Neutral Citation Number: [2023] EWHC 404 (Fam)

Case No: FA-2022-000117

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2023

Before :

MR JUSTICE MOSTYN

- -

Between :

Manouchehr Shilani Tousi	**Appellant**
- and -	
Natalya Gaydukova	**Respondent**

- -
- -

Max Lewis and William Horwood (acted pro bono through **Advocate**) for the **Appellant**
Katherine Gittins (instructed by **Caveat Solicitors**) for the **Respondent**

Hearing dates: 9 February 2023

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in public. There are no reporting restrictions relating to it or to the appeal hearing.

Mr Justice Mostyn:

1. The appellant contends that Recorder Allen KC did not have jurisdiction to order on 25 March 2022 that a tenancy held by the parties jointly be transferred to the respondent solely. This is my judgment on his appeal against that order.

2. Although it is common ground that the parties did not enter into a legally valid marriage, for simplicity I shall refer to them respectively as husband and wife[1].

Background

3. The husband was born on 12 July 1971 and is aged 52. He is an Iranian national. The wife was born on 27 March 1972 and is aged 50. She is a Ukrainian national. Each also holds British citizenship.

4. In the mid-1990s the husband moved to Kyiv to study for his master's degree in aircraft radio electronic engineering. There he met the wife.

5. A marriage ceremony took place at the Iranian Embassy in Kyiv on 12 December 1997. The ceremony was conducted in Farsi in the presence of two official witnesses. At the time the husband was an Iranian citizen and the wife was a Ukrainian citizen. This marriage was not "registered" with the Ukrainian State authorities. According to the wife, they were well aware that the marriage should have been registered. On three occasions she attempted to register the marriage but the husband refused to cooperate. It is clear to me that registration in this context means the parties formally marrying according to Ukrainian law in what we would describe as a Registry Office.

6. It is the husband's case that he chose not to register the marriage because he saw it as a celebratory social event in which he was uninterested.

7. The parties have two daughters. The elder is aged 23 and has completed a degree; and the younger is aged 14.

8. The parties moved from Ukraine to the UK in 2001 (in 2000 according to the husband) for the husband to study for a PhD at the University of Wales. The Home Office granted entry clearance to the wife as the validly married spouse of the husband.

9. On 22 March 2010 the parties were granted by a Housing Association a tenancy in their joint names of a property in Notting Hill.

10. The parties separated in December 2019. On 21 April 2020, the wife applied for non-molestation and occupation orders. A non-molestation order was granted ex parte on 28 April 2020 and was made final by District Judge Mulkis on 4 May 2020 with an expiry date of 27 April 2021. No admissions were made by the husband and no findings were made against him[2].

[1] Except where the historical context requires otherwise I shall use the new language of divorce and nullity as set out in the Divorce, Dissolution and Separation Act 2020 with effect from 6 April 2022. So a decree of divorce will be a divorce order, a decree of nullity will be a nullity order, a decree nisi will be a conditional order, and a decree absolute will be a final order.

[2] There seems to be quite a lot wrong with this process, but this is not the place for me to raise my concerns.

11. On 12 May 2020 the wife and the younger daughter moved out of the property and into a two-bedroom flat provided by the local authority as temporary accommodation. A month later the older daughter joined them.

12. On 29 June 2020 District Judge Mulkis gave further directions on the wife's occupation order application and the final hearing was heard by Recorder Nice on 3 and 14 December 2020. She made findings against both parties and concluded that the husband's behaviour was sufficient for the non-molestation order to stay in place. She refused, however, to make an occupation order but observed that the wife could apply for a transfer of the tenancy.

13. On 15 June 2020 the wife petitioned for divorce but later withdrew the application due to lack of funds to pay the fees. On 10 January 2021 the wife petitioned for divorce a second time. On 15 January 2021 Deputy District Judge Rogers refused the wife permission to lodge a petition for divorce without a marriage certificate and suggested that she should apply for a declaration of status under s 55 of the Family Law Act 1986. On 24 February 2021, the wife formally withdrew her petition for divorce.

14. On 9 June 2021 the wife moved into a different 2-bedroom flat closer to the younger daughter's school. The wife maintains that this housing is unsuitable.

15. On 17 September 2021 the wife applied for the transfer of tenancy of the former matrimonial home into her sole name supported by a statement of the same date. The application was served on both the Housing Association and on the husband.

16. The application was made under s. 53 of and Schedule 7 to the Family Law Act 1996 ('Schedule 7'). So far as they applied to people who were married, or who had been through a form of marriage capable of being the subject of a nullity order, these provisions re-enacted the terms of Schedule 1 to the Matrimonial Homes Act 1983, as amended[3]. Paras 2 and 12 of Schedule 7 allow a transfer of a protected or secure tenancy to be made on or after (but not before) a conditional divorce or nullity order or a judicial separation order but in the case of a divorce or nullity order, the date on which the transfer takes effect cannot be earlier than the date on which the order is made final.

17. No decree nisi or conditional order of nullity has been made in this case. Whether the court should make such an order in this case is the central issue I have to determine. Para 2 of Schedule 7 applies to "a spouse" who has obtained a nullity of marriage order. This gives rise to the question whether a party to a void marriage can literally be described as a spouse. The term a "void marriage" is an oxymoron because the very essence of what is called a void marriage is that the parties were never married in any shape or form and certainly were never spouses. This directly bears on the issues I have to determine and which I address below.

18. The innovation of the 1996 Act was to extend the power to order a transfer of a tenancy to cohabitants. Paragraph 3 of Schedule 7 permits the court to make such an order where cohabitants cease to cohabit. This puts a cohabitant applicant in a rather better position than a spouse applicant. Unlike the latter, the former does not have to

[3] These powers were extended to civil partners by the Civil Partnership Act 2004. All my references to legislation about marriage, divorce and nullity should be taken as including their civil partnership equivalents.

wait until the court has conditionally terminated their union before his or her application can be heard. Nor does s/he have to wait until the court has finally terminated their union before the transfer can take effect. For cohabitants the only requisite condition for the application to be heard and to take effect is that the cohabitation has ceased.

19. On 11 October 2021 the husband filed a statement confirming that he opposed the wife's application; the wife filed a statement in response on 18 November 2021.

20. On 8 November 2021 the Housing Association confirmed they were neither in favour or against a transfer and would abide by the order of the court in compliance with para 14(1) of Schedule 7 of the Family Law Act 1996.

