Neutral Citation Number: [2013] EWHC 3852 (Fam)

Case No: FD12D02671

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2013

Before :

THE HON. MR JUSTICE MOYLAN

- -

Between :

Majda ASAAD	**Applicant**
- and -	
Zeyto KURTER	**Respondent**

- -
- -

Ms Bhutta (instructed by **Oliver Fisher**) for the **Applicant**
Mr Daniels (instructed by **Barker Gooch & Swailes**) for the **Respondent**

Hearing dates: 1st, 2nd July, 5th August and 5th December 2013

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Judgment

THE HON. MR JUSTICE MOYLAN

This judgment is being handed down in private on 5th December 2013. It consists of 22 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The Hon. Mr Justice Moylan:

1. In this case I must determine (a) the nature of a ceremony which took place in a Syriac Orthodox Church in Syria on 6th August 2007; (b) the effect of the ceremony; and (c) whether, as a consequence, the Petitioner is entitled to a decree of divorce or a decree of nullity or no remedy at all.

2. The Petitioner initially sought a decree of divorce on the basis that the ceremony had effected a valid marriage. During the course of the proceedings her position has changed. By the end of the hearing she was seeking either (i) a declaration that the marriage was valid in reliance on the presumption of marriage based on a ceremony followed by cohabitation and, if the marriage is found to be valid, a decree of divorce; or (ii) a decree of nullity on the basis that the failure to comply with certain requirements of Syrian law is such that the marriage is not valid but is sufficient to entitle the Petitioner to a nullity decree.

3. The Respondent alleges that the ceremony was no more than a blessing and did not create either a valid marriage or a void marriage. It is his case that the ceremony is of no legal effect and does not entitle the Petitioner to any remedy under English law.

4. The documents which have been translated for these proceedings have adopted different spellings for some of the people and places involved. Also the Church is known as the Syrian as well as the Syriac Orthodox Church. I have used the same names rather than as they appear in the individual translations and the latter rather than the former name for the Church.

Proceedings

5. The Petition was filed on 6th June 2012. In it the Petitioner asserts that she and the Respondent were married on 6th August 2007 by a ceremony which took place at a Syriac Orthodox Church in Kamishli, Syria. The Petition sought a decree of divorce. A document entitled "Marriage Certificate" was sent with the Petition. It is dated 6th November 2009. It declares that the parties were married on 6th August 2007 by the priest at the Syriac Orthodox Church in Kamishli. It is signed by the Metropolitan of Jazirah and Euphrates.

6. In his Acknowledgement of Service dated 4th July 2012 the Respondent asserts that the court has no jurisdiction because there "is no valid marriage". The Respondent also issued an application seeking the dismissal of the Petition on the basis that "there is not and has never been a marriage between the parties". He asserts that the ceremony was merely a church blessing and did not fulfil the requirements under Syrian law for it to be a legal marriage.

7. These documents set out the essential contest between the parties. The issues which I must determine, as summarised above, are:
(a) what was the nature of the ceremony which took place on 6th August 2007; was it a marriage ceremony or merely a blessing;
(b) what is the effect of the ceremony having regard to the fact that certain of the formal requirements of Syrian law were not fulfilled, in respect of permission and registration; and
(c) what remedy under English law, if any, is available to the Petitioner in respect of the ceremony.

History

8. Much of the history is disputed but the following provides the broad background to this case.

9. The Petitioner was born in Syria in 1978 and lived there until 2007. She is a member of the Syriac Orthodox Church.

10. The Respondent was born in Turkey in 1970 and moved to live in England in about 1990. He has also been at times a member of the Syriac Orthodox Church.

11. The parties met in Syria in 2006. There was a ceremony at the Syriac Orthodox Church in Kamishli on 6th August 2007. This was attended by a large number of

guests. I have seen photographs of the ceremony and the reception which followed it. There is also a video.

12. No marriage was registered with the Syrian authorities and no permission was obtained as required as the Respondent is not a Syrian national. The Petitioner's status remains registered with the Syrian authorities as single.

13. After the ceremony the parties travelled to Turkey, first to the Respondent's home town and then to Istanbul.

14. The Petitioner applied for a spousal visa from the British Embassy in Istanbul on 18th September 2007. Her visa was issued on 20th September 2007. She arrived in the UK on 3rd November 2007 and went to live with the Respondent. The Petitioner worked at a café owned by the Respondent. There is a dispute about the payslips, some of which are said by the Respondent to have been forged, but those produced by the accountants for the café are in the name of "Mrs M Asaad".

15. The parties separated in the latter half of 2009 when the Petitioner left the home.

16. The parties have filed written statements and they gave oral evidence. The Petitioner also relies on the written and oral evidence of Archbishop Dawod, Head of the Syriac Orthodox Church in the UK. The Respondent relies on statements from Gabriel Malas, Sharon Kurter, Simon Sheen and his parents. I propose only to summarise the evidence in this judgment but I have taken it all into account when determining the issues in this case.

The Petitioner's Case

17. The Petitioner states that she and the Respondent met in 2006. He visited Syria in the Summer of 2006 and they became engaged at Christmas when the Respondent again visited Syria. The Respondent gave her an engagement ring when he was in Syria at Easter 2007. A few days before the ceremony in August 2007, the Petitioner had a traditional Henna party. The ceremony itself, which was organised by the Respondent, was a large family wedding with members of both her family and the Respondent's family (his parents and four of his brothers and sisters) attending. During the ceremony they exchanged wedding rings and signed the marriage register. There is a video and photographs of the ceremony, the latter having been put in albums, one with the name "Wedding Album" appearing on the front.

18. After the ceremony the parties travelled to Turkey, first to the Respondent's home town and then to Istanbul. When in Istanbul, they went to the British Embassy, where the Respondent was told they could apply for a visa. The Petitioner later applied for a spousal visa after the Respondent had returned to England. She applied there because the Embassy in Damascus was effectively closed. When she and the Respondent went there at Easter 2007 they were told they would have to go to another Embassy.

19. After her arrival in the UK on 3rd November 2007 the Petitioner lived with the Respondent. She also worked for a period at a café he owned. Although the

period of her employment is disputed, the accountants for the café have written confirming that "Mrs Majda Asaad" was an employee and have produced payslips which are in the name of Mrs M Asaad.

20. The Petitioner spoke to her local priest, now Archbishop Dawod, about difficulties in her relationship with the Respondent. He spoke to both of the parties.

21. When the Petitioner left the home she went to live with her sister who also lives in England.

22. On 28th November 2011 the Petitioner obtained a religious divorce from the Syriac Orthodox Church. In a certificate signed by Archbishop Dawod and dated 5th January 2012 it is stated that the parties' marriage on 6th August 2007 has been dissolved.

23. It was suggested to the Petitioner during the course of cross-examination that her goal was to live in England and that the ceremony was undertaken merely to provide a respectful cover for this to take place. She strongly refuted this saying that she and the Respondent were married and intended to marry. She came to this country solely as the Respondent's wife.

24. The Petitioner has produced a letter dated 21st December 2011 from the Syrian Embassy in London confirming that the marriage certificate produced by her is authentic and genuine. She also relies on what are said to be photocopies of the marriage register from the Church in Kamishli which she says they signed on the day of the ceremony. They contain details of the parties, the witnesses, the church and the priest. They also contain like details for other couples who have married at the church and which appear on the same page. These were provided by the Syriac Orthodox Church in Syria by letter dated 21st June 2013 to the Petitioner's Solicitors from the Metropolitan of Jazirah and Euphrates.

25. The written evidence from Archbishop Dawod comprises a letter dated 2nd February 2010, written to assist the Petitioner with her immigration status, and a statement for these proceedings dated 24th June 2013. As referred to above, he also gave oral evidence.

26. He states that both the Petitioner and the Respondent are members of the Syriac Orthodox Church and are well known to him. He has known the Respondent since about 1994. He was an active member of the church until recent years. The Respondent was previously married and divorced. He had been married in 1999 to a woman called FA in a Syriac Orthodox Church ceremony in Holland. Archbishop Dawod has produced a photograph of this ceremony. Archbishop Dawod assisted the Respondent in obtaining a religious divorce in respect of that ceremony. He has produced copies of documents dated 2004 and 2006 including a certificate of divorce dated 8th July 2006 provided by the Patriarch of the Church.

27. In 2007 the Respondent sought Archbishop Dawod's help as he wanted to re-marry. Archbishop Dawod gave him a certificate confirming that he was a

member of the Church and was not bound in a religious marriage. This certificate, a copy of which has been produced, was required to enable the Respondent to marry the Petitioner in a Syriac Orthodox Church. He was invited to the wedding but could not attend.

28. Archbishop Dawod says that he was regularly in contact with the newly married couple and counselled them when he became aware that the marriage was in difficulties. After it became clear that the marriage could not be saved and at the request of the Petitioner, the Church granted a divorce. Archbishop Dawod has produced copies of documents relating to this divorce including the Certificate he issued on 5th January 2012 confirming that the marriage which took place between the parties in the Syriac Orthodox Church in Kamishli on 6th August 2007 has been dissolved.

29. Archbishop Dawod states that the Syriac Orthodox Church does not provide church blessings to couples seeking to live together outside marriage. It is his evidence that the ceremony which took place in this case was a marriage ceremony. When asked about the fact that the witnesses were the Petitioner's sister and the Respondent's brother, he said that this did not affect the validity of the ceremony.

30. The Petitioner also relies on a statement dated 16th June 2013 provided by Father Yousef. In this he states that he conducted a ceremony of marriage between the parties and also told them that they needed to register their marriage with the civil authorities.

The Respondent's Case

31. The Respondent states that the Petitioner wanted to live in England and that, as their relationship developed, she asked whether she could come and live with him in London. He agreed and he also agreed to a church blessing which she wanted so that their relationship would be acceptable to her community. There was no discussion between them about marriage. The Respondent says that, before agreeing to the church ceremony, he checked with the British Embassy in Damascus about its possible legal consequences. He was told there were none and, accordingly, attended the church ceremony which was merely a blessing.

32. The Respondent returned to England on 25th August 2007, leaving the Petitioner in Turkey. She applied for a residence permit in Turkey because her intention was not to start a family with him but to leave Syria and start a new life somewhere else. She then changed her mind and applied for a visa to enter the UK. She applied in Turkey rather than Syria because she knew that if she had applied in Damascus, which she could have done, it would have been refused on the basis that there was no legal marriage.

33. In his oral evidence the Respondent replied, when first asked what role he had played in the Petitioner's application for a visa, "None, I was not in the country". He then said that he had written a letter or letters in support of the application.

34. When the Petitioner arrived in England they lived together in the Respondent's property until she left August 2009.

35. The Respondent says that much of the Petitioner's evidence is false. For example, he asserts that some of the payslips on which she relies are forgeries. He also questions the honesty and credibility of Archbishop Dawod.

36. The husband relies on a transcript of the Petitioner's "Individual Civil Record" as provided by the Syrian Ministry of the Interior on 11th March 2012. This states that the Petitioner's marital status is single.

37. The Home Office has been able to provide only limited information as documents relating to a visa are kept for a maximum of two years. The notes retained provide details of the information provided to the Embassy. They include the following: (i) "Were advised by Damascus that since 2nd May they were unable to deal with app"; (ii) "Applicant obtained temp residence permit to allow application in Turkey"; (iii) "Couple spent honeymoon in Turkey; Photos of wedding etc. submitted"; (iv) "Ev of contact" – which has been explained as usually referring to contact with the applicant and the sponsor; (v) "M & A okay" – which means maintenance and accommodation ok.

Expert Evidence

38. Expert evidence on the effect of the ceremony in this case under Syrian law has been obtained from Ms Aina Khan. She has provided her opinion in three documents dated 11th March, 14th March and 2nd July 2013. She did not give oral evidence.

39. Ms Khan is of the opinion that the ceremony which took place is a Syriac Orthodox Church marriage and not a church blessing. However, in order for a valid marriage to have taken place under Syrian law, as applicable to this case, permission would have had to be obtained from the Ministry of the Interior as the Respondent is not a Syrian national. In addition, the general requirements as to the registration of the marriage would have had to be fulfilled. It is accepted by both parties that these steps were not taken. Importantly, Ms Khan states that "permission can be obtained as part of the registration process following the marriage". Accordingly the marriage was capable of being made formally valid after the ceremony as well as before it.

40. The controversial elements of the expert's opinion are in respect of her evidence as to the effect of these deficiencies as a matter of Syrian law. In her first report she stated:

> "Although the marriage may exist in the eyes of the Christian Church, it is not valid under Syrian law because the Ministry of the Interior's prior permission has not been obtained. This makes this a 'non-marriage'. This is akin to the marriage of a Muslim couple having an Islamic 'Nikah' ceremony in the UK but not taking steps to register it under the Marriage Act."

In addition, later in her report, the expert stated:

> "As the marriage is not legal under Syrian law, it is not legal under UK law. This is therefore a non-marriage."

41. I was concerned when I read these parts of the report. The assertion as to the potential effect of an Islamic ceremony in the UK did not appear to take into account my decision in *MA v JA and the Attorney-General* [2013] 2 FLR 68. Further, the bald assertion that because the marriage is not legal under Syrian law and not legal under UK law, it is "therefore" a non-marriage required explanation. The fact that a legal marriage has not been effected does not mean that it *will* be classified as a "non-marriage", if this term is being used as it is defined in English law. In addition, Ms Khan was instructed to give evidence as to Syrian law, not the consequences under English law of the effect of the ceremony under Syrian law.

42. At my request, Ms Khan was asked further questions. For the purposes of answering them, she again consulted an attorney in Damascus whom she had previously consulted. Ms Khan's further report contains the following propositions:

> (a) The Ministry of Interior's permission can be obtained as part of the registration process following the marriage;
>
> (b) "Syrian law does accept the concept of a 'non-existent marriage' or 'non-marriage'";
>
> (c) The Syrian attorney "clarified that there is no concept in Syria of void/voidable/non-marriage";
>
> (d) "For Syrian Orthodox Christians, the marriage will either be valid because due process has been followed, or a non-marriage because of the fatal error of not applying for prior permission to marry. It may be legal in the eyes of the Church but that would not make it legal by the law of the land."

The Syrian lawyer had previously stated that the marriage would be regarded as a "non-approved" marriage.

43. Given what, in my view, remains a lack of clarity in Ms Khan's evidence, it might have been helpful if she had given oral evidence, in particular to provide an explanation of the terms being used, but neither party was willing to meet the cost of her doing so.

44. The evidence given by Ms Khan and, through her, the Syrian attorney is in summary as follows. Ms Khan first states, simply, that the marriage is a "non-marriage". The Syrian attorney first states that it is a "non-approved" marriage, because of the failure to obtain the permission required as a result of the Respondent not being a Syrian national. In answer to the further questions, Ms Khan states: (a) that Syrian law does accept the concept of a "non-existent marriage" or "non-marriage"; (b) that, as clarified by the Syrian attorney, there is "no concept" in Syria of "void/voidable/non-marriage"; and (c) – this also

appears to be derived from the Syrian attorney – for Syrian Orthodox Christians the marriage will either be valid because due process has been followed or a non-marriage because of the fatal error of not applying for permission; it may be legal in the eyes of the Church but that would not make it legal by the law of the land.

45. I will deal with what I consider to be the effect of this evidence later in this judgment.

Submissions

46. Both counsel have made comprehensive submissions. In my view they have both raised all the points which could reasonably be advanced on behalf of the parties. Although I only summarise their submissions in this judgment, I have taken all the points they have made fully into account.

47. Ms Bhutta (who has acted pro bono, as have her Solicitors) on behalf of the Petitioner submits that the evidence establishes that the ceremony which took place on 6th August 2007 was a marriage ceremony. She accepts that the formal requirements of Syrian law – in respect of registration and permission – were not fulfilled.

48. As referred to earlier in this judgment the Petitioner also seeks to rely on the presumption of marriage arising from a ceremony of marriage followed by cohabitation. Ms Bhutta has referred to *Rayden and Jackson on Divorce and Family Matters,* 18th Ed. para. 7.12:

> "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary …".

49. She has also referred me to a number of authorities including *In re Shepard, George v Thyer* [1904] Ch. 456 and *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6. As I read the former decision, in which the parties had lived together as husband and wife for 30 years, it is an example of the application of the presumption which arises "from cohabitation and reputation" as set out in. para. 7.11 of *Rayden*. In the latter case, in which the parties had lived together as husband and wife for 20 years, the evidence was not sufficient to rebut the effect of this presumption.

50. In contrast, in the present case there is clear, compelling evidence that the requirements necessary to effect a valid marriage under Syrian law were not fulfilled. Accordingly, any presumption which might arise is clearly rebutted.

51. In support of her alternative case, namely that there is an invalid marriage which entitles the Petitioner to a decree of nullity, Ms Bhutta relies in particular on *Burns v Burns* [2008] 1 FLR 813. She accepts that the parties failed to obtain permission as required from the Ministry of the Interior and also failed to register the marriage as required. She submits that Ms Khan appears to have conflated some concepts of English and Syrian law when she states that the marriage is a "non-marriage". In advancing this submission, Ms Bhutta relies in particular on

the evidence given by Ms Khan that the Syrian attorney whose opinion she has sought states that Syrian law has no concept of void/voidable/non-marriage and that the marriage is "non-approved". She submits that I should follow *Burns* and decide that, as a matter of English law, the Petitioner is entitled to a decree of nullity.

52. Mr Daniels on behalf of the Respondent submits that the ceremony in this case was of no effect and created a "non-marriage". He sensibly accepts that the weight of the evidence points to the ceremony having been a ceremony of marriage but submits that it is no more than a religious ceremony, the parties having failed to comply with the requirements of Syrian law to effect a valid marriage. He also submits that the parties knew that the ceremony was of no legal effect under Syrian law. The Respondent had been told this by the British Embassy in Damascus and the Petitioner was aware of this.

53. He submits that the Petitioner took a circuitous route to obtain her UK visa. This, he suggests, raises questions about the Petitioner's credibility as she must have told the UK authorities that she was lawfully married when she knew she was not. He also relies on the way in which the Petitioner's evidence about the Respondent's role in her visa application changed as undermining her credibility. Mr Daniels submits that the Petitioner's evidence and her actions after the ceremony in 2007 do not support her case that she and the Respondent were intending to live together in England as a married couple. Why, for example, he asks did she not come to England until November when she obtained her spousal visa in September?

54. He relies on Ms Khan's evidence and submits that the circumstances of this case are equivalent to those in *Hudson v Leigh* [2009] 2 FLR 1129 in which Bodey J found that the ceremony was of no effect and did not create even a void marriage. The absence of the necessary permission, required because the Respondent was not a Syrian national, is not merely an administrative defect but results in there being a non-marriage.

The Nature of the Ceremony

55. There is a stark conflict in the evidence. The Petitioner says that she and the Respondent became engaged and were married. She then obtained a spousal visa to enter the United Kingdom and lived with the Respondent as his wife until they separated in 2009. The Respondent says that the Petitioner knew they were only participating in a church blessing. She then falsely obtained a spousal visa procured by applying in Istanbul rather than Damascus. She relies on the false testimony of Archbishop Dawod and others who have provided manufactured documents.

56. Given the stark conflict between the competing accounts in this case there can, clearly, be no middle ground. Either the Petitioner has created a false case or the Respondent has. In determining where the truth lies I must, of course, weigh all the evidence in this case. I must also set out my assessment of the witnesses who gave oral evidence.

57. The Petitioner's case has not developed entirely consistently but I found her a convincing witness. She was able to deal with skilful and detailed cross-examination calmly and coherently.

58. I also found Archbishop Dawod to be an impressive witness. I can see no reason why he should decide to produce falsely created documents for the purposes of these proceedings and I accept his evidence.

59. The Respondent was not a credible witness. He was evasive when being cross-examined. His evidence was not consistent. When being questioned by his own counsel he first said that he had played no role in the Petitioner's application for a visa before saying that he had written a letter or letters in support, limited to stating that he would provide accommodation. When being questioned by the Petitioner's counsel about his alleged marriage in 1999, the Respondent first said that he had no recollection of a church ceremony and could not say whether the photograph produced by Archbishop Dawod was of him and FA without looking at the original. The copy of the photograph is very clear and the Respondent almost immediately changed his evidence saying that he did recall the church ceremony and that it was a blessing. When being cross-examined about the nature of the 2007 ceremony he agreed that it could well be the same as weddings he had attended. He also admitted signing the church register. In respect of the visit to the UK Embassy in Damascus in 2007, having asserted in his witness statement of 8th February 2013 that he had asked about the legal consequences of a "church blessing", in his oral evidence the Respondent said he had asked about the consequences of a religious marriage.

60. Further, the Respondent's case requires the creation by the Petitioner and/or others on her behalf of forgeries including the documents produced by Archbishop Dawod. The Respondent expressly asserts that the documents are "fabricated". As referred to above, I can see no reason why the Archbishop or any other Church officials should have done this. There is, therefore, no reason for Archbishop Dawod to have provided the Respondent with what has been called the "Singlehood Certificate" dated 1st July 2007 other than that he was asked to provide it by the Respondent to enable him to marry the Petitioner in a Syriac Orthodox ceremony.

61. The Petitioner's case in respect of the nature of the ceremony is supported by a significant volume of other evidence, including that provided by Archbishop Dawod. It is supported by the Church Register which the Respondent accepts he signed. It is also supported by the photographs which depict what gives every appearance of being a wedding ceremony, as was effectively accepted by the Respondent during his oral evidence. The Petitioner was able, without any apparent difficulty, to obtain a spousal visa which in my view also supports her case. The Respondent lays great emphasis on the application being made in Istanbul rather than Damascus. But he supported this application and the notes provided by the Home Office demonstrate that the authorities were given an explanation for the application being made in Istanbul. If this explanation was false, as the Respondent asserts, it is difficult to understand why the application was processed so quickly. An obvious lie like this would have been likely to alert the authorities to raise questions. Further, as the application was supported

by the Respondent, frankly, I find it unbelievable that he did not know and would not have expressly stated that he was supporting her application for a *spousal* visa.

62. I have no hesitation in coming to the conclusion that the ceremony which took place on 6th August 2007 was a marriage ceremony and, indeed, was known and intended by both of the parties to be a marriage ceremony. I should add that I specifically accept Archbishop Dawod's evidence that the validity of the ceremony as a Syriac Orthodox ceremony is not affected by the identity of the witnesses. I do not consider it necessary to decide whether the Respondent might have had some unspoken plan to seek to prevent the creation of a valid marriage by failing to comply with the registration requirements. It is not necessary because the ceremony in which he freely participated was a marriage ceremony, as he well knew, and such an unexpressed intention could not alter the nature of the ceremony.

The Effect of the Ceremony under Syrian Law

63. I propose at this stage merely to address the expert evidence on the effect under Syrian law of the failure to obtain permission and the failure to register the marriage with the civil authorities.

64. I have summarised earlier in this judgment the evidence given by Ms Khan. I remain of the view that Ms Khan's evidence, that the marriage is a "non-marriage", is undermined by her comment that this is equivalent to an Islamic ceremony in the UK without steps having been taken to register the marriage under the Marriage Act 1949. As *MA v JA and the Attorney-General* demonstrates, this depends on all the circumstances of the particular case. Further, as referred to above, to state baldly that a marriage is a non-marriage merely *because* a legal marriage has not been effected lacks sufficient reasoning especially when, as Ms Bhutta submits, it appears that Ms Khan may be conflating concepts of English and Syrian law.

65. The additional evidence provided serves, in my view, not to clarify this evidence but further to undermine it. The Syrian attorney first states that it is a "non-approved" marriage. Secondly, the further evidence includes the assertion that Syrian law has no concept of void/voidable/non-marriage; that the marriage is a non-marriage and that it is not a legal marriage under Syrian law.

66. It may be that I, too, am seeking to interpret this evidence by reference to English law definitions. However, given that Syrian law has no concept of void, voidable and non-marriage, in my view the effect of this evidence is simply that, as a legal marriage was not effected, there is no marriage.

67. I deal with what I consider to be the consequences under English law of this evidence later in this judgment

Is the Petitioner is entitled to a decree of nullity or no remedy at all?

68. I have dealt above with the Petitioner's case that there is a valid marriage which entitles her to a decree of divorce. The evidence clearly establishes that a valid marriage was not effected as a result of the failure to comply with Syrian

formalities. I turn to consider whether the Petitioner is entitled to a decree of nullity or to no remedy under English law at all.

69. The Matrimonial Causes Act 1973 sets out the grounds on which a marriage is void or voidable. The former are contained in s.11 which provides:

> "A marriage celebrated after 31st July 1971 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 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;
>
> (c) that the parties are not respectively male and female;
>
> (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.
>
> For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other.

70. It is clear that whether these provisions apply in respect of a marriage contracted overseas will depend on the rules of private international law, save in respect of sub-paragraph (d), which expressly applies to a marriage contracted outside England and Wales.

71. Section 14 of the MCA 1973 specifically deals with marriages contracted outside England and Wales.

> "14 Marriages governed by foreign law or celebrated abroad under English law.
>
> (1) Subject to subsection (3) 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 …"

72. The formal validity of a marriage is governed by the law of the country where the marriage has been celebrated: *Dicey, Morris & Collins, The Conflict of Laws* 14th Ed. (2006), p. 789, Rule 66. There can be problems in classifying whether a particular element is a question of formal or essential validity. However, in this case both the failure to obtain permission from the Ministry of Interior and the failure to comply with the requirements in respect of registration are aspects of the formal validity of the marriage and, accordingly, governed by Syrian law.

73. It is a well-established rule of private international law that if a marriage is formally valid in the country in which it took place, it is formally valid everywhere. Conversely, if it is not formally valid by the laws of that country, it is not valid anywhere; *Dicey, Morris & Collins,* 17-003; *Cheshire, North & Fawcett, Private International Law* 14th Ed. (2008) p.878; and *Berthiