transgender (a characteristic falling within the scope of "other status"). Any difference in treatment (assuming AP could prove it) would not be on the basis that he is transgender, but instead on the ground that AP did not have the characteristic(s) entitling a person to a decree of nullity in the remaining categories. There are likely to be transgender people who are entitled to a decree of nullity on one of the other grounds in section 11 MCA 1973. This is not, alternatively, a *Thlimmenos* case (*Thlimmenos v Greece* (2000) 31 EHRR 15) which arises where the State fails to treat differently persons whose situations are significantly different, as AP has not made out that he should be treated differently from non-transgender same-sex people who are now not able to obtain a decree of nullity; there is no evidence that any breach of ECHR particularly prejudicially impacts on transgender persons within the comparator group, rather than being a problem similarly affecting non-trans persons who also entered into a marriage which was void because they were the same sex.

The Advocate to the Court

65. Ms Hannett argues that:

i) My judgment in 2019 (*P v P*) was clear in determining that the marriage was void. By [74] of that judgment I had already determined that a decree of nullity is "declaratory only, and cannot effect any change in the parties' status" (see §19 above), a position which, she says, faithfully reflects the case law;

ii) The Law Commission report on the nullity of marriage (1970) should be considered and adopted; this reads at §3(b) as follows:

> "A void marriage is not really a marriage at all, in that it never came into existence because of a fundamental defect; the marriage is said to be void ab initio; no <u>decree of nullity is necessary to make it void and parties can take the risk of treating the marriage as void without obtaining a decree</u>. But either of the spouses or any person having a sufficient interest

> in obtaining a decree of nullity may petition for a decree at any time… In effect, the decree is a declaration that there is not and never has been a marriage." (Emphasis by underlining added, and see *Kassim v Kassim* below at §69);

iii) *Akhter v Khan* at [46] puts the question beyond doubt (see §34 above); Miss Hannett also refers to the recent decision of *Tousi v. Gaydukova* [2023] EWHC 404 (Fam) in which Mostyn J described a void marriage as "a nuptial event which is regarded by the court as never having taken place, and which the parties can disregard for the purposes of entering into a future marriage" (at [40]);

iv) The inability of the court to grant a decree of nullity does not engage Articles 8 or 12 of the ECHR. Ms Hannett, like Mr Cross, relied on *Johnston* for the proposition that only the right to marry is guaranteed by Article 12. There would only ever be any engagement with Article 12 if "insurmountable legal impediments" were imposed by the State on the possibility to remarry after divorce;

v) While Article 12 might be engaged if the domestic law on the dissolution of marriage imposed "unreasonable restrictions" or "insurmountable legal impediments" on AP and JP's ability to marry, this is not established on the facts. AP and JP have been able to marry;

vi) Ms Hannett further referenced and relied upon the Court of Appeal's emphatic statements in the judgment at [81] in *Akhter v Khan* (which I have reproduced at §34(iii) above);

vii) Finally while acknowledging that Article 8 protects "the right to establish and develop relationships with other human beings and the outside world" (*Dadouch* at §47), *Akhter v Khan* at [105] (see §34(iv) above) had effectively despatched this point by determining that no separate Article 8 point arises on facts such as these.

Section 11(a)(iii) MCA 1973

66. AP invites me to consider granting the decree of nullity under section 11(a)(iii) MCA 1973 on the basis that "certain requirements" (notably as to their gender) were not fulfilled at the time of the marriage.

67. The Secretary of State for Justice and the Advocate to the Court argue that the court does not have the power to make a decree of nullity under section 11(a)(iii) of the MCA 1973 on the facts of this case. This subsection in the MCA 1973 is designed to cover the non-compliance with the formalities of marriage, such as a failure to give proper notice of the marriage, or the marriage taking place other than in a church or registered building, where the parties are aware of the non-compliance and wilfully 'intermarry'. There is no evidence that the 2009 marriage was conducted without regard to the formalities; plainly the parties were unaware of the impediment which rendered their marriage void.

Discussion and Conclusion

68. The fateful communication from the Department for Work and Pensions in 2017 (see §8[3] above), which exposed the invalidity of the 2009 marriage, understandably caused AP and JP considerable confusion and upset; I have no difficulty in accepting his evidence (which I set out at §12 above) in this regard. The revelation has in turn triggered two legally complex sets of consecutive court proceedings over many years. I have no doubt whatsoever that AP's desire for clarity and certainty in respect of his marital status is important to him and to JP, as it is indeed important for the State. As the Court of Appeal itself recognised in *Akhter v Khan* (at [9]):

> "The status of marriage creates a variety of rights and obligations. It is that status alone, derived from a valid ceremony of marriage, which creates these specific rights and obligations and not any other form of relationship."

69. In launching this application for a decree of nullity, Counsel for AP understandably took as their starting point the concluding remarks of my judgment in *P v P*. Those comments were drawn in part from the submissions of the Advocate to the Court in that application; their origins can in fact be traced back to the remarks of Ormrod J (as he then was) said in *Kassim v Kassim* [1962] P 224:

> "A void marriage is not really a marriage at all, in that it never came into existence because of a fundamental defect; the marriage is said to be void *ab initio*; no decree of nullity is necessary to make it void and parties can take the risk of treating the marriage as void without obtaining a decree. But either of the spouses or any person having a sufficient interest in obtaining a decree of nullity may petition for a decree at any time, whether during the lifetime of the spouses or after their death. In effect, the decree is a declaration that there is not and never has been a marriage." (Emphasis by underlining added).

The description of the 'risk' in this extract of the judgment in *Kassim v Kassim* found its way into the Law Commission paper (1970) (see §65(ii) above); it is the existence of this 'risk' (of simply treating the marriage as void without a formal piece of paper to prove it) which principally prompted the current application.

70. In fact neither the Secretary of State for Justice nor the Advocate to the Court has sought to argue otherwise than that a decree of nullity "may" indeed have yielded "some advantages" for AP and JP (see [74] *P v P*), but they contend that:

i) none of the advantages which I identified as applying to the grant of a decree of nullity in my earlier judgment (at [74]) appear to be relevant to the current situation of AP and JP as a newly lawfully married couple;

ii) in any event, advantages cannot and should not be equated to rights under the ECHR, the breach, or threatened breach, of which renders the inability of the court to grant a decree of nullity an unlawful act of which AP can properly claim to be a victim.

71. In resolving the wide range of arguments which have been so skilfully marshalled before me, I have first considered whether AP can be said to be a 'victim' as that term is understood, in the context of section 7(1)/(7) HRA 1998. As I earlier remarked (§38), the claim that he was/is a 'direct' victim was only tentatively presented by AP's counsel. The witness statement (see §12 above) was couched in correspondingly hesitant terms ("we may want to obtain a decree.. we may need a nullity order"). Of course, as it turns out AP and JP have been able to marry without having in their hands a decree of nullity; there was no legal impediment to them doing so, and there is no evidence that the 2024 marriage will not be universally recognised. Now that they are married, they have all the rights available to each other under Part II of the MCA 1973. There is therefore no proper basis on which I can conclude that AP is a 'direct' victim of any alleged unlawful act under the ECHR.

72. In this regard, I am similarly not persuaded that AP 'runs the risk' in *Norris* or *Shortall* terms (see §39 and §41 above respectively) of being a victim, so as to bring himself within section 7(1)/(7) HRA 1998. In order for AP to be able to claim to be a potential victim, he was obliged to produce reasonable and convincing evidence of the likelihood of a violation affecting him personally; "mere suspicion or conjecture is insufficient in this respect" (*Shortall*, above §41, at [48]). In my judgment, AP has failed to adduce evidence or argument which gets close to this. He has no case for asserting that the General Register Office will not accept that the 2009 marriage is void; it does recognise this. Moreover, he has no claim for financial relief arising from the void marriage; now that he is lawfully married to JP, he has full access to Part II MCA 1973, thus he runs no risk of being barred from access to a financial remedy in the event of marital breakdown. Were he and JP to divorce, and either of them launch a financial remedy claim under Part II MCA 1973, the court when considering 'duration' of the 2024 marriage as one of the discretionary factors under section 25(2)(d) MCA 1973, would be bound to take into account the fact that the parties had previously been through a ceremony of marriage in 2009, believing thereafter that they had been lawfully married. After all, it is well known in matrimonial jurisprudence that even a period of settled and committed cohabitation can be, and is not uncommonly, considered in this regard.

73. There is no proper basis (as AP asserts: see §16 above) for me to treat him as a 'victim' on behalf of other transgender people who married before the M(SSC)A 2013 without a Gender Recognition Certificate. The ECHR does not allow complaints *in abstracto* alleging a violation of the convention, nor does it allow *actio popularis* for the interpretation of ECHR rights (see *Shortall* at [48], see §47 above). I accept Mr Cross' argument that AP cannot show that he is now (or arguably ever was) a member of a class of people who risk being directly affected by the omission of section 11(c) MCA 1973, and the inability to obtain a decree of nullity.

74. The conclusions which I have reached in relation to 'victim' status arguably dispose of this application altogether. But I go on to consider whether there have in fact been breaches or threatened breaches of AP's ECHR rights.

75. In this regard, I am of the view that the judgment in *Akhter v Khan* is essentially dispositive of the ECHR arguments in this application. I reject Mr Hale's submission that the decision in *Akhter v Khan* was particular to its own facts and is therefore distinguishable. I am satisfied that the Court of Appeal's judgment – in particular at [81]-[82] (see §34(iii) above), and [105]-[106] (see §34(iv) above) – is of general application, and is directly relevant to the issues before me.

76. Specifically, I am satisfied, having regard to *Akhter v Khan* (which in turn considered *Johnston* and *Owens*) that Article 12 is of no relevance in the instant case. This article deals with formation of marital relationships; it has been successfully invoked in the context of dissolution only where it can be demonstrated that the failure to dissolve a marriage (or grant a decree of nullity) had materially "injured the substance" or "impaired the very essence" of the complainant's right to marry (see *Hamer* and *F v Switzerland*) or had created "insurmountable legal impediments on the possibility to remarry after divorce" (*Babiarz* at §34(ii) above). The absence of a decree of nullity in this case did not have that effect; taking AP's case at its highest, the process of persuading the registrar in the summer of 2023 that the 2009 marriage was void involved AP in disclosing the *P v P* judgment, and confirming his identity as 'AP' therein; this was, he says, distressing and embarrassing. There was altogether a three week delay while the issue was resolved; this is of course quite different from the six years delay in *VK* (see §51 above) and did not represent an "unreasonable restriction" on the ability to marry. Notwithstanding those inconveniences, given the absence of evidence of any impediment or material impairment placed on AP and JP's ability to marry following the judgment in *P v P*, Article 12 is not in my judgment engaged.

77. For the reasons set out in *Akhter v Khan* the case is not materially advanced by separate reliance on Article 8. Given that the court does not consider that a right to divorce or nullity derives from Article 12, it cannot with consistency assert that it derives from Article 8. I am, as the Court of Appeal was in a similar context in *Akhter v Khan*, satisfied that AP's Article 8 rights are engaged on these facts, but the failure to grant a decree of nullity is not a breach of those rights: simply put, "[t]he right or otherwise to the grant of a decree of nullity does not in itself engage Article 8" (*Akhter v Khan* at [106](ii)).

78. AP has further failed, in my judgment, to demonstrate an Article 14 breach; while I acknowledge that there may be a breach of Article 14 without a breach of any of the other articles of the Convention, the discrimination relied on must nonetheless fall within the ambit of one of those articles. In this regard, I have considered carefully the judgments of the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223.

79. I do not find that the Article 14 discrimination claim has been established on these facts; the purported discrimination claim does not fall within the 'ambit' of the other articles of the ECHR. AP has not in my judgment been treated differently (i.e., directly discriminated against) by reason of a prohibited ground of discrimination and/or because he is transgender without (at the material time) a Gender Recognition Certificate. Nor has AP been discriminated against in *Thlimmenos* terms; that is to say he has not been treated differently from others in a comparator group who can obtain a decree of nullity under section 11 MCA 1973, because of a prohibited ground of discrimination (transgender). The fact is that in 2009 he was legally female at the date of his marriage; the subsequent omission of section 11(c) MCA 1973 from the statute after 2014 does not create discrimination against AP on the grounds that he is transgender.

80. Finally, adopting the phraseology from *Akhter v Khan*, I am satisfied that I would be putting the 'cart before the horse' were I to rely on A1P1 to establish any actual or threatened unlawfulness; the gateway to the rights enshrined in A1P1 arise only if a decree of divorce or nullity is pronounced. To adopt Williams J's view (with which the

Court of Appeal agreed) there is no potential property right infringed until that is established (see §34(i) above). I agree with Mr Cross that the situation in this case is materially different from that which obtained in *Čakarević*, where the claimant had an established enforceable right to money. Even at its highest, this case was far from reaching the threshold contemplated by the court in *Kopecky* (§63 above).

81. The language of section 11 MCA 1973 leaves no residual discretion for me to 'read down' or 'read in' asserted rights under the ECHR. The statute provides that a marriage "shall be void on the following grounds only" (emphasis added); the Court of Appeal in *Akhter v Khan* confirmed that it would be inappropriate to interpret the MCA 1973 'flexibly' as Williams J had done in order to incorporate ECHR rights. In this regard the Court of Appeal had disagreed with Mr Hale's submission in the appeal in *Akhter v Khan* (essentially repeated before me), that section 11 MCA 1973 did not provide an exhaustive list of circumstances in which a marriage could be declared void (see *Akhter v Khan* [50]).

82. Turning to section 11(a)(iii) MCA 1973, I am satisfied that the court does not have the power to issue a decree of nullity under this statutory provision on the facts of this case. I am satisfied that the 2009 marriage was not void for disregard of "certain requirements as to the formation of marriage" which refers to procedural matters (see §22 above). On the facts there were no contraventions of those specific requirements.

83. It follows from what I have said above that the inability of the court to grant a decree of nullity under section 11 of the MCA 1983, or otherwise, does not interfere with AP or JP's rights under Articles 12, 8, 14 of the ECHR or of A1P1 of the same. Thus, there is no need to consider the application of sections 3 and/or 4 of the HRA 1998.

84. However, if I had been satisfied that AP was a victim of an unlawful violation of his ECHR rights, I can make clear that I would not have felt able to 'read down' the words into section 11 MCA 1973 which were advanced by Mr Hale (§7(i) above) in order to give effect to the legislation in a way which is compatible with those rights. In this regard I was taken to the Supreme Court judgments in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. At [32] and [33] it was said that:

> "[32] Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In order words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> [33] Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. … Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the

> grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

85. The 'read down' approved by the Supreme Court in *Ghaidan* eliminated the discriminatory effect of the Rent Act 1977 by treating surviving same-sex partners as if they were 'spouses'; this ECHR-compliant extension of the statutory language recognisably 'goes with the grain' of the original legislation. By contrast, the Applicant's proposal in this case invites me to create an altogether new statutory measure. I reject the invitation. Section 3 HRA 1998 provides that primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights, but only "so far as it is possible to do so". It is in my judgment not "possible" for me to re-write section 11 MCA 1973 to include the words which Mr Hale advances (§7(i) above); this would have the effect of re-inserting (albeit in a modestly adapted and more limited form) a statutory provision which was specifically repealed by the M(SSC)A 2013, and goes far and above a 'reading in' of the section.

86. For the reasons set out above, I dismiss AP's application.

Reporting Restriction Order

87. I turn finally to set out my reasons for making a Reporting Restriction Order ('RRO') at the outset of the hearing, and to the fact that this judgment is accordingly published with the parties anonymised.

88. The hearing of this application, over two court days, was conducted in public, in accordance with rule 7.30 FPR 2010. Prior to the hearing, and in accordance with the Practice Direction 12I FPR 2010, the solicitors for AP issued a formal application which was served on the Press Association's CopyDirect service indicating the intention to seek an RRO**.** In fact there was no attendance at the hearing from any representative of the press. I made an interim RRO on the first morning of the hearing. I now need to consider whether the order should be continued.

89. I heard brief argument from counsel on this issue; I considered the application together with the supporting witness statement from AP's solicitor. Mr Hale argued that, while the competing rights under Article 8 and Article 10 of the ECHR are indisputably engaged, such an order should clearly be made in this case for the following reasons:

    i) For consistency with the earlier judgment;

    ii) The evidence in support of the application indicates that AP and JP were distraught to discover (from my earlier judgment) that their 2009 marriage was void. This further legal process has been upsetting to them, even without the threat of publicity; publicly identifying them would make matters immeasurably worse;

    iii) Many of AP and JP's friends are unaware of AP's background history, and AP's gender transition. In order to argue his case, AP has plainly disclosed personal

matters to the court which if friends came to know would cause him and JP distress. It would be a significant and disproportionate interference with their Article 8 rights to reveal this information through publication of their names in this judgment;

iv) None of their friends or wider family knew that AP and JP recently took part in a ceremony of marriage in February 2024; the marriage took place out of the jurisdiction so as to reduce the risk of accidental disclosure of this information;

v) While it is accepted that the public is entitled to know the arguments raised within, and the outcome of, this unusual case, there is no public interest in them knowing the specific identities of the parties;

vi) So strongly did AP and JP feel about this issue that if the RRO were not to be made, they would instruct their lawyers to apply to withdraw the application; this would have an overall impact on the administration of justice in this case.

90. Mr Cross did not oppose the making of the RRO; Ms Hannett did not wish to raise any further or arguments on the issue. The fact that the application is unopposed is of note, but it is not determinative; an order for anonymity or for reporting restrictions should not be made simply because the parties consent, as parties cannot waive the rights of the public (see Lord Neuberger in *H v News Group Newspapers Ltd: Practice Note* [2011] EWCA Civ 42, [2011] 1 WLR 1645).

91. First, I should make clear (in relation to the argument at §89(i) above), that I received no arguments in relation to reporting whatsoever in 2019, but having seen and heard AP and JP at that time, and having considered the competing arguments under Article 8 and Article 10, I nonetheless concluded that AP and JP's Article 8 rights prevailed. This unfortunate tale is deeply personal to the parties, and I concluded that they were entitled to respect for their private life. That said, this does not establish a precedent or presumption that the same order would be made now.

92. Secondly, and specifically in relation to this application, I start from the proposition that general rule is that the names of the parties to an action are spelled out in orders and judgments of the court, and that the restriction on the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large. There is of course no reason why the media should not be free to report this judgment; they could of course have reported the hearing, and the arguments advanced, had they attended and observed. No one chose to do so; I repeat, the hearing was conducted in open court.

93. Moreover, in divorce cases, parties can expect to be named. This is the customary practice; every divorce court list bears the names of those to be divorced. This was acknowledged by Sir James Munby in the case of *M v P* [2019] EWFC 6 where he observed at [114] that:

> "After all, divorce goes to status and the public at large has an interest in knowing whether or not someone's marriage has been dissolved and what that person's status is."

94. Thirdly, I pay close attention to what AP and JP tell me of their private lives now, and the limited extent to which the intensely personal information which underlines the facts of this case is known among their friends and wider family.

95. In a case such as this, it is necessary to balance the Article 8 (rights of the family) and Article 10 (freedom of expression) in the manner described by Lord Steyn in the paradigm passage in *Re S (a child) (Identification: Restrictions on Publication)* [2005] 1 AC 593:

> "17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.""

96. On the particular facts of *M v P*, Sir James Munby declined to name the parties for reasons which he spelled out at [115]. He concluded this section of his judgment (at [115]) with these words, which I respectfully adopt and apply to the facts of this case:

> "I am, of course, acutely aware of Lord Roger of Earlsferry's famous answer to his question in *In re Guardian News and Media Ltd and others* [2010] UKSC 1, [2010] 2 AC 697, para 63, "What's in a name?" – ""A lot", the press would answer." But on this occasion, and in these most unusual circumstances, the public interest must, to this very limited extent, give way to the private interests of P and M which, in my judgment, heavily outweigh the claims of the public and the media."

97. In conclusion, and weighing the competing factors set out above in this unusual case, I have resolved to continue the RRO to protect AP and JP's right to privacy in their private and family life until further order. As in *M v P*, I conclude that the private interests of AP and JP outweigh the claims of the public and the media. I repeat that this does not restrict publication of information about the case, provided that such publication is not likely to lead to the identification of AP and JP or their family members.

98. That is my judgment.