21. Case management directions were given by Deputy District Judge Burles on 20 October 2021, including for the husband to send to the court the questions that he sought to be put to the wife in cross-examination, which he duly did. Recorder Allen KC heard the application at a final hearing on 15 February 2022. The Recorder asked on the husband's behalf the questions he considered relevant to the issues for the court to determine. The court granted a transfer of tenancy to the wife on 25 March 2022 and ordered that the husband could continue to occupy the property for 14 days from the date of service of the order but had to vacate by 4 April 2022 in any event.

22. Recorder Allen KC gave a full judgment on 25 March 2022. On 29 March 2022 he then stayed by consent the order of 25 March 2022 due to concerns regarding the parties' marital status having been raised after the conclusion of the hearing. Specifically, the husband had pointed out that even if not validly married he and the wife were spouses for the purposes of para 2 and so in making the order before a decree nisi (as it was still called on that day) the court acted without jurisdiction. The court gave directions for the parties to file statements in relation to the marriage ceremony. On 14 April 2022 Recorder Allen KC gave a supplemental judgment and lifted the stay of the order of 25 March 2022. He did not consider that there was a need to try the issue of the validity of the parties' marriage for the purposes of the application before him. He ordered the husband to vacate the property by 12 May 2022 and extended the time for seeking permission to appeal to the same date.

23. The husband's appeal notice was issued on 3 May 2022. Permission to appeal was granted by Arbuthnot J on 4 May 2022. The appeal was adjourned until 9 February 2023 because Single Joint Expert ("SJE") evidence from a Ukrainian lawyer was required. Directions were given by Arbuthnot J on the choice of SJE. AGA Partners, Kyiv were instructed and Mrs Aminat Suleymanova provided a SJE report on 31 January 2023. I ordered that the SJE was to answer further questions by 2 February 2023 and a SJE supplemental report was provided by this date. At the hearing I ordered the SJE to answer yet further questions and her written reply was filed on 20 February 2023.

24. Arbuthnot J granted permission to appeal on the first of the husband's eight grounds and adjourned permission to appeal in relation to the 7 other grounds of appeal to be considered at the appeal hearing on a "rolled-up" basis. The first ground of appeal is that the Recorder was wrong to have made a transfer of tenancy order without first determining whether the parties were legally married. Therefore the other seven grounds depend on whether the judge had jurisdiction to make the transfer of tenancy

in the first place. Regarding the first ground of appeal, the husband made a preliminary application pursuant to FPR 30.9 to amend the ground so as to read:

> "The learned judge was wrong to conclude that he had jurisdiction to make a transfer of tenancy order before having first determined whether:
>
> i. The parties had entered into a marriage which was capable of recognition under English law; or
>
> ii. The parties had entered into a marriage which should be treated as void under English law; or
>
> iii. The parties had not entered into any marriage at all."

I granted that application.

25. The remaining grounds are that the transfer of tenancy application is a back-door appeal against the refusal to grant an occupation order and therefore is an abuse of process (grounds 2 and 3); the order would make the appellant homeless and is unjust (ground 4); the Judge failed to take into account "all the circumstances of the case" (ground 5); the Judge disproportionately relied upon false facts and/or weak evidence (ground 6); and that there was procedural irregularity in that a screen was used in court (grounds 7 and 8). At the beginning of the hearing, after receiving submissions on the husband's behalf from Mr Lewis, I refused permission to appeal on grounds 2-8. I was satisfied that none of them had a real prospect of success.

The parties' positions

26. It is common ground between the parties that they intended to create a valid legal marriage between themselves and that for at least 20 years they thought that they had, at least until the wife first presented her divorce petition in January 2021.

27. It is the husband's case that the ceremony in Kyiv in 1997 was a genuine attempt, made in good faith, to enter into a valid marriage. In contrast to English law, where all such marriage are invalid, a marriage in a diplomatic mission in Ukraine is capable, where both spouses are citizens of the state of the mission, giving rise to a valid marriage under Ukrainian law.

28. Mr Lewis, counsel for the appellant, submits that Recorder Allen KC, in making a transfer of tenancy without waiting for the outcome of a petition, logically must have determined that the parties were cohabitants and impliedly must have found that the parties had not even gone through a form of marriage that could be the subject of a nullity order.

29. The wife's case is that the court should regard the marriage as a "non-marriage" which cannot even give rise to a nullity order. Ms Gittins of counsel thus submitted that the court should therefore find that the order of tenancy had been correctly made. In the event the court deems there to be a void marriage, she invites the court to vary the transfer of tenancy order to come into effect on decree of nullity. This would not be possible in circumstances where the hearing had taken place on the basis that the

court had immediate jurisdiction; see *K v K (Financial Remedy Final Order prior to Decree Nisi)* [2016] EWFC 23.

History I: Formation of marriage

30. From Gratian's time, in the middle of the twelfth century, the marriage law of England was that of the canon law[4]. That law stipulated that the formation of a valid marriage required *habiles, consensus et forma. Habiles*, or capacity, existed where there was no impediment. Impediments were either diriment, proof of which rendered a marriage void ab initio, or impedient, which rendered the marriage illicit but not invalid.

31. From the time of the Decretal of Alexander III in 1180 up to the Tametsi decree of the Council of Trent in 1563 the only requirement of due form was that the exchange of vows had to be *per verba de praesenti* rather than *per verba in futuro* (i.e. "I do" rather than "I will"), although an exchange of vows *in futuro* followed by consummation was regarded as forming a valid marriage bond. It could be said that these requirements were an aspect of *consensus* and that there were in fact no requirements of *forma* at all. This had led to major problems arising from secret ('clandestine') marriages. The decree required, in those places where the laws of the Council were promulgated, that a valid marriage had to take place in the presence of a parish priest or his deputy and at least two witnesses. Breach of these requirements would render the marriage null and void.

32. The intervention of the Reformation meant that the Tametsi decree was not promulgated in, or adopted by, England and Wales and clandestine, unrecorded marriages remained rife. Eventually this country joined the rest of the Catholic world and passed Lord Hardwicke's Act in 1753. This imposed strict formal requirements, breach of which would render a marriage null and void. The core formal requirement was the same as that prescribed by the Tametsi decree namely that the marriage had to take place in a church or chapel in the presence of a clergyman and two or more witnesses.

33. It is important to recall that notwithstanding the imposition of these requirements of due form an essential feature of every marriage is that it is formed by the parties alone by words spoken by them in person. A marriage is not bestowed by the officiating cleric, whose official role is as a witness.

34. The subsequent legislative history is laid out by Moylan J in *A v A (Attorney-General Intervening)* [2012] EWHC 2219 (Fam), [2013] Fam 51.

History II: the taxonomy of invalidity

35. At the time of the Reformation Canon law held that marriages were either valid or void; the concept of a voidable marriage did not exist. Following the rift with Rome, freed from curial domination, the common law judges created the concept of the voidable marriage. This was a marriage which was treated as valid until it was annulled by the court. The foremost example of a voidable marriage was the unconsummated marriage. In truth, this was a divorce by another name (and indeed in

[4] Pollock and Maitland: *Magistri Vacarii Summa de Matrimonio* 13 LQR 133.

Canon law a marriage *ratum sed non consummatum* has always been, exceptionally, dissoluble by the Pontiff).

36. English law historically has recognised only these two types of invalid marriage. It is these two types, and only these two types, which are recognised in the codifying Nullity of Marriage Act 1971. A third type, created exclusively by the judges, and arguably in direct conflict with that statute, arrived on the scene in 2001. This third type is the "non-marriage" - a union the voidness of which is so extreme that it falls outside the Nullity of Marriage Act 1971 (now s. 11 of the Matrimonial Causes Act 1973) and will not even attract a decree of nullity.

37. In *HM Attorney General v Akhter & Ors* [2020] EWCA Civ 122, [2021] Fam 277 (*'Akhter*'), which is binding on me, the Court of Appeal seemingly confirmed the existence of this third type of invalid marriage. It held that it was bound by the decision of *Sharbatly v Shagroon* [2013] 1 FLR 1493 to do so: see [56] – [60]. However, a careful reading of the decision yields a different conclusion. The true ratio of the decision is that the Marriage Act 1949 (the successor to Lord Hardwicke's Act) only allows certain types of defective nuptial ceremonies <u>conducted in England and Wales</u> to be the subject of a nullity order. If the ceremony in question does not fit the type then no nullity order can be made: see [64] where the Court of Appeal stated:

> "…we agree with observations that have been made about the unsatisfactory nature of the expression "non-marriage". We consider that the focus should be on the ceremony and would propose that they should be called a "non-qualifying ceremony" to signify that they are outside the scope of both the 1949 and the 1973 Acts."

And see also [54] and [121] – [127]. I return to this below.

History III: the nature of, and grounds for, a void marriage

38. As stated above, a void marriage is an oxymoron. Void means "non-existent". A marriage is an intangible joint status. A non-existent joint status is a contradiction in terms. It was for this reason that that master of language, Ormrod J, was always careful to refer to such invalid unions as "so-called" marriages.

39. In *De Reneville v. De Reneville* [1948] P 100 Lord Greene MR stated at 111:

> 'a void marriage is 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 any decree annulling it.'

40. The law on this is extensive and stretches back to pre-Reformation Canon law, but the principle has been consistently stated. A void "marriage" is 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.

41. In *Kassim v Kassim* [1962] P 224 Ormrod J found that a marriage was bigamous and therefore void. At 233 he held:

> 'The cases cited to me by Mr. Temple amply establish that the ecclesiastical courts had jurisdiction, which they frequently exercised, to grant what were called "declaratory sentences" in cases where the so-called marriage was ipso facto void or, in other words, where the ceremony of marriage in no way altered the status of the parties to it.'

And at 234 he held:

> 'The jurisdiction of this court to deal with marriages void ab initio exists quite independently of the Rules of the Supreme Court and unlike that jurisdiction is not a matter of discretion. Either party and, indeed, third parties having an interest in the subject-matter are entitled ex debito justitiae to a declaration on proof of the necessary facts … **When this court pronounces on a marriage which is ipso facto void it is merely finding and recording a particular state of fact for the convenience of the parties and the public,** and the court is exercising the jurisdiction inherited from the ecclesiastical courts. **In such cases the form in which the judgment is recorded is a declaration that the marriage is and always has been null and void, and it is called a decree of nullity**.' (emphasis added)

42. On 3 December 1970 the Law Commission published a report and a draft Bill to codify the domestic law of nullity of marriage (Law Comm No. 33). I deal with this below. At para 3 it stated:

> '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 added)

43. The concept of "a void marriage" therefore describes something that does not exist. Parties cannot "create" a void marriage. Although it may be linguistic pedantry I do quibble with the statements by the Court of Appeal at [63] and [65] that "there are some ceremonies of marriage which do not create even void marriages", and at [123] that "the December 1998 ceremony did not create a void marriage because it was a non-qualifying ceremony." I recognise that this is shorthand for "there are some ceremonies of marriage the voidness of which Parliament has decreed may not be recognised by a nullity order."

44. The Marriage Act 1949 set out some, but not all, of the grounds on which a so-called marriage would be void. I set out those grounds:

i) The impediment of consanguinity (Section 1).

ii) The impediment of non-age (Section 2).

iii) A marriage knowingly and wilfully contracted by the parties according to the rites of the Church of England but where they knew that the celebrant was not in holy orders or where certain formal requirements (such as the ceremony taking place in the correct church) were not fulfilled (Section 25).

iv) A marriage knowingly and wilfully contracted by the parties "under" Part III of the Act where certain formal requirements (such as prior notice having been given to the Superintendent Registrar) were not fulfilled (Section 49).

45. Section 44 spells out the key requirements for the solemnisation of a civil marriage in a registered building, including the fundamental obligation, stretching back to Lord Hardwicke's Act (which in turn echoed the Council of Trent), that it had to be with open doors in the presence of two or more witnesses. Sections 45 and 46B impose an equivalent requirement for civil marriages solemnised in Registry Offices or on Approved Premises. The Act does not actually say that a failure to comply with this requirement renders the marriage void. It was probably so obvious that it did not need to be said.

46. Curiously, the 1949 Act does not mention *ligamen* (a prior subsisting marriage) which is, of course, one of the primary diriment impediments to formation of a valid marriage. Nor did it mention in its original form the parties being of the same sex, which at that time was, of course, a diriment impediment to marriage. Nor did it mention any of the types of lack of consent which would, at the time it was enacted, have rendered a marriage void (e.g. mistake, fraud, duress, unsoundness of mind). These remained common law grounds in the sense that they were not provided for by statute. Technically they were grounds recognised in Ecclesiastical law which entered our secular law from the Ecclesiastical Court by means of s. 22 of the Matrimonial Causes Act 1857, which provided:

> 'In all Suits and Proceedings, other than Proceedings to dissolve any Marriage, the said Court shall proceed and act and give Relief on Principles and Rules which in the Opinion of the said Court shall be as nearly as may be conformable to the Principles and Rules on which the Ecclesiastical Courts have heretofore acted and given Relief, but subject to the Provisions herein contained and to the Rules and Orders under this Act.'

47. The fact that the 1949 Act did not mention these other grounds obviously did not mean that they were not justiciable. But in *Akhter* the Court of Appeal stated at [50]:

> 'Mr Hale submitted that the 1949 Act does not preclude the court from finding a marriage void in circumstances other than those set out in that Act. We do not agree with this submission at least in respect of the circumstances of this case and certainly in respect of the court's power to grant a decree of nullity.'

Standing on its own and read out of context this is, with respect, very misleading. Indeed, in the very next sentence, the Court of Appeal referred to s. 11 of the 1973 Act as prescribing "when the court will have jurisdiction to grant a decree of nullity." While it is true that the same sex impediment was removed by the Marriage (Same Sex Couples) Act 2013, and that the Nullity of Marriage Act 1971 made want of consent a ground for a voidable marriage, *ligamen* remains a prominent ground for a void marriage (under s 11(b) Matrimonial Causes Act 1973) outside the 1949 Act.

History IV: nullity and public policy

48. There had long been a judicial practice of refusing any matrimonial relief, and with it the corollary of the right to claim a financial remedy, in respect of so-called marriages which were regarded as being beyond the pale for their blatant non-compliance with our requisite standards for the formation of marriage. Lord Penzance led the way in *Hyde v. Hyde and Woodmansee* (1866) LR 1 P&D 130 when his horror of polygamy led him to dismiss a divorce petition without giving the petitioner the opportunity to amend to plead nullity. He concluded his judgment thus:

> 'All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.'

49. The root cause of the chaos in which the law of nullity finds itself is the extraordinary concept, enshrined in the Matrimonial Causes Act 1973, that a decree of nullity in respect to a void marriage (which, as has been seen, does no more then to record the necessary facts and to declare that there is not and has never been a marriage) nonetheless entitles both parties to those proceedings to apply to the court for ancillary relief as if they had been married all along. It is the existence of this right that has caused judges to reach for the weapon of public policy to stop a case in its tracks or to invent entirely new concepts, arguably at variance with statute.

50. In *Risk (Otherwise Yerburgh) v Risk* [1951] P 50, PDA Barnard J dismissed a nullity petition in respect of an Egyptian potentially (but not actually) polygamous marriage. He held:

> 'It therefore seems to me to be clear that … a petitioner cannot come to this court either to enforce rights under or seek relief from a polygamous marriage; and in view of the decision of the Court of Appeal in *De Reneville v. De Reneville*, it is my opinion that such a marriage, if it is voidable, is also excluded from the jurisdiction of this court. Is such a marriage, if void ab initio, equally excluded?
>
> If English law regards such a polygamous marriage as the one now before me as no marriage, it might seem at first sight that there could be no objection to the court's saying so, for the decree would be declaratory. But this would mean that a successful petitioner would have the right to apply for maintenance and for custody; it would also mean that if the present petitioning wife were the second, third or fourth wife of the husband, the court would still have to entertain her petition,

> for under Moslem law the first wife is no more the wife than the remaining three.
>
> On this aspect of the matter the words of Lord Penzance in *Hyde v. Hyde and Woodmansee* are very much to the point. He said: "Is the court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily presuppose duties. There are no conjugal duties, but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of the law. So much for the reason of the thing".'

51. The reference to the decision of *De Reneville v. De Reneville* was completely irrelevant. In that case the wife had failed to establish a sufficient connection to this country for the court to have jurisdiction to hear her petition. In truth, the dismissal of the petition in *Risk* resulted from a judicially created public policy exception to what was a lawful entitlement vested in that wife to be granted a decree of nullity. That Barnard J's decision was based on his personal feelings of affront is shown by his comment that if she were the fourth (concurrent) wife of the husband, she would, if her argument were correct, be able to claim maintenance. Implicitly, this was beyond the pale.

The Nullity of Marriage Act 1971

52. As stated above, on 3 December 1970 the Law Commission issued its report on Nullity of Marriage. This was the culmination of a project which began in 1968,

> "to examine the existing law of nullity of marriage, the division of annulled marriages into void and voidable one, whether the existing law and this division are satisfactory and whether any alteration is desirable in the status or effect of voidable marriages"

The report stated that its objective was "to state comprehensively when a nullity decree can be obtained" (para 95). It stated that the attached bill "codified the English domestic law of nullity but did not attempt to deal with problems of conflict of laws" (page 51). It proposed that lack of consent should render a marriage voidable, not void.

53. The draft Bill set out the grounds on which a "marriage" may be declared void. In accordance with the recommendations these did not include lack of consent. The grounds were duly enacted as s. 1 of the Nullity of Marriage Act 1970 and are now found at s.11 of the Matrimonial Causes Act 1973. This provides in its present form:

> '**Grounds on which a marriage is void.**
>
> 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 sixteen; 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 **….**
>
> (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.'

54. Section 1 of the Nullity of Marriage Act 1973 thus stipulated a closed class of grounds for a void marriage. These grounds included at s.1(a)(iii) "intermarriage" in disregard of certain requirements as to the formation of marriage, but the report at p.45 said only this about it:

> "Ground (a)(iii) is perforce less explicit because, under the Marriage Act, the question whether failure to comply with the prescribed formalities renders the marriage void depends on the nature and extent of this failure and, in some circumstances, on the knowledge of the parties. The law in this respect is at present under review by a Working Party set up by the Registrar-General and the Law Commission and it is hoped that this review will lead to a much needed simplification of the present confusing position."

So far as I am aware that review produced no report and no simplifying legislation ever ensued.

55. Following the enactment of the 1971 Act the question of the effect of a blatant failure to comply with the requirement of due form came to the fore in the controversial decision of *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6. The ceremony in that case was an Islamic marriage in an apartment. The husband had a prior subsisting marriage. Hughes J held at [58] that unless a marriage purports to be of the kind contemplated by the Marriage Acts, it is not a 'marriage' for the purposes of s 11 of the Matrimonial Causes Act 1973. The idea of a "non-marriage" was born.

56. The authority relied on to justify this conclusion was *R v Bham* [1966] 1 QB 159, but, with respect, that case is totally irrelevant to the question whether an applicant who satisfies all the jurisdictional requirement to seek a nullity order should nonetheless be refused it. It is irrelevant because, as Mr Lewis correctly submitted, the defendant would have been acquitted if a decree of nullity had been issued declaring the marriage void for having been contracted in disregard of the formal requirements as to its formation under the 1949 Act. The judgment says absolutely nothing about

whether there is a class of ceremony that is so beyond the pale that not even a nullity order can be made in respect of it.

57. Following *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* the idea of a non-marriage took hold and was applied in a number of first instance decisions, including some defective ceremonies conducted overseas. This concept was undoubtedly another instance of the judges giving effect to personal views of public policy. In *Burns v Burns* [2007] EWHC 2492 (Fam), [2008] 1 FLR 813 at [46] Coleridge J explained:

> "There is a final suggestion from the authorities, namely that certain marriage ceremonies are so deficient of the character of marriage that almost as a matter of public policy, they cannot attract the kind of relief ancillary to a nullity decree that is usual. If that is being suggested in this case and in relation to this marriage ceremony, I reject it."

Domestic ceremonies: lack of due form after Akhter

58. Where lack of due form is cited in a domestic civil marriage case (i.e. a ceremony which does not purport to be under the Anglican rite), the Court of Appeal has held in *Akhter* that s.11(a)(iii) should be read as if it says:

> '[A marriage shall be void on the following ground]… where it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 in that the parties have purported to intermarry pursuant to the terms of Part III of the 1949 Act but knowingly and wilfully have disregarded certain requirements as to the formation of marriage under that Part.'

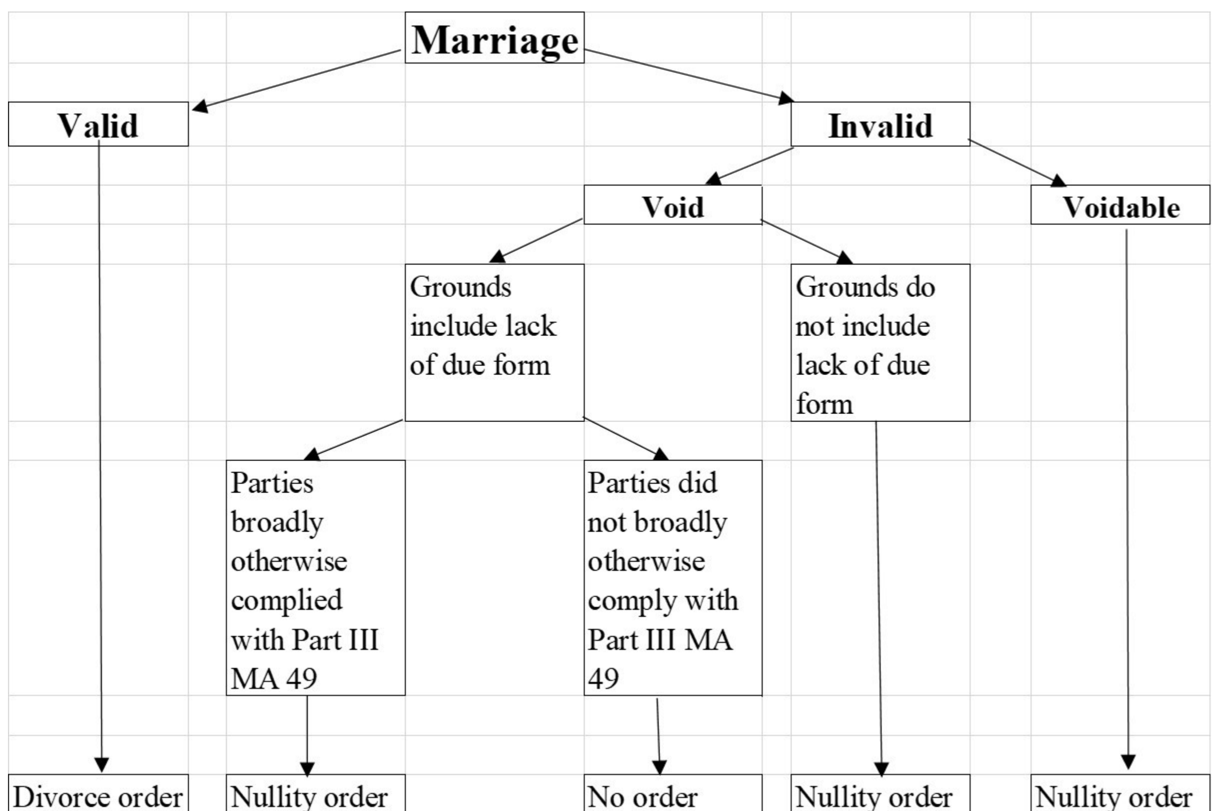
59. I fully agree that this is the only tenable construction of s.11(a)(iii) of the 1973 Act that makes it consistent with the terms of Part III of the 1949 Act. Thus, to fall within s.11(a)(iii) of the 1973 Act the intermarriage has to be of a character which broadly complies with the obligations in Part III of the 1949 Act.

60. I agree that an interpretation on these lines is needed if the system of regulating marriages is not to be grievously undermined. Lord Hardwicke's Act did not seek to deal with entrenched legal concepts relating to capacity or consent. It was concerned only with due form. It did not apply to the marriages of Jews, Quakers or the Royal Family. All other marriage ceremonies had to be under the Anglican rite, which in turn required certain specified regulatory formalities. The requirement that the marriage ceremony had to be under the Anglican rite was removed by the Marriage Act 1836, but the formal requirements remained. That system, much amended, endures to the present day.

61. The effect of the Court of Appeal judgment is therefore as follows. The age-old taxonomy of valid, void and voidable marriages, formally confirmed by the 1971 Act, is undisturbed. On an application relating to these concepts the court is empowered to award matrimonial relief. In the case of divorce, the relief is a divorce order dissolving the marriage; in the case of a void marriage it is a nullity order that operates as a declaration that there is not and never has been a marriage; and in the

case of a voidable marriage it is a nullity order that operates as a declaration that there was a valid marriage until the date of the order but that thereafter it is treated as not existing. However, if the application concerns a marriage in England and Wales which is said to be void because of non-compliance with certain formal requirements stipulated in the Marriage Act 1949 the court will entertain the application if, and only if, the ceremony otherwise broadly complied with the requirements of that Act. If it did not, the state effectively washes its hands of dealing with that "non-qualifying" ceremony in any way.

62. The existing structural law of the formation and dissolution or annulment of marriages contracted in England and Wales may be graphically shown as set out below. This shows just how complex and confusing this field of law has become. Given the continuing popularity of marriage it is in my opinion unacceptable that the rules are so obscure and impenetrable.



Overseas ceremonies

63. This case concerns a defective overseas ceremony of marriage. The Law Commission report was clear that its proposed reforms only applied to domestic ceremonies. The note to Clause 4 of the Draft Bill stated:

> 'As stated in paragraph 2 of the Report, the Bill codifies the English domestic law of nullity but does not attempt to deal with problems of conflict of laws. Accordingly, subsection (1)

> makes it clear that clause 1 or 2 does not preclude the English courts from determining the question of the validity of a marriage in accordance with the rules of a foreign country where our rules of private international law so require. This has a two-fold application. First, a marriage governed by foreign law may be valid notwithstanding that it would be void under clause 1 or voidable under clause 2 if it were governed by English law. For example, notwithstanding clause l (a)(ii) it will be valid although one party was under the age of sixteen years if valid in the country where it was celebrated and by the law of the parties' domicil. Secondly, the marriage may be void or voidable if defective according to the law of the place where it was celebrated or that of the parties' domicil, notwithstanding that it would not be void or voidable under clause 1 or 2. This might be so, for example, where the applicable law had wider prohibited degrees, a higher minimum age or additional grounds of voidability.'

64. Clause 4(1) was duly enacted and is now s.14(1) of the Matrimonial Causes Act 1973. This provides, so far as relevant to this case:

> **'Marriages governed by foreign law…**
>
> (1) where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11, 12 or 13(1) above shall:
>
> (a) preclude the determination of that matter as aforesaid; or
>
> (b) require the application to the marriage of the grounds or bar there mentioned except so far as applicable in accordance with those rules.'

65. It is well established under our rules of private international law that the formal validity of a marriage celebrated overseas (*forma*) is governed by the *lexi loci celebrationis* ('the foreign law') while personal validity (*habiles*, *consensus*) is governed by the law of the party's domicile: see *Sottomayor v De Barros (No.1)* (1877) 3 PD 1 (CA) per Cotton LJ at 5:

> '**The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted**; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile.' (emphasis added)

66. Viscount Dunedin put it in even stronger terms in *Berthiaume v Dastous* [1930] A.C. 79, 83 (PC):

> 'If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage.'

67. Although the *lex loci celebrationis* decides "all questions relating to the validity of the ceremony" there has been debate as to the width of that principle. For example, in *Burns v Burns* [2007] EWHC 2492 (Fam), [2008] 1 FLR 813, at para [45] Coleridge J held:

> 'Once the foreign law has determined whether it is or is not a valid marriage, it is for the lex fori to decide its implications and what remedies are available to the petitioning spouse. It is neither here nor there that the local law happens to use the same wording, 'void and voidable', to categorise certain invalid marriages. Some local laws would, some would not; that is coincidence arising from similar use of language. The point is that it is invalid by local rules, and by English law having determined that it is invalid, a decree of nullity is available.'

68. It is undoubtedly true that once the foreign law has determined the question of validity, and once that determination has been recognised by this court, then the actual relief that is awarded, if any, is the domestic remedy of the grant or refusal of a nullity order. That seems to me to state the obvious. However, this principle does not tell us precisely what the remit of the foreign law determination is. In my judgment, the binding determination by the foreign law does not necessarily come to a halt at the question of the validity of the ceremony. If the foreign law not only determines the question of validity, but also determines the ramifications of invalidity (if found), then in my judgment that corollary should also be binding, provided that it is not obviously contrary to justice.

69. If, for example, the parties have disregarded the marriage laws of the other country when devising their marriage ceremony to such an extent that the court of the foreign law ('the foreign court') would, if the matter came before it, treat the ceremony as being entirely non-existent, giving rise to no entitlement to make a claim in court for anything, then, in my judgment, that too is a determination of a question "relating to" the validity of the ceremony, which is binding, provided that it is not obviously contrary to justice. The determination corresponds to our domestic concept of a non-qualifying ceremony and so the appropriate remedy would be dismissal of the application for a nullity order.

70. In contrast, if, for example, the foreign law determined that a ceremony was defective for want of compliance with the necessary formalities, and that therefore the marriage was void, but that the ceremony could be later ratified or validated by compliance with the formalities, then such a determination should likewise be regarded as being a question relating to the validity of the ceremony which, under our rules of private

international law, is binding. That binding decision is that the marriage is not non-existent and therefore the appropriate remedy to be made by the English court is a nullity order.

71. That was the case in *Asaad v Kurter* [2014] 2 FLR 833 where Moylan J at [70] – [97] laid out an impressive survey of our private international law which illuminates the difficulty, arising from time to time, in determining whether a defect is one of formal or personal validity. This led to his conclusion at [97]:

> 'In summary, in my view:
>
> (a) whether the defect makes the marriage valid or invalid is a matter to be determined by the applicable law, being in the case of the formalities of marriage the law of the place where the marriage was celebrated;
>
> (b) the English court must determine the effect of the foreign law by reference to English law concepts; if the applicable foreign law determines the effect of the defect by reference to concepts which clearly (or sufficiently) equate to the same concepts in English law then the English court is likely to apply those concepts; if the foreign law does not, then it is for the English court to decide which English law concept applies; and
>
> (c) in any event, it if for the English court to decide what remedy under English law, if any, is available for the reasons set out in *Burns v Burns* [2007] EWHC 2492 (Fam), [2008] 1 FLR 813, at para [49].'

72. He then went on to state:

> '[98] I must now apply my view of the law, as set out above, to the facts of this case. As referred to above, I consider that the effect of the expert evidence is simply that, as a legal marriage was not effected, there is no marriage. It is clear that Syrian law has no separate concepts of a marriage being void or voidable or a non-marriage. It would appear, in the circumstances of this case, that a marriage will either be legal or not legal – the marriage in this case is clearly not valid and has been described as being either a 'non-approved' marriage or a 'non-marriage'. As described above, it would be simplistic merely to take the words 'non-marriage' or even 'non-existent' marriage and apply those words in an English law sense when Syrian law does not have the same terms.
>
> [99] It is clear to me that the ceremony in the present case is not, in English law terms, a non-marriage. As referred to above, both parties knew they were participating in a marriage ceremony. It was a ceremony which was capable of being made formally valid because permission could have been obtained as part of the registration process following the marriage. It was a

> ceremony which was capable of conferring the status of husband and wife, if the parties had subsequently complied with the necessary formalities. To adopt Coleridge J's words, it is not 'so deficient' that it can be described in English law terms as a 'non-marriage'.
>
> [100] In my judgment, it is a marriage which is not valid as a result of a failure to comply with certain of the required formalities and as such is properly described in English law terms as a void marriage. I do not consider that this is to give the marriage any greater effect than it has under Syrian law because as described above a void marriage could be described as no marriage or a non-existent marriage or, even, a non-marriage but for the way in which these latter terms are used under English law.'

73. For the reasons stated above, I would go further than Moylan J. In my judgment, the "questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted" which fall to be determined by the foreign law encompass:

    i) the formal validity or invalidity of the ceremony; and

    ii) the ramifications of that finding under the foreign law.

    And provided that it is not contrary to justice, the relief awarded by this court should reflect those ramifications. It follows that expert evidence about the foreign law must address both of the above elements.

74. Approaching the matter in this way would avoid the awkwardness exemplified by the decision in *Hudson v Leigh* [2009] EWHC 1306 (Fam)[5]. In that case an elaborate Christian ceremony of marriage took place in South Africa although it was made deliberately defective (for example by leaving out key words at the exchange of vows) so that it did not produce a valid marriage under the local law. The reason for this was that the defendant, an atheist Jew, did not want to be married in a Christian ceremony. Therefore, the parties agreed that there would be a Christian ceremony which looked very much like a marriage, but that they would in fact be later properly legally married in a registry office on their return to this country. Needless to say, their relationship broke down before they could get to a registry office here. Bodey J heard expert evidence as to what South African law, the proper law, would say about the validity or otherwise of the so-called marriage. He rejected the opinion of the wife's expert that the parties had in fact concluded a valid marriage; he accepted the opinion of the husband's expert that a court in South Africa would find the ceremony to amount to a void marriage and that there would be a judgment or order issued to that end. In [40] Bodey J held that under South African law "Miss Hudson would be entitled to a decree of annulment, rather of divorce."

75. Notwithstanding that this was the effect of the foreign law Bodey J went on to hold that under English law the ceremony amounted to a "non-marriage". He even granted a declaration that "the Cape Town ceremony of 23.1.04 did not create the status of

[5] Where, as it happens, I successfully represented the respondent Mr Leigh.

marriage as between Miss Hudson and Mr Leigh". That meant she would have no right to apply for financial relief for herself.

76. In Bodey J's judgment the declaration did not fall foul of s.58(5) of the Family Law Act 1986 which prohibits a declaration being made by any court that a marriage was at its inception void. At [83] he held:

> 'In my judgment, the making of such a declaration is not outlawed by s.58(5) if and for so long as it is made to declare that there never was a marriage, as distinct from being a declaration (which is not permitted) that a given marriage was void at its inception.'

77. I have to say. looking at that decision impartially as a judge, that for the English court to have decided that Miss Hudson could not be granted a decree of nullity when the finding was that she would have been granted exactly that relief by a South African court is extraordinary. The foreign law determined that the ceremony amounted to a void marriage entitling the defendant to a decree of annulment in South Africa. It was the duty of the English court to give effect to the foreign law. The actual decision was completely at variance with the foreign law and made a mockery of the duty to recognise its disposition.

78. I would also take issue with the declaration made by Bodey J that "there never was a marriage" which was, he said, distinct from a declaration that the marriage was void at its inception. But the authorities which I have cited above show with striking clarity that a decree of nullity in this jurisdiction is no more than a declaration that there is, and never was, a marriage between the parties. Therefore, the declaration made by Bodey J was saying, albeit using different words, that at its inception this was a void marriage, which is prohibited by s. 58(5) of the Family Law Act 1986.

79. Applying this "ancillary finding is binding unless contrary to justice" test, it is my view as to the following overseas ceremonies that:

    i) the grant of a decree of nullity in *Burns v Burns* was the right decision;

    ii) the dismissal of the wife's nullity petition in *Hudson v Leigh* was the wrong decision;

    iii) the grant of a decree of nullity in *Asaad v Kurter* [2013] EWHC 3852 (Fam) was the right decision;

    iv) the grant of a decree of nullity in *K v K* [2016] EWHC 3380 (Fam) was the right decision[6].

This case

[6] Although, again, this is not the place to raise unconnected concerns, I have to ask: Why was this decision anonymised?

80. Having regard to the admirably clear evidence of the SJE I make the following findings about the Ukrainian law about the formation and annulment of marriages within Ukraine[7]:

    i) The parties had the capacity to marry each other in 1997 according to Ukrainian law. There were no impediments preventing their marriage.

    ii) Although two Iranian citizens could have validly married in the Iranian embassy in Kyiv in 1997, this was not possible in this case as the wife was a Ukrainian citizen.

    iii) In order validly to marry in Ukraine in 1997 the parties needed to register their marriage officially. Registration in this context means the actual formation of the marriage in what we would call a Registry Office. The core requirement is that the spouses must personally sign the registration record and each must receive a copy of the marriage certificate. The event can be a simple process or an elaborate celebratory affair. The parties never did this.

    iv) The marriage of the parties in the Iranian embassy is invalid under Ukrainian law.

    v) The 2002 family code is essentially the same as the 1969 family code which was in force at the time of the ceremony. It provides for automatic invalidation of marriages where there was a prior subsisting marriage, or close consanguinity, or mental incapacity. It provides for mandatory invalidation in cases where a judge has found that there was a want of free consent, or where the marriage was a sham. It provides for discretionary invalidation where a judge has found remoter degrees of consanguinity, where in the case of a young person the necessary consent has not been given, and where ill-health has been concealed. Where a marriage is invalidated, either automatically, or in the exercise of judicial discretion, the parties lose all spousal rights and their property is divided between them as if they were cohabitants. However, some spousal relief may be awarded where a party was found to have been unaware of the impediment to forming a valid marriage.

    vi) I have been referred to a decision of the Ternopil City District Court dated 25 April 2016 where a Swedish man married in Sweden an Ukrainian woman he had met online. However, after the marriage the husband flatly refused to live with, or have anything to do with, the wife apart from demanding that she pay his debts of €500,000. The wife petitioned for an annulment of the marriage claiming that it was fictitious in that the husband never had an intention of creating a family or acquiring the rights and obligations of the spouse. The claim was upheld the court holding that the wife did not give free consent. The court went on to hold pursuant to article 45(1) of the 2002 family code of Ukraine that a marriage declared invalid by a court decision did not constitute a basis for the rights and obligations of spouses. This provides:

[7] I have received evidence about the recognition of marriages solemnized outside Ukraine where one party, at least, is Ukrainian. These will be recognised provided that the foreign law was complied with and that the Ukrainian spouse(s) had capacity to marry under Ukrainian law.

> "Invalid marriage (Article 39 of the present Code), as well as a marriage found invalid judicially do not constitute any ground for the persons between whom it has been registered to assume spouses' rights and responsibilities, as well as rights and responsibilities established for spouses by other laws of Ukraine."

vii) There is nothing in the code to explain how a marriage invalid for want of due form is dealt with. The nearest provision in the 2002 code is article 48 which refers to a marriage which is "non-concluded". Such a state of affairs would arise if a marriage is registered (i.e. formed) in the absence of one or both parties. The SJE's evidence shows that this provision is used where a marriage has been fraudulently contracted for example where a signature of a spouse has been forged, or where an alleged marriage simply did not occur. In such a situation the record of the marriage is removed from the register at the behest of a judge. This would not be an apt process if there was a challenge for lack of due form.

viii) The reason that there is no process is explained very simply and clearly by the SJE. If a marriage said to have been contracted in Ukraine is not recorded in the civil status acts register of Ukraine, then there is no such marriage in Ukraine. The court in Ukraine would decline to hear a claim for recognition of such a marriage as valid or concluded.

ix) If, following their marriage in 1997, the parties had lived in Ukraine and their relationship had broken down there, then they would be treated as if they were unmarried cohabitants. From 2002, under Article 74 of the 2002 Code they would be treated as if they were married de facto and from that point their property would be divided between them by reference to the same rules that would apply if they were married. These rights would derive from their cohabitation and not from their unregistered marriage in the Iranian embassy. Further, under Article 91, with effect from 2002, maintenance may be ordered to be paid to a long-standing cohabitant if that person has become unable to work or is living with their child. Again, this right to claim maintenance derives from cohabitation and has nothing to do with an unregistered marriage.

81. In the light of this evidence it is clear that under its proper law the 1997 marriage in the Iranian embassy in Kyiv is invalid *ab initio*, and incapable of being later ratified. When choosing between the alternative of a void and voidable marriage the closest English law concept to the Ukrainian legal treatment of this ceremony is a void marriage.

82. The next question is what primary or consequential matrimonial relief, if any, could be awarded by an Ukrainian court. The answer is absolutely none at all. The evidence suggests that neither party could bring any form of case to court for recognition of the marriage or otherwise. The SJE evidence is clear. This ceremony will not be afforded any recognition in any shape or form. Nor is it a ceremony which can be subsequently ratified by an administrative step (unlike the marriage in *Asaad v Kurter* which is best seen as a marriage which was at its formation conditionally void). The 'registration'

referred to above would not ratify the Iranian embassy ceremony. On the contrary, it would be an actual original marriage.

83. It is true that the parties went through a marriage ceremony which had the capability of being valid under Ukrainian law if both parties had been Iranian citizens. Further, it seems likely that the marriage was valid under Iranian law. It is true that the parties have relied on the marriage as being valid; and they secured the wife's entry into this country on the basis that they were validly married. However, while Ukrainian law unsurprisingly does not have a concept of a non-marriage, the SJE is equally clear that the ceremony in the Iranian embassy gave no rights to either party to seek anything.

84. This is the key aspect of the expert evidence in my opinion. In contrast to other cases where the expert evidence is ambiguous, in this case it could not be clearer. Save in the exceptional case where a party was unaware of the existence of an impediment to marriage a finding of invalidity of the marriage, whether automatically or by judicial decision, has the invariable consequence of removing any right of the parties to make any claim whatsoever akin to that of spouses.

85. In my judgment this evidence as to the ramifications of the invalidity of this ceremony is clear and is presumptively binding on me. In my judgment , it would not be obviously contrary to justice to apply it. The way in which it is to be given effect is for the husband's appeal to be dismissed on the following footing:

i) that the 1997 ceremony was analogous to a domestic non-qualifying ceremony generating no right to the grant of a nullity order;

ii) the parties are thus not to be treated as spouses for the purposes of Paragraph 1 of Schedule 7 to the Family Law Act 1996; and

iii) the power to transfer the tenancy was validly exercised by the Recorder.

86. The appeal is therefore dismissed on that basis.

87. Further, if the husband were to present to the Family Court an application for a divorce order, alternatively a nullity order, both applications would have to be dismissed.

Postscript

88. In a thoughtful article in [2013] Fam Law 1278 entitled "A critique of non-marriage" the late and much lamented Valentine Le Grice QC cited p 85 of the 2nd edition of Jackson's The Formation and Annulment of Marriage:

> '… the question of whether a marriage is void, voidable or valid presupposes the existence of an act allegedly creative of a marriage status'

He argued that if at least one party to the ceremony believes that it is creative of a marriage status (no matter how unorthodox, alternative, or even weird, the ceremony was) then that will be sufficient to satisfy the definition of a void marriage. If, however, the evidence shows that the parties were playing a game or were acting in a stage or film drama then no act has occurred which is creative of a marriage status and

any application for a nullity order based on those facts will be peremptorily struck out. He argued:

> 'If alternative ceremonies are brought within void marriage, non-marriage could be limited to fictional marriages on stage and screen and ceremonies which everyone knew to be a game. The word void would be reunited with its dictionary definition, status could be clarified by decree, meritorious claims for financial relief permitted and discrimination avoided. Further, it is submitted that these ends would be achieved by a proper analysis of the legislation and older authority.'

89. In my opinion these are persuasive arguments.

90. These cases are not rare and remote outliers. There are many religious (usually Islamic) marriages solemnised in private dwellings in gross disregard of our laws (or the host country's laws) concerning the due form for such ceremonies. According to the judges these ceremonies are so irregular that they amount to non-qualifying ceremonies, a feature of which is that no primary or ancillary matrimonial relief may be awarded. Yet, the ceremony is a valid marriage in the minds of the parties and probably would be recognised as valid by the entire Islamic world. In my opinion the situation is a disreputable mess and urgently needs to be definitively clarified both substantively and procedurally.

91. This can only be achieved comprehensively, as Mr Le Grice QC pointed out, by the Supreme Court as the Court of Appeal and all lower courts are bound by *Akhter* in relation to domestic ceremonies.

92. This case, however, concerns an overseas ceremony. Unfortunately, I cannot grant a leapfrog certificate under s.12(1) of the Administration of Justice Act 1969 as there is no Court of Appeal binding authority on the effect of s.14 of the Matrimonial Causes Act 1973 and the rules of private international law on the treatment of defective overseas ceremonies of marriage. Further, this being an appeal I cannot grant permission for there to be a second appeal to the Court of Appeal. Under CPR 52.7 only the Court of Appeal can do that. It would therefore seem, by virtue of s. 15(3) of the 1969 Act, even if there had been such binding authority no certificate could be granted by me under s.12(1) as I do not have the power to grant leave to appeal.