Neutral Citation Number: [2021] EWHC 224 (Fam)

Case No: FD20F00051

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Sitting remotely

Date: 08/02/2021

Before :

MR JUSTICE MOSTYN

- -

Between :

NB **Applicant**

- and –

MI **Respondent**

- -
- -

Tahmina Rahman (instructed by **Begum & Co Solicitors**) for the **Applicant**
The Respondent did not attend and was not represented

Hearing date: 2 February 2021

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Approved Judgment

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This judgment was delivered in private. 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 applicant, the respondent and members of their families 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.

Mr Justice Mostyn:

1. I have before me an application for a declaration of non-recognition of a marriage pursuant to the inherent jurisdiction of the High Court dated 2 September 2020 and a petition for nullity dated 6 November 2020. By an earlier order the latter was transferred by me to the High Court to be heard alongside the former. Both relate to a marriage formed on 1 June 2013 in Pakistan under sharia law between the parties. There is no suggestion that the marriage is not valid in Pakistan. The issues for me are, first, whether the applicant had capacity to consent to marriage on 1 June 2013; and second, if not, whether the marriage should not be recognised by this court, or, alternatively, annulled.

2. The respondent has not engaged in these proceedings. He is a national of Pakistan but I understand that he currently works in Dubai. The applicant's solicitors have attempted to serve the respondent by post and email but there has never been a response. An earlier order made by me permitted service by email. None of the emails has bounced. I am satisfied that the respondent has been served but has chosen not to engage in the proceedings.

3. In 1995 the applicant at the age of six was involved in a major car accident along with other members of her family. She was taken by helicopter to hospital where she spent many months recovering from her injuries, including what has been described as a catastrophic brain injury. There was understandably a serious impact on the applicant's mental health and cognitive functioning.

4. The applicant settled her claim arising out of the accident for a large sum. A deputy was appointed for the applicant by the Court of Protection because she lacked capacity to manage her property and financial affairs. The final deputy was the applicant's current solicitor who acts in these proceedings. The deputyship was discharged in 2019. The applicant's deputy had observed that the applicant was becoming more independent and was able to manage her property and financial matters. A capacity assessment from Dr Simon Prangnell, a consultant clinical neuropsychologist, was obtained in March 2019; it deals with various aspects of the applicant's life from making a will and managing property to entering into marriage and engaging in sexual relations. I will turn to his evidence in more detail below but in summary he concluded that the applicant did have capacity in all the areas of life canvassed including to marry and enter sexual relations. But it was his expert opinion that in June 2013 the applicant did not have capacity to marry.

5. The report by Dr Prangnell followed two earlier capacity assessments by Dr Michael Barnes, Honorary Professor of Neurological Rehabilitation at Newcastle University. The deputy had for a number of years been obtaining capacity reports so that she could keep the Court of Protection up to date as to the applicant's capacity. Professor Barnes in 2012 concluded that the applicant did not have capacity to marry. He opined in 2016 that the applicant would have continued to lack capacity in this regard in 2013. Again, I will turn to his report in further detail below.

6. The applicant comes from a Muslim Pakistani family, resident in England.

7. I will set out below my findings about the course of the parties' relationship leading up to and following the marriage. As will be seen, the parties have since the marriage on 1 June 2013 spent very little time together and are now irretrievably estranged. The

applicant has come under pressure from her family to reconcile with the respondent which has caused a high level of tension. The applicant travelled to see the respondent in April 2018 to explore the possibility of reconciliation. The applicant says they both agreed that the marriage was at an end although she says the respondent later changed his stance. She understands that the respondent now has plans to remarry although she is unaware of any attempts by him to divorce her.

8. Clearly, the applicant has achieved a great deal in her life. The applicant has fought back from the life-changing events of 1995 and from an uncertain initial prognosis to acquire qualifications, employment, and independent living. She has regained capacity in seemingly every field. This is not to detract from the submission of her counsel, who rightly argued that just because the applicant's presentation is currently good, it does not mean that she is not suffering from a mental impairment or condition. I readily accept that to some degree the applicant still lives with the consequences of the accident.

9. These are the questions that fall for determination:

   i) Did the applicant lack capacity to consent to marry on 1 June 2013?

   If yes:

   ii) Does the court have power under its inherent jurisdiction to declare that the marriage between the applicant and the respondent, valid according to the law of Pakistan, is not recognised as a valid marriage in this jurisdiction, and if so, should the power be exercised?

   iii) Should time be extended under s.13(4) of the Matrimonial Causes Act 1973 to permit the applicant's nullity petition to be heard?

Capacity to marry

10. In *Durham v Durham* [1885] 10 PD 80, 81 Sir James Hannen P held in a dictum that has since become canonical:

> "The contract of marriage is a very simple one which does not require a high degree of intelligence to comprehend. It is an engagement between a man and a woman to live together and love one another as husband and wife to the exclusion of all others."

This has become the universal standard (although, of course, a marriage now can be formed between a same-sex couple). The simplicity of the contract has been emphasised time and again.

11. In *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326 at [141(ix)] Munby J held:

> "There are thus, in essence, two aspects to the inquiry whether someone has capacity to marry. (1) Does he or she understand the nature of the marriage contract? (2) Does he or she

> understand the duties and responsibilities that normally attach to marriage?"

And at (x):

> "The duties and responsibilities that normally attach to marriage can be summarised as follows: Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance."

12. Although Munby J spoke of obligations and rights I myself would prefer to speak in terms of expectations. The language of obligations and rights is the language of justiciability and enforceability, which are concepts likely to be alien to a marrying couple. This was recognised by Munby J himself in *X City Council v MB, NM and MAB* [2006] EWHC 168 (Fam), [2006] 2 FLR 96 at [59] – [65]. At [60] he agreed that the sexual component of marriage (where it arises) cannot properly be described as either a duty or a responsibility. The same must be true of any other facet of married life.

13. In *Sheffield City Council v E* at [83] Munby J explained that capacity to marry is status-specific, rather than spouse-specific. He said:

> "The question is whether E has capacity to marry. That is not, with respect to Mr Jay, some hypothetical or abstract question. It is a very specific question to be addressed by reference to the state of affairs existing at the time by reference to which the inquiry is made. It is, if you like, a general question, in the sense that the question is whether E has capacity to marry, not whether she has capacity to marry X rather than Y, nor whether she has capacity to marry S rather than some other man."

14. In *X City Council v MB, NM and MAB* Munby J considered the inter-relationship of capacity to marry and capacity to choose to engage in sexual relations. At [84] he held:

> "Generally speaking, capacity to marry must include the capacity to consent to sexual relations."

Munby J was careful not to formulate this proposition in absolute terms. I respectfully agree that he was right not to do so. The authorities have set the standard for capacity to choose to engage in sexual relations at an equivalently low level to that for capacity to marry: see for example *D Borough Council v AB* [2011] EWHC 101 [COP]; [2011] 2 FLR 72, at [21]. If someone has the capacity to consent to marry then, as a matter of empirical experience, he or she is likely to have the capacity to choose to engage in sexual relations. However, because capacity is always issue-specific, capacity to marry, and capacity to choose to engage in sexual relations, are legally distinct. They may not necessarily produce the same answer, although typically they will.

15. It therefore does not follow that there is a rule that capacity to marry requires as a pre-condition capacity to choose to engage in sexual relations. It is possible to envisage a person lacking the mental and physical capacity to choose to engage in sexual relations, perhaps as a result of traumatic injury, but who nonetheless has full capacity to take a wife. Similarly, a couple may marry and live together *tanquam soror vel tanquam frater* (as sister and brother - see below). In *X City Council v MB, NM and MAB* Munby J at [62] helpfully reminded us of *Briggs v Morgan* (1820) 3 Phill Ecc 325 at 331-332, where Sir William Scott said it may be that a marriage "at a time of life when the passions are subdued" is "contracted only for comfortable society", the spouses being "fairly left to just reflection and more placid gratifications". Needless to say, these are all perfectly valid marriages.

16. In *London Borough of Southwark v KA and Others* [2016] EWCOP 20 Parker J sought to draw the threads together and held at [37]:

> "The tests for capacity in respect of sexual relations and marriage are not high or complex. The degree of understanding of the 'relevant information' is not sophisticated and has been described as 'rudimentary', although Macur J's word 'salient' may be more apt. I must not set the test too high."

And at [76]:

> "The test for capacity to marry is also a simple one: (a) Marriage is status specific not person specific. (b) The wisdom of the marriage is irrelevant. (c) P must understand the broad nature of the marriage contract. (d) P must understand the duties and responsibilities that normally attach to marriage, including that there may be financial consequences and that spouses have a particular status and connection with regard to each other. (e) The essence of marriage is for two people to live together and … love one another. (f) P must not lack capacity to enter into sexual relations."

17. For the reasons set out above I do not agree with (f) as an absolute proposition.

18. Parker J continued at [79]:

> "It is not relevant to his understanding of marriage that he does not understand … how financial remedy law and procedure works and the principles are applied. The fact that he might lack litigation capacity in respect of financial remedy litigation does not mean that he lacks capacity to marry."

19. In *Mundell v Name 1* [2019] EWCOP 50 I developed this point at [31]:

> "In my judgment, it would be inappropriate and, indeed, arguably dangerous to introduce into the test for capacity to marry a requirement that there should be anything more than a knowledge that divorce may bring about a financial claim. This, (name 1) plainly understands. However, what the extent of that

> claim should be is a mystery to even the most sophisticated and well educated of lay, as well as legal, persons and to suggest that there is needed an appreciation of what the result of a financial remedy claim might be, would be to set the test for capacity far too high."

20. A shared economy is not of the essence of the marriage contract (even if on divorce the law treats the spouses as equal financial partners). A marriage will normally give rise to financial consequences and on divorce there may be a financial claim, but these are not of the essence of the contract. Knowledge and understanding of these consequences is not a component of marital consent and capacity should not be judged by reference to this factor. This is to import a degree of sophistication at odds with the simplicity of the contract.

21. Although it has been said that an essential feature of the marriage contract is that the spouses should live together and love each other to the exclusion of all others, later cases have shown that the advancement of modern life has adapted even these traditional requirements. Thus, in *The matter of X (A Child)* [2018] EWFC 15 the relationship of the married couple was described as being neither sexual nor cohabitative. Sir James Munby P was satisfied that the marriage was a marriage. At [7] he held:

> "The marriage, which took place in this country, complied with all the requirements of the Marriage Act 1949. There is, as Ms Fottrell has demonstrated, no ground upon which the marriage could be declared voidable, let alone void. There can be no question of the marriage being a sham. In short, the marriage is a marriage. The fact that it is platonic, and without a sexual component, is, as a matter of long-established law, neither here nor there and in truth no concern of the judges or of the State. One needs look no further than Nigel Nicholson's Portrait of a Marriage, his acclaimed account of the unusual marriage of his parents, Vita Sackville-West and Harold Nicholson, to see how happy and fulfilling a marriage, more or less conventional, more or less unconventional, can be. But it is really none of our business. As the first Elizabeth put it, we should not make windows into people's souls."

22. In *Mundell v Name 1* I put it this way at [27]:

> "I do not accept that the essence of marriage is for two people to live together and to love one another, although I would accept that that is how people would normally expect their married life to commence and to be conducted. The fact that it may be empirically the norm does not mean, of course, that they are essential features of the marriage contract."

23. Therefore, cohabitation is not an essential feature of the marriage contract.

24. Sexual relations, and *a fortiori*, procreation are not essential features of the marriage contract. In *The matter of X (A Child)* Sir James Munby P at [8] stated:

> "A sexual relationship is not necessary for there to be a valid marriage. The law was stated very clearly, if in Latin (for the use of which I apologise) by Sir James Wilde in *A v B* (1868) LR 1 P & D 559, 562:
>
> 'The truth is, *consensus non concubitus facit matrimonium*.'
>
> The law has always recognised that a couple may take each other as wife and husband *tanquam soror vel tanquam frater* (as sister and brother), as our ancestors would have put it applying the canonists' maxim: see Sir John Nicholl in *Brown v Brown* (1828) 1 Hagg Ecc 523, 524, Sir Cresswell Cresswell in *W v H (falsely called W)* (1861) 2 Sw&Tr 240, 244, and, more recently, *Morgan v Morgan (otherwise Ransom)* [1959] P 92."

25. The notion that the procreation of children is a chief end of marriage was discredited long ago. In *Baxter v Baxter* [1948] AC 274 Viscount Jowitt LC said at 286:

> "Again, the insistence on the procreation of children as one of the principal ends, if not the principal end, of marriage requires examination. It is indisputable that the institution of marriage generally is not necessary for the procreation of children; nor does it appear to be a principal end of marriage as understood in Christendom, which, as Lord Penzance said in *Hyde v. Hyde* (1866) L R 1 P & D 130, 133 "may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." As regards the phraseology of the marriage service in the Prayer Book, this House in the recent case of *Weatherley v. Weatherley* [1947] A C 628, 633 pointed out the dangers of too strict a reliance upon these words. In any view of Christian marriage the essence of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith. But this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage."

And at 288 he cited an old text:

> "It seems to me that the true view of the matter is expressed in Lord Stair's Institutions, 1681 ed., book I., tit. 4, para. 6. That learned and distinguished author put the matter thus: 'So then, it is not the consent of marriage as it relateth to the procreation of children that is requisite; for it may consist, though the woman be far beyond that date; but it is the consent, whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of marriage, is the solace and satisfaction of man.' I am content to adopt these words as my own."

I too would adopt those words, save that nowadays a conjugal society does not necessarily require a conjunction of bodies.

26. Distilling all this learning results in some straightforward propositions:

i) The contract of marriage is a very simple one, which does not take a high degree of intelligence to comprehend.

ii) Marriage is status-specific not spouse-specific.

iii) While capacity to choose to engage in sexual relations and capacity to marry normally function at an equivalent level, they do not stand and fall together; the one is not conditional on the other.

iv) A sexual relationship is not necessary for a valid marriage.

v) The procreation of children is not an end of the institution of marriage.

vi) Marriage bestows on the spouses a particular status. It creates a union of mutual and reciprocal expectations of which the foremost is the enjoyment of each other's society, comfort and assistance. The general end of the institution of marriage is the solace and satisfaction of man and woman.

vii) There may be financial consequences to a marriage and following its dissolution. But it is not of the essence of the marriage contract for the spouses to know of, let alone understand, those consequences.

viii) Although most married couples live together and love one another this is not of the essence of the marriage contract.

ix) The wisdom of a marriage is irrelevant.

27. Therefore, the irreducible mental requirement is that a putative spouse must have the capacity to understand, in broad terms, that marriage confers on the couple the status of a recognised union which gives rise to an expectation to share each other's society, comfort and assistance.

28. It is not necessary for a person getting married to have an awareness of the detail of the financial consequences of the union, let alone of the law of financial remedies. Nor is there imposed on a person getting married a duty to cohabit, or to engage in sexual relations, or to procreate with his or her spouse. Modern marriage has moved on a long way from the days when canon law ruled the legal roost.

29. In this case a number of expert reports relating to the applicant's capacity were obtained in the context of the ongoing continuous review of her capacity required by the Court of Protection and which led to the discharge of her deputy by that Court on 12 August 2019. Among those reports are the following:

i) Dr Kinch, Consultant Clinical Neuropsychologist, 7 February 2014;

ii) Professor Barnes, Honorary Professor of Neurological Rehabilitation, 5 December 2016; and

iii) Dr Prangnell, Consultant Clinical Neuropsychologist, 7 March 2019.

30. The claim form seeking the declaration was issued on 2 September 2020. These reports all predate the proceedings. The applicant did not need to seek the court's permission to adduce expert evidence under FPR Part 25, because she was entitled to file these reports, obtained for the purposes of other proceedings, without the need to obtain permission: see *Illumina Inc v TDL Genetics Ltd* [2019] EWHC 1159 (Pat) where a party served a hearsay notice adducing the evidence of an expert witness which had been relied on in a previous claim. Henry Carr J held that the party did not need permission under CPR Part 35 to adduce such evidence, although as hearsay evidence it would be given the weight it deserved.

31. In her report Dr Kinch said:

> Miss B was able to tell me about her prospective husband and it was clear that she feels love for him. Miss B was able to describe her prospective husband's personality and was able to highlight how it complemented hers.
>
> Miss B was able to describe to me the wedding ceremony which would lead up to the wedding day as well as describing the wedding ceremony itself. Miss B was also able to understand the contractual nature of wedding vows. She explained that marriage was about making a lifelong commitment to another person. She explained that marriage involves compromising with the other person. She was clear in asserting that marriage did not mean that she would have to submit to her husband's wishes unconditionally and that she would not tolerate a husband who was "nasty, controlling or unkind". She discussed appropriate division of labour within the marital home."

32. Dr Kinch concluded that the applicant had the capacity to engage in sexual relations and the capacity to marry. As will be seen, I agree with her assessment.

33. Professor Barnes said:

> "However, I have been asked specifically to address the issue of whether Ms B had capacity to consent to marriage at the time of her marriage on 1 June 2013. I consider that at a very simple level she would have understood the nature of the marriage 'contract' that she was entering into. In other words, I consider that she would be able to understand her emotions towards her husband-to-be and able to consent that she would like to live with him as his wife. It is also my opinion that she was able to consent to sexual relations. However, I do not feel that she had capacity, and still does not have capacity, to understand the full ramifications of marriage. In particular, it is clear to me that she was not able to think through the consequences of marriage, particularly in terms of her husband's future residence with her in the UK. She was not able to think through his involvement in the management of her financial settlement and she was not able

> to think through the consequences of living with her husband in terms of less involvement from her own family in her day-to-day life. She is very dependent on her family, particularly her mother and sisters, and now finds it distressing to think that if her husband came to the UK then there would be potentially less involvement from her family. She now finds the whole situation anxiety-provoking and stressful and it is clear that she was not able to consider these broader implications when she entered into the marriage in June 2013.
>
> In summary, I consider that Ms B did not have capacity under English law at the time of the marriage on 1 June 2013 to fully consider the implications of that marriage and I still do not think that she has capacity to enter into a marriage. Now it is such a long time from the accident in question I consider that she is never likely to be able to do so."

34. These passages were read out to the applicant during her oral evidence, and she agreed with them. She was asked what ramifications of the marriage she did not understand and her reply was she did not understand their financial differences; how the respondent would live here; what work he would do; or whether he would be prepared to sign a prenuptial agreement.

35. In my judgment, Professor Barnes has deployed a test of capacity to marry higher than that laid down by the law. He accepted that the applicant at a simple level understood the nature of the marriage contract; that she understood her emotions to her husband to be; that she was able to consent to live with him as his wife; and that she was able to choose to engage in sexual relations. That seems to me fully to satisfy the test for capacity to marry which I have set out above. In my judgment the law does not impose on this applicant a requirement to be able to understand the full ramifications of marriage and specifically the question of where her husband might choose to live, or his involvement in the management of her damages. The fact that she might find it distressing to spend less time with her family while her husband to come to England says nothing at all about her capacity to consent to marriage.

36. Dr Prangnell stated:

> "She stated that in 2013 her understanding had been that a marriage was a binding agreement made between two people to spend the rest of their lives together. This involved a ceremony including vows of commitment to the other person. The marriage was made binding by the certificate of marriage.
>
> She was able to explain the nature of the marriage ceremony and that it was sometimes possible to be married under Islamic law without another person present. Beyond that she said had been unaware of the differences between a marriage made under Islamic law in Pakistan and a marriage made under UK law. Consistent with the account summarised by Professor Barnes, Mrs B had not appeared to understand the consequences of

> marriage to her husband in terms of her settlement and future living arrangements.
>
> It is my view that Mrs B lacked capacity to consent to marriage in 2013.
>
> Whilst she demonstrated a general awareness of the nature of a marriage contract it appeared that she did not understand the difference between a marriage made under UK law and a marriage made wider Islamic law in Pakistan. It appeared she had been aware of some of the duties of a husband and wife but not how these duties might vary between contracts or the respective implications of a divorce.
>
> I concur with Professor Barnes in that I do not believe Mrs B understood the full implications of marriage in terms of her husband's living arrangements and potential claim on her property/settlement at the time of the ceremony in 2013.

37. Again, it is my judgment that Dr Prangnell has deployed a standard for capacity to marry higher than that stipulated by the law. He accepted that the applicant had a general awareness of the nature of marriage; that she was aware of the duties of a husband and wife; that she was aware that a marriage was a binding agreement made between two people to spend the rest of their lives together; and that marriage involved a ceremony including vows of commitment to the other person. It seems to me that this matches the simple and relatively low standard set 136 years ago by the then President. Her lack of awareness of the difference between Islamic and English marriage; or the financial consequences depending on the contract; or her husband's potential claims against her estate; or her husband's proposed living arrangements say nothing at all about her capacity to marry. They may say quite a lot about her wisdom in getting married, but that is not the issue I have to decide.

38. The applicant gave oral evidence. She told me that at the time of the marriage in 2013 her expectation was about just entering into marriage and living a normal married life; about living life as a couple. It was not about the after-effects such as finances and contracts. She told me that it was a choice that she made, but in which her family also had a say. She had met her husband-to-be at a family wedding about two years previously. She lived in England and he was in Pakistan; their courtship was by telephone. The agreement to marry was reached through the family; her parents learned that they were courting by telephone and thought that marriage would be a good idea. Nonetheless, she made the decision. The agreement to marry was about two months before the wedding. Her parents approved of her fiancé. Naturally, she talked to her parents about the forthcoming marriage. She has siblings all of whom are married. The marriage took place in person and vows were exchanged. It was a big affair; there were about 500 guests. There was an after-party at the respondent's house after the ceremony. She stayed with him in his house and the marriage was consummated. About two weeks later she returned to England. They have never lived together since. She thought that once married he would come and live with her here; but that never happened. She has since discovered that he was always ambivalent about coming to live with her here. She heard last year that he was planning to remarry, but she has not been told that he has obtained a divorce in Pakistan. The difference between her comprehension then and

now of the nature of marriage is that then she had a fairy-tale image of the institution, whereas now she has an understanding of how to commit herself to deal with her finances.

39. The evidence given by the applicant satisfies me fully that she had capacity to marry. She was fully aware of the simple nature of the contract and that by an exchange of vows a union was created with mutual expectations of comfort, society and assistance. That she was not aware, and may not have been capable of being made aware, of the potential financial ramifications of marriage; of her husband's intentions as to residence and work; of whether he would sign a prenuptial agreement; or of any potential claim he may have against her on divorce is nothing to the point. None of these things tell me anything about her capacity to marry in June 2013. Again, they may tell me quite a lot about the wisdom of the marriage she entered into, but that is quite another matter.

40. It is my finding of fact that on 1 June 2013 the applicant had the capacity to consent to marriage, and did consent on that day to be married and thereby formed a valid marriage with the respondent under Pakistani law which is entitled to be recognised in this jurisdiction. On that day the three classic requisite elements of formation of a valid marriage were present: *habiles, consensus, forma*[1].

41. Accordingly, I find that the factual foundation pleaded in the applicant's claim form and in her nullity petition, namely that she lacked capacity to consent to marriage on 1 June 2013, is not proved, and that therefore the application and the petition must be dismissed.

42. That is sufficient to dispose of these claims. However I propose to address the remaining questions as it may be that a higher court disagrees with my primary finding, in which case my conclusions on those questions will be relevant.

A declaration under the inherent jurisdiction

43. In 1984 the law relating to declarations in family matters was a "hotchpotch of statutory and discretionary relief". That is how the Law Commission described the state of affairs in its report dated 22 February 1984: *Declarations In Family Matters* (Law Com No. 132)[2]. Ignoring two outliers (suits for jactitation of marriage and petitions under the Greek Marriages Act 1884) declarations in family matters were then made either under s.45 of the Matrimonial Causes Act 1973 or at the discretion of the court under RSC Order 15, r.6. Section 45 of the 1973 Act was a virtually identical reproduction of a statute enacted in 1858. It allowed a declaration of legitimation to be made in favour of the applicant, his parent or remoter ancestor, or a declaration that a person domiciled here is deemed to be a British subject.

44. The majority of declaration cases proceeded under RSC Order 15, r.6. This discretionary power became available to the divorce courts when the Court for Divorce and Matrimonial Causes, established in 1858, was merged into the High Court in 1875 by the Judicature Acts 1873 and 1875. Until that merger the divorce court had no power

[1] No impediment to marriage; valid consent; observance of formalities.

[2] The report had been preceded by a Working Paper (No. 48) published 11 years earlier on 17 April 1973.

to grant a declaratory sentence, it having inherited no such power from the ecclesiastical courts: *Kassim v Kassim* [1962] P 224.

45. The Law Commission report explained that RSC Order 15, r.6 did no more than make clear that the rules of court did not prevent the exercise of a declaratory jurisdiction: it did not create any such jurisdiction or specify what declarations were available. Lawyers had to look to the cases to discover the nature of the jurisdiction and the declarations that a court could make.

46. Declarations had been made:

- that a foreign divorce had validly dissolved a marriage;
- that a foreign decree of nullity had validly annulled a marriage;
- that a foreign divorce or foreign nullity decree was not entitled to be recognised in England; and
- that a marriage was still subsisting.

47. In contrast, it had been held that a declaration could not be made that a marriage was valid or invalid *ab initio*, although in some instances rogue declarations to this effect cropped up. Sometimes the principles went head-to-head: in *Vervaeke v Smith* [1981] Fam 77 the discretion was not exercised by Waterhouse J because the purpose of the declaration sought - that a foreign nullity decree should be recognised in England - was to establish the validity of a subsequent marriage.

48. The confusion about the scope of the relief available, coupled with great uncertainty about the jurisdictional criteria for making a claim for such a declaration, had left the law in a disreputable mess, ripe for reform. Accordingly, the Law Commission recommended **"a new legislative code based on consistent principles to replace the existing hotchpotch of statutory and discretionary relief"** (at para 2.13 - my emhasis). It is absolutely clear that the Law Commission intended the new code to be the Alpha to Omega, the *ne plus ultra*, of the legal regime. The report makes clear beyond doubt that it was never intended that there would remain outside the code a residual, inherent, discretionary power to make alternative declarations where the subject matter was covered in the code. At para 3.28 the report stated:

> "We recommend that it should not be possible to seek declaratory relief under the inherent jurisdiction of the court in those circumstances where we have recommended specific statutory provision for the granting of declarations in family matters. Furthermore, in those cases where we have specifically recommended that no declaratory relief should be available, this recommendation ought not to be evaded by seeking declarations under Order 15, rule 16. We do not wish, however, to introduce any other restrictions on the availability of declarations under the inherent jurisdiction of the court."

The summary of recommendations at paras 3 and 7 puts it this way:

> "(3) The court should not have power to grant a declaration as to the initial invalidity of a marriage, even in those cases where it cannot entertain a petition for a decree of nullity of a void marriage because the parties do not satisfy the jurisdictional requirements for the grant of such relief.
>
> **Relationship between the statutory regime and the court's inherent jurisdiction**
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> (7) The declarations referred to at (2) above should only be available under, and in accordance with, the statutory regime. Such declarations, [and] a declaration as to the initial invalidity of a marriage (referred to at (3) above) … should not be available under the court's inherent jurisdiction" (original emphasis).

49. For declarations about marriages the Law Commission recommended that the following should be available, and no more:

    i) that the applicant's marriage was, when celebrated, a valid marriage;

    ii) that the law recognises, or as the case may be, does not recognise, a foreign divorce, annulment or legal separation in respect of the applicant's marriage; and

    iii) that the applicant's marriage, the initial validity of which is not in question, subsists on a particular date.

50. The Law Commission emphasised that the third of these declarations would only be available where there was no question about the initial validity of the marriage.

51. The Law Commission then set out, with full reasons, those declarations which would not be available. So far as marriages were concerned the prohibition was confined to a declaration as to the initial invalidity of a marriage. At para 3.18 the report stated:

> "Our recommendation is, therefore, that the court should not be empowered to make a declaration as to the initial invalidity of a marriage, even in those cases where, because the parties do not satisfy the jurisdictional requirements, the court cannot entertain a petition for a decree of nullity of a void marriage."

As will be seen, this prohibition was duly enacted. I shall refer to it as "the statutory prohibition".

52. It can therefore be seen that the Law Commission was emphatically clear that even if, for one reason or another, there was no jurisdiction to entertain a nullity petition, there could not be recourse to an application for a declaration under the inherent jurisdiction to fill the gap.

53. It is clear that when the Law Commission spoke of "a petition for a degree of nullity of a void marriage" it was not merely speaking of marriages void *ab initio* within s.11 Matrimonial Causes Act 1973 but was also including voidable marriages within s.12. This is demonstrated by the reasoning in the report at para 3.18 that the statutory

prohibition should exist principally in order to prevent the evasion of ancillary relief powers that a decree of nullity would give rise to[3].

54. The Law Commission went on to consider whether declarations should be available as of right. It recommended that if the matter in question for which a declaration was sought was proved to the satisfaction of the court, then a declaration had to be made unless to do so would be manifestly contrary to public policy. It is noteworthy that the Law Commission did not provide an exception to the statutory prohibition on the ground of public policy. It could have said that, by way of exception, the court should be permitted to make a declaration under the inherent jurisdiction as to the initial invalidity of a marriage where not to do so would be manifestly contrary to public policy. But it did not. It specifically declined to let public policy unlock such a prohibited declaration.

55. In the usual way, the Law Commission report appended a draft bill. Clause 4(5)(a) stated: "No declaration may be made by any court, whether under this Act or otherwise (a) that a marriage was at its inception void…" The notes to that clause state:

> "Paragraph (a) of this subsection gives effect to the recommendations in paragraphs 3.19 and 3.28 of the Report that the court should not be able to grant a declaration that a marriage was initially invalid, whether under this Bill or under R.S.C., Order 15, rule 16. The effect of this subsection is that an applicant who wishes to have it declared that his marriage was initially invalid will have to apply for a decree of nullity. This will prevent the parties from avoiding the ancillary powers of the court which arise in nullity, but not declaration, proceedings."

To my mind this puts beyond a shadow of a doubt the intention of the Law Commission to outlaw any attempt to circumvent the statutory prohibition.

56. The Law Commission's recommendations concerning marital declarations were enacted by Parliament, unaltered, in sections 55 and 58 of the Family Law Act 1986. These provide, so far as is material to this case:

> **55 Declarations as to marital status.**
>
> (1) Subject to the following provisions of this section, any person may apply to the High Court or the family court for one or more of the following declarations in relation to a marriage specified in the application, that is to say -
>
> (a) a declaration that the marriage was at its inception a valid marriage;
>
> (b) a declaration that the marriage subsisted on a date specified in the application;

[3] See also paras 24-27 of the Working Paper.

> (c) a declaration that the marriage did not subsist on a date so specified;
>
> (d) a declaration that the validity of a divorce, annulment or legal separation obtained in any country outside England and Wales in respect of the marriage is entitled to recognition in England and Wales;
>
> (e) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in England and Wales.
>
> **58 General provisions as to the making and effect of declarations.**
>
> (1) Where on an application to a court for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.
>
> (2) Any declaration made under this Part shall be binding on Her Majesty and all other persons.
>
> (3) A court, on the dismissal of an application for a declaration under this Part, shall not have power to make any declaration for which an application has not been made.
>
> (4) No declaration which may be applied for under this Part may be made otherwise than under this Part by any court.
>
> (5) No declaration may be made by any court, whether under this Part or otherwise -
>
> (a) that a marriage was at its inception void;
>
> (b) …
>
> (6) Nothing in this section shall effect the powers of any court to grant a decree of nullity of marriage.

In enacting these provisions Parliament must be taken to have adopted the reasoning and intentions of the Law Commission as set out in its report.

57. My account set out above explains how s.55(1)(c) cannot be used to declare that on the date of the marriage, the marriage did not subsist. The provision is only available where the initial validity of the marriage is not in question. It cannot be used to subvert the statutory prohibition on the court making a declaration that the marriage was invalid at inception.

58. The reference to a marriage void at inception in s.58(5)(a) encompasses, for the reasons set out above, a void marriage under s11 Matrimonial Causes Act 1973 and a voidable marriage under s12.

59. The use of the word "otherwise" in s.58(4) and (5)(a) makes it clear beyond any doubt that declarations that can be sought under these provisions, must be sought under these provisions; and, further, that the inherent jurisdiction cannot be used either (1) to make a declaration that could be sought under those provisions, or (2) to make a declaration that the marriage was at its inception void. In this way the statutory prohibition was enacted.

60. However you interpret these words, the meaning is clear. A strict textual interpretation, asking what the words fairly meant when they were enacted in 1986, is that these provisions constitute a complete code which explicitly prohibits a declaration being made by any means as to the initial invalidity of the marriage. An interpretation which asks what the lawmakers intended when the statute was passed, takes you to the Law Commission report, which leads to exactly the same conclusion.

61. However, judicial fidelity to these statutory prescriptions and prohibitions has been mixed.

62. In *KC & Anor v City of Westminster Social & Community Services Dept. & Anor* [2008] EWCA Civ 198 a local authority applied under the inherent jurisdiction for a declaration as to the capacity to marry of a physically and mentally disabled 26-year-old Bangladeshi man ('IC'). It was then discovered that he had purportedly been married to NK in a Muslim ceremony conducted by telephone the year before. Unquestionably, under English law the marriage was voidable under s12(1)(c) Matrimonial Causes Act 1973, the consent in question being invalidated by unsoundness of mind. The trial judge, without being referred s.58(5)(a) and (6) of the Family Law Act 1986, granted a declaration that:

> "The 'marriage' of IC and NK on or about 3 September 2006 is not valid under English law".

63. In the Court of Appeal Thorpe LJ recorded that it was common ground that IC lacked the capacity to marry in English law, and that the marriage was thus voidable rather than void[4]. At [26] and [27] he cited s.58(5)(a) and (6) of the Family Law Act 1986 and said:

> "Thus the combined effect of these provisions is to ensure that the only route to a judicial conclusion that a marriage was void at its inception is a petition for nullity. An alternative route, namely an application for a declaration, was plainly proscribed.
>
> Had Roderic Wood J had his attention drawn to the provisions of the Family Law Act 1986 I hazard that he would not have made the declaration that he did."

However at [31] he stated:

[4] At [33] – [42] Thorpe LJ referred to ambiguity concerning the place of the marriage. The consensus at the Bar was that it was in Bangladesh, and that therefore Bangladeshi law as the *lex loci celebrationis* governed the essential formalities of the marriage. Had the *locus ad celebrationem* been England then under English law this marriage would have been void *ab initio* under s11(a)(iii) of the Matrimonial Causes Act 1973 in that the parties had intermarried in disregard of certain requirements as to the formation of marriage.

> "I would be equally supportive of the judge's introduction of the public policy considerations. Not every marriage valid according to the law of some friendly foreign state is entitled to recognition in this jurisdiction. In *Cheni v Cheni* [1965] P 85 Sir Jocelyn Simon P refused to withhold recognition on the ground of public policy. However he clearly defined the possibility of such an outcome when he said:-
>
> > 'If domestic public policy were the test, it seems to me that the arguments on behalf of the husband, founded on such inferences as one can draw from the scope of the English criminal law prevail. Moreover, they weigh with me when I come to apply what I believe to be the true test, namely, whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law. In deciding that question the court will seek to exercise common sense, good manners, and a reasonable tolerance'."

And at [32] he stated:

> "In the present case it is common ground that IC lacks the capacity to marry in English law. Even having regard to the relaxations that have permitted marriage to be celebrated in a variety of places and by a variety of celebrants, it is simply inconceivable that IC could be lawfully married in this jurisdiction. There is much expert evidence to suggest that the marriage which his parents have arranged for him is potentially highly injurious. He has not the capacity to understand the introduction of NK into his life and that introduction would be likely to destroy his equilibrium or destabilise his emotional state. Physical intimacy is an ordinary consequence of the celebration of a marriage. Were IC's parents to permit or encourage sexual intercourse between IC and NK, NK would be guilty of the crime of rape under the provisions of the Sexual Offences Act 2003. Physical intimacy that stops short of penetrative sex would constitute the crime of indecent assault under that statute. IC's parents, perhaps understandably, cannot accept the court's statutory and inherent powers to protect IC. Their engineering of the telephonic marriage is potentially if not actually abusive of IC. It is the duty of the court to protect IC from that potential abuse. The refusal of recognition of the marriage is an essential foundation of that protection. Miss Ball has suggested that the public policy exception is not easily illustrated in the authorities. In my judgment the refusal of recognition in this case is justified even if not precedented. Accordingly I would grant permission to appeal on ground one and allow the appeal only to the extent of varying the language of the order of 21st December. In place of the existing declaration (h) I would propose a declaration that the marriage between IC

> and NK, valid according to the law of Bangladesh, is not recognised as a valid marriage in this jurisdiction."

64. Wall LJ stated at [102] and [103]:

> "I am therefore firmly of the view that IC's marriage to NK is not entitled to recognition in English law. I respectfully agree, however, with Thorpe LJ's observations on the inapplicability of Part III of the Family Law Act 1986. These proceedings were launched under the inherent jurisdiction of the High Court, not under Part III of the 1986 Act.
>
> As I have already stated, this case, in my judgment, is about recognition, and I therefore agree with Thorpe LJ's conclusion that in place of the existing declaration (h) there should be substituted a declaration that the marriage between IC and NK, valid according to the law of Bangladesh, is not recognised as a valid marriage in this jurisdiction."

65. The declaration made by Roderic Wood J was set aside as having violated s.58(5)(a) of the Family Law Act 1986. I now set it out augmented (in bold) to state the essential reason for its making, so that it reads:

> "The 'marriage' of IC and NK on or about 3 September 2006 is not valid under English law **because on that date IC was incapable of consenting to it**".

I do the same to the declaration which replaced it:

> "The marriage between IC and NK [on or about 3 September 2006], valid according to the law of Bangladesh, is not recognised as a valid marriage in this jurisdiction **because on that date IC was incapable of consenting to it**"

66. When the two declarations, thus augmented, are set alongside each other it can be seen that although different words are used they are identical in substance. For my part, I struggle to understand how this is not a circumvention of the statutory prohibition.

67. Both Thorpe and Wall LJJ justified this decision by reliance on the decision by the then President, Sir Jocelyn Simon, in *Cheni v Cheni* [1965] P 85. In that case the then President was asked to apply the rule that the courts of this country will exceptionally refuse to recognise and give effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give it recognition and effect would be unconscionable in the circumstances in question. That rule is part of the wider principle as expressed in Dicey, Morris & Collins on the Conflict of Laws (Sweet and Maxwell, 15th Edition), Rule 2, that

> "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right,

> power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law."

68. The Commentary to that Rule emphasises that in English domestic law it is now well settled that the doctrine of public policy should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. The court will only take the exceptional and momentous decision of non-recognition where recognition would violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal. Thus in *Cheni*, the then President gave the example of the refusal by the Court of the King's Bench in *Sommerset's case* (1772) 20 State Tr. 1. to recognise and give effect to a foreign status of slavery. However, in the case before him he declined to refuse to recognise the validity of a marriage in Egypt between uncle and niece as being an affront to the judicial conscience. That foreign marriage was void ab initio under English law in consequence of the parties being within the prohibited degrees of consanguinity. On the contrary, he held that injustice would be perpetrated, and conscience would be affronted, if the English court were not to recognise and to give effect to the law of the domicile in that case.

69. The Commentary continues:

> "Public policy may require that a capacity existing under a foreign law should be disregarded in England[5]: but the circumstances would have to be extreme before such a course becomes justifiable. Thus, the courts recognise the validity of marriages within the prohibited degrees of English law (provided they are valid under the applicable foreign law), but they might refuse to recognise a marriage between persons so closely related that sexual intercourse between them was incestuous by English criminal law, or a marriage with a child below the age of puberty or a marriage with a man suffering from autism and severe impairment of intellectual functioning[6]."

70. I explain below that I do not dispute the existence of the public policy power to refuse to recognise unconscionable foreign legal constructs, notwithstanding the statutory prohibition. So my only quibble with the Commentary is that the statutory codification in 1986 of the subject matter is not mentioned as an additional powerful reason for very narrowly construing the criterion of exceptionality in this class of case. *Cheni v Cheni* was decided 20 years before the reform. The Law Commission, and therefore Parliament, specifically decided not to allow a public policy exception to the statutory prohibition on making a declaration that a marriage was invalid at its inception. By contrast, it specifically did allow a public policy exception to the granting of a declaration that was otherwise available to be made. These considerations surely strongly militate, at the very least, in favour of an extremely limited exercise of the public policy power in cases such as these. It could be argued that the reach of statutory prohibition in fact extends to block additionally the exercise of the public policy power. It is not necessary for me to grapple with that, as I have decided that the facts of this case do not justify the exercise of the power. But it is a serious argument which will

[5] Citing *Cheni v Cheni*.
[6] Citing *KC & Anor v City of Westminster Social & Community Services Dept. & Anor*.

have to be addressed head-on in any future case where the court is actively considering exercising the power.

71. Finally, I would point out that in *KC & Anor v City of Westminster Social & Community Services Dept. & Anor* three years since the date of the marriage had not elapsed, and so there was no bar under s.13(2) Matrimonial Causes Act 1973 to the court granting a decree of nullity, which is the route explicitly contemplated by the 1986 legislation.

72. In *Hudson v Leigh* [2009] EWHC 1306 (Fam), [2009] 2 FLR 1129 the parties had decided to have two ceremonies. First, they would have an elaborate quasi-marital ceremony, which would not actually be a marriage, but would look like one; later they would have an actual formal marriage ceremony in a register office. Following the first event on 23 January 2004, the relationship broke down; the actual register office marriage never took place. Mr Hudson petitioned for a declaration pursuant to the inherent jurisdiction that the first ceremony did not constitute a marriage at all; it was a 'non-marriage'. He justified taking this approach on the grounds that the subject matter of the declaration was not covered by the statutory code. The code presupposed in each instance that the ceremony in question was one of marriage; whereas, this ceremony was said to have been nothing more than a charade. The case principally concerned the question of whether the law recognised such a thing as a "non-marriage". Bodey J held at [62] and [84] that recourse could be made to the inherent jurisdiction for a declaration where the issue was whether there was a bona fide marriage ceremony (even if the marriage was void or voidable) or whether it was a charade (and therefore a non-marriage). Such a declaration could legitimately be made where its purpose is to declare that there was never a marriage, as distinct from being a marriage void at its inception.

73. I agree fully with Bodey J that a declaration that a ceremony is a non-marriage - a mere charade - is not covered by the statutory code and therefore can be sought under the inherent jurisdiction.

74. In that case Mr Hudson had amended his petition to add a secondary prayer for a declaration pursuant to s.55(1)(c) that no marriage between the parties subsisted on the 23 January 2004 or thereafter. That secondary prayer was abandoned during the hearing. At [81] Bodey J observed that the making of a declaration pursuant to that prayer would have been "wholly impermissible as being a device to get around s.58(5)".

75. In *B v I (Forced Marriage)* [2010] 1 FLR 1721 a 16 year old girl was forcibly married to an 18 year old cousin when visiting Bangladesh. The marriage was voidable at its inception under English law in consequence of duress. More than three years later she managed to escape from her family and sought legal advice as to her marital status. Unfortunately, by virtue of s.13(2) Matrimonial Causes Act 1973 she was not able to pursue a nullity petition under section 12(1)(c) Matrimonial Causes Act 1973 on the ground that she did not validly consent to it in consequence of duress, as more than three years had elapsed since the marriage. I consider s.13(2) and (4) in detail below under the third question.

76. In order to try to get round the statutory prohibition in s.58(5)(a) of the Family Law Act 1986 the applicant phrased her proposed declaration very carefully: she sought a declaration that "there was never a marriage capable of recognition in England and Wales". This was granted. Curiously, *KC & Anor v City of Westminster Social &*

Community Services Dept. & Anor [2008] EWCA Civ 198 was seemingly not cited; it would have provided a path to a safe haven for the decision that was made.

77. At [14] Baron J stated that authorities had persuaded her that the inherent jurisdiction was "a flexible tool which must enable the court to assist parties where statute fails". I have to say that I do not agree that the prohibition in s.58(5)(a) of the Family Law Act 1986 meant that the statute had "failed". On the contrary, as I have explained above, the statute was exceptionally carefully drafted, and the intention of its framers was that the prohibition would apply even where there was no jurisdiction to pursue a petition for nullity.

78. At [17] Baron J addressed the phraseology of the proposed declaration. She accepted that the distinction between declaring that the marriage was void at its inception and declaring that there had never been a marriage capable of recognition was "extremely fine" and might not be thought to be wholly logical. I fully agree. To my mind, there is no substantive difference between the two concepts.

79. A different, and to my mind more principled, approach was taken by Holman J in *A Local Authority v X & Anor (Children)* [2013] EWHC 3274 (Fam). This was a similar case where a local authority sought, pursuant to the inherent jurisdiction, a declaration of non-recognition of the marriage in Pakistan of X, a girl then aged 14. Although that marriage was valid under the laws of Pakistan, it was completely invalid, and void *ab initio* under English law on the ground of non-age: s.11(a)(ii) Matrimonial Causes Act 1973. Holman J refused the application stating: "I would be bypassing and flouting the statutory prohibition in section 58(5) of the 1986 Act by a mere device. I cannot do that and I am not prepared to do that." He held that there was nothing to prevent X petitioning for a decree of nullity.

80. In *Re RS (Capacity to Consent to Sexual Intercourse and Marriage)* [2015] EWHC 3534 (Fam) a 24-year-old man, who suffered from intellectual disability and autism spectrum disorder, was married in Pakistan. The marriage was valid under the laws of Pakistan. The evidence was that he could not validly consent to the marriage in consequence of unsoundness of mind. Accordingly, it was an invalid, albeit voidable, marriage under s.12(1)(c) Matrimonial Causes Act 1973.

81. An application was made by the local authority for a declaration pursuant to the inherent jurisdiction that the marriage is not recognised as valid in England and Wales. At [5(ii)] of his judgment Hayden J stated that the declaration was sought as a "precursor to the initiation of formal proceedings to annul the marriage". I cannot find in the report any explanation as to why this precursory step was regarded as necessary. Having regard to the statutory scheme it is hard to understand why the first and last step was not the issue of a nullity petition.

82. At [37] Hayden J said:

> "Section 58(5) of the Family Law Act 1996 specifically prohibits the Court from making a declaration to the effect that a marriage was void 'at the time of its inception'. It is also quite clear that the 'forced marriage' amendments to the Family Law Act 1996 (in part 4A) do not confer any new power to terminate a marriage

> extraneous to the framework of the Matrimonial Causes Act 1973."

Yet at [39] he stated:

> "Ms. Hearnden, on behalf of the Local Authority, identifies what she describes as 'clear public policy grounds for seeking a declaration' that the marriage should not be recognised. Her submissions are succinct and attractively presented. Whilst she concedes that this Court has discretion whether to make a declaration of non recognition of a foreign marriage, she submits that the public policy priority weighs so heavily that it overwhelms the balancing exercise. If the Court declares that RS lacks capacity to marry it follows axiomatically, Ms Hearnden argues, that the marriage could not lawfully have been conducted in England and Wales. The fact the marriage is formally valid in Pakistan, an unchallenged fact in this case, should not encourage an English Court to recognise a marriage which offends a key contractual component, namely consent."

83. This argument was accepted. The declaration was made. At [52] Hayden J concluded:

> "In most cases an overseas marriage, entered into by an individual who lacks capacity to consent to either sexual relations or marriage, is likely to require the Court to make a declaration of non recognition. (There will be more direct remedies in the case of a marriage contracted in the UK). However, it overstates the position to regard the discretionary exercise here as essentially 'illusory'. Whilst I am not prepared to predict the circumstances in which the discretion might be exercised, neither am I prepared to say that a Court is never likely to do so. The interests of justice, fairness and respect for different aspects of individual autonomy may, in certain circumstances prevail. That said, those circumstances are likely to arise very rarely indeed. They have not done so here."

84. For my part I must respectfully part company with this reasoning. I cannot shrink from the conclusion that the statutory prohibition in s.58(5)(a) of the Family Law Act 1986 has been, to use the words of Holman J, bypassed and flouted. I can see the temptation of a judge to find some kind of loophole where nullity proceedings are impossible, whether in consequence of want of jurisdiction, or because they are out of time. But this scenario was expressly considered by the Law Commission, and therefore impliedly by Parliament, which decided that the statutory prohibition should be unyielding even in those circumstances. Parliament could have inserted an exception on the ground of public policy but it chose not to do so.

85. The decision in that case is all the more difficult to understand in circumstances where nullity proceedings were possible and were contemplated.

86. Finally, I refer again to the decision of Munby J *X City Council v MB, NM and MAB*. That case involved MAB, a 25 year old man of Pakistani origin, who suffered from

marked autistic spectrum disorder, and who thereby unquestionably lacked capacity to marry. However, it was the ambition of his parents that he should marry his first cousin. Injunctions had been obtained by the local authority inter alia preventing the parents from causing or permitting MAB from undergoing any civil or religious ceremony of betrothal or marriage. At the final hearing Munby J allowed these injunctions to be replaced by undertakings. In addition, Munby J made two declarations namely:

> "1. MAB does not have the capacity to marry.
>
> 2. Any purported marriage by MAB whether celebrated inside or outside England and Wales will not be recognised in English law."

87. There is no reference in the judgment to ss. 55 and 58 of the Family Law Act 1986. Nor is there any reference to the public policy power of non-recognition of an unconscionable foreign legal construct.

88. In circumstances where no ceremony of marriage has taken place the statutory code does not directly apply. It only applies where a ceremony of marriage has taken place. Therefore it is not in direct violation of s.58(5)(a) for anticipatory declarations of this nature to be made. The first declaration only speaks to MAB's capacity at the time it was made and it is a truism that capacity can and does fluctuate. Therefore if MAB were to go through a ceremony of marriage at a later date his capacity at that point would have to be reassessed. However, the declaration is a useful record of the judicial finding of MAB's capacity to marry at that point in time.

89. With respect, I cannot agree with the second declaration. It addresses a marriage at some point in the future. If MAB had recovered his capacity to marry at that point then it would be valid under English law. But if he had not, and his incapacity to consent to marriage endured, the declaration would be in conflict with the statutory prohibition. It could only be granted by application of the stringently exceptional public policy power which I have set out above. That is not referred to in [36] where the grant of the declaration is explained.

90. I do not dispute the existence of the general power not to recognise, exceptionally, an unconscionable right, power, capacity, disability or legal relationship arising under the law of a foreign country. However, in a case where the statutory prohibition applies, the exercise of this power, if not in fact blocked by the prohibition (see above), must be very highly exceptional, for the reasons I set out below.

91. By s.2 of the Nullity of Marriage Act 1971 Parliament re-categorised marriages which were invalid due to defective consent from void *ab initio* to merely voidable (see the historical discussion of the 1971 Act in the next section of this judgment). By s.5 of that Act (now s.16 Matrimonial Causes Act 1973) a decree of nullity granted on the ground that a marriage is voidable shall operate to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time. It is impossible to conceive that Parliament would have passed s.5 if all marriages voidable on the ground of lack of consent in consequence of unsoundness of mind were in fact so offensive that they should not be recognised on the ground of public policy. To my mind, this is a very weighty point in deciding whether the criterion of exceptionality is met.

92. Although the ground for annulling such a voidable marriage *ex hypothesi* arises at inception, Parliament thus decided in 1971 that such a marriage should nonetheless be treated as valid and subsisting up to the date of a decree absolute of nullity. Yet from 2006 the judiciary have rendered the decisions set out above which say that those very marriages were so unconscionable that they should not be recognised under English law. In *KC* they did so in reliance on the authority of *Cheni v Cheni*, the outcome of which recognised as valid and subsisting, and not as unconscionable or offensive, a marriage within the prohibited degrees of consanguinity in which sexual expression would now amount to a criminal offence. It is very difficult to follow.

93. In this case I have already decided that the marriage was valid under English law at its formation. If, however, that decision is wrong and this marriage is voidable on the ground that the applicant did not validly consent to it in consequence of unsoundness of mind I would unhesitatingly refuse to grant a declaration that the marriage should not be recognised as a valid marriage in this jurisdiction. I would refuse to do so because it would amount to a blatant bypassing and flouting of the statutory prohibition. I would unhesitatingly decline to exercise the public policy power not to recognise this marriage (assuming that its exercise is not in fact blocked by the statutory prohibition) as the facts of this case do not satisfy the stringent criterion of exceptionality. On the contrary, the facts appear to fall squarely within those contemplated by Parliament when it enacted the statutory prohibition.

94. It may well be that the applicant is now too late to petition for nullity (I discuss below the question of whether she is entitled to an extension of time to do so) and that therefore there is no legal medium in which her lack of valid consent may be directly expressed. But that is a dilemma that was expressly contemplated by the framers of the 1986 legislation. If its operation leads to unfairness than the solution is for an exception to be inserted by Parliament. My base position is that Parliament has enacted a compendious set of binding rules, and that, to quote Scalia J[7], in this sphere the rule of law is the law of rules.

95. Finally, I wish to make clear that I fully acknowledge that the marriages in *KC*, *B v I* and *RS* were all potentially, if not actually, abusive of the incapacitated spouse. In *KC* at [32] Thorpe LJ said:

> "[The] engineering of the telephonic marriage is potentially if not actually abusive of IC. It is the duty of the court to protect IC from that potential abuse. The refusal of recognition of the marriage is an essential foundation of that protection."

In *B v I* Baron J said at [10]:

> "She is now living at a secret address, unknown and separated from her birth family. I am clear that her actions will be regarded as having brought shame upon the family, with the result that in accordance with the prevailing 'code of honour', she will risk

[7] See his Oliver Wendell Holmes Jr lecture "the Rule of Law as a Law of Rules" published in the fall 1989 issue of the University of Chicago Law Review.

> serious injury and, potentially, death (if the family considered that that degree of punishment were merited)."

In *RS* Hayden J said at [41]:

> "In summary, Ms. Hearnden contends that there are sound reasons why marital unions in which one party lacks the capacity to consent should be deterred. Many such marriages will be abusive and exploitative. Even should I find this not to be the case here, Ms. Hearnden submits 'there is no utility to RS maintaining the pretence of a marriage in which he can not lawfully have a sexual relationship with his wife'. It is certainly difficult to see how it could be respectful to the dignity of either of the parties to this union to blight their relationship with the permanent threat of a criminal prosecution."

I confess to being at a loss as to how a declaration of non-recognition of those voidable marriages would give rise to the practical consequence of protection of the incapacitated spouse from abuse. In each case the marriage was voidable. In *KC* and *RS* a decree of nullity would terminate the marriage. In *B v I* that relief was time-barred and so the marriage could only be terminated by a divorce. Either way, the legal relationship in question would be ended.

96. Assume that in *KC* and *RS* nullity proceedings had been issued and that divorce proceedings had been issued in *B v I.* In each case, if undefended, it would have been possible for the District Judge considering proof of the suit to have referred, exceptionally, the public pronouncement of decree nisi to a judge of High Court judge level under FPR r.7.20, and to have requested that a judgment be given. Alternatively, the petition could have been allocated to a High Court judge to be determined at a hearing in the historic manner. Either way, in each case, had that course been followed, the judgment granting the decree nisi of divorce or nullity would no doubt have recorded the lack of valid consent by the incapacitated spouse and the background facts generally. Thus in each case there would have been full judicial recognition, but in a constitutionally correct manner, of the offensive and abusive features of the marriage in question.

97. That is precisely what happened in *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661 where Coleridge J heard in open court the applicant's nullity petition alleging invalid consent in consequence of duress. At [17] – [18] he said:

> "17. In cases where a forced marriage is alleged the proper course is for a petition under s 12(c) to be brought before the court. I am informed by counsel for the petitioner that there is a real stigma attached to a woman in the petitioner's situation if merely a divorce decree is pronounced and it is desirable from all points of view that where a genuine case of forced marriage exists the court should, where appropriate, grant a decree of nullity and as far as possible remove any stigma that would otherwise attach to the fact that a person in the petitioner's situation has been married.

> 18. It follows from that that those charged with the decision of whether or not public funds should be made available in these circumstances should be ready, in the right case, to grant public funding to enable such nullity proceedings to be brought. It is necessary for public funding to be made available so that these cases, which are now not rare, can be investigated by the court. They are of special significance in the community from which the petitioner originates and it is appropriate that they should be transferred to the High Court and investigated properly and fully in open court."

In my judgment the same principles should apply where the petition is for divorce because a decree of nullity is time-barred.

98. If in such a case there were a perceived risk of actual molestation, then protective orders could be obtained under s.42 of the Family Law Act 1996. Further, the facts of each of those cases suggest, to a greater or lesser extent, that the incapacitated spouse was "forced into a marriage" within the meaning of s.63A(1)(b) and (4) of the Family Law Act 1996 by virtue of not having given "free and full consent". Accordingly, the court could make in such a case forced marriage protection orders containing such prohibitions, restrictions, requirements or other terms as the court may consider appropriate for the purposes of protecting the incapacitated spouse.

99. A declaration of non-recognition of a marriage does not enhance the power of the court to protect an incapacitated spouse. It is not a condition precedent for the exercise of those powers. The powers exist irrespective of whether a marriage is declared to be valid, voidable, void or non-recognised. Therefore, the declaration made in each of those cases might be regarded as merely symbolic.

Extension of time under s13(4) Matrimonial Causes Act 1973

100. On 3 December 1970 the Law Commission published its report on Nullity of Marriage (Law Com. No 33). The principal objective of the report was to analyse the distinction between void and voidable marriages, and to propose reform in their categorisation and in the relief that may be sought in respect of them. It set out the familiar concepts at para 3:

> "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.
>
> A voidable marriage is a valid marriage unless and until it is annulled; it can be annulled only at the instance of one of the spouses during the lifetime of both, so that if no decree of nullity

> is pronounced during the lifetime of both spouses the marriage becomes unimpeachable as soon as one of the spouses dies."

101. In this case I am concerned with a marriage said to be invalid on the ground of lack of consent as a consequence of unsoundness of mind. The report explains that under the then existing law such a marriage was void, not merely voidable. This was the case under the pre-1857 ecclesiastical law which became incorporated into secular law by s.22 of the Matrimonial Causes Act 1857. However, it was a doctrine of Canon Law, dating back to the Decretals of Pope Gregory IX in 1227, and adopted by English ecclesiastical law, that a marriage void on the ground that there was no consent at the time of the marriage ceremony could be ratified by consent voluntarily given subsequently, whereupon such consent was deemed to relate back to the time of the marriage. Thus, if no valid consent could be given at the time of the marriage in consequence of unsoundness of mind, and the marriage was therefore void, that void marriage could later be ratified following a later mental recovery. This doctrine of ratification was acknowledged in the post-1857 secular law.

102. The existence of the doctrine of ratification was considered by the Law Commission to be a good reason for the transfer of a marriage alleged to be void on the ground of lack of consent from the void into the voidable category, since it enabled a party to decide for himself whether he wished the marriage to take effect.

103. For this reason and others spelt out in the report at para 14, the Law Commission recommended that lack of consent due to unsoundness of mind at the time of the marriage should render the marriage voidable. The Law Commission opposed the suggestion that the concept of voidable marriages should be abolished altogether, leaving them as valid marriages only terminable by divorce, but recommended in para 25 that the effect of the decree of nullity of a voidable marriage should make clear that the marriage is to be treated in every respect as a valid marriage until it is annulled.

104. The Law Commission recommended that the doctrine of ratification should be abolished and replaced by a form of approbation which would debar a party from seeking an annulment if he had led the other party to believe that he would not do so. It went on to propose at para 79 that there should be a three-year time limit from the date of the marriage for bringing nullity proceedings in the case of voidable marriages. This would extend to cases of lack of consent due to unsoundness of mind. At para 85 the Law Commission said that even in such a case there would be no hardship since proceedings could be taken on an incapacitated party's behalf within the time limit. Moreover, there was sense in bringing in a time limit for this ground where there already was a time limit for the already existing ground, now found in s.12(1)(d) Matrimonial Causes Act 1973, that a party at the time of the marriage suffers from mental disorder of such a kind or to such an extent as to be unfitted for marriage.

105. The recommendations were duly enacted in the Nullity of Marriage Act 1971. Section 2(c) provided that a marriage would be voidable if either party to the marriage did not validly consent to it in consequence of (among other reasons) unsoundness of mind. Section 3(2) provided that the court shall not grant a degree of nullity on the ground mentioned in s.2(c) unless the proceedings were instituted within three years of the marriage. There was no power to extend the period of three years.

106. These provisions were later consolidated and re-enacted within the Matrimonial Causes Act 1973 ss. 11-16. The time limit was contained in s.13(2).

107. By s.2 of the Matrimonial and Family Proceedings Act 1984, Parliament later granted the court the power to extend the three-year period. Section 13(4) of the Matrimonial Causes Act 1973 was inserted. This provides that a judge may grant leave for the proceedings to be instituted after the expiration of the three-year period from the date of the marriage if (a) he is satisfied that the petitioner has at some time during that period suffered from mental disorder within the meaning of the Mental Health Act 1983, and (b) he considers that in all the circumstances of the case it would be just to grant leave for the institution of proceedings.

108. It is true that 'mental disorder' is defined very laconically in the Mental Health Act 1983. It means merely any disorder or disability of the mind. Disorders resulting from learning disabilities or dependence on alcohol or drugs are excluded. That said, it is common knowledge that there is a world of difference between an impairment of, or a disturbance in the functioning of, the mind or brain under s.2(1) of the Mental Capacity Act 2005 and a disorder or disability of the mind under s1(2) of the Mental Health Act 1983. The words describe two completely different scenarios. It is often said that there are plenty of people sectioned under the Mental Health Act who nonetheless have full capacity under the Mental Capacity Act. Conversely there are plenty of people who lack capacity under the Mental Capacity Act who nonetheless have perfectly good mental health.

109. None of the medical evidence in this case addresses the question whether between June 2013 and June 2016 the applicant suffered from mental disorder or mental disability within the meaning of the 1983 Act. Miss Rahman made a valiant effort to get me to construe the medical evidence, which was directed at capacity, as demonstrating that mental disorder or mental disability existed at that time. I am afraid that it does nothing of the sort; if anything it demonstrates that in June 2013, and subsequently, the applicant has enjoyed good mental health. The condition for a grant of leave out of time under section 13(4) Matrimonial Causes Act 1973 is therefore not satisfied in this case.

110. For all these reasons the applicant's application for a declaration and her petition for nullity are dismissed. The effect of section 16 of the Matrimonial Causes Act 1973 is that even if I am wrong about the question of capacity at the time of the marriage ceremony, the marriage thus formed is treated for all purposes as validly continuing. The applicant's remedy is therefore to seek a divorce.

111. I sense that the reason that the applicant proceeded initially for a declaration was to avoid the possibility of the respondent later seeking ancillary relief. That assumption was undermined by the later issue by the applicant of a nullity petition, which had it been successful would have granted the respondent the unrestricted right to seek ancillary relief. If the applicant now proceeds with a divorce petition the respondent's right to seek ancillary relief would be identical to that he would have enjoyed had a decree of nullity been granted.

112. I want to make it clear, just as I did in the case of *Munday*, that based on the information before me the prospects of the respondent succeeding in a claim for ancillary relief is vanishingly remote. The award of damages to the applicant was calibrated by reference to her needs, and compensation for her pain and suffering. This marriage never

functioned as a marriage and accordingly I find it impossible to conceive of any circumstances, even were the respondent to suffer grave hardship, where he could mount a plausible claim against the applicant. I say this in order to reassure the applicant were she now to regularise her status and move on by seeking a decree of divorce.

113. That is my judgment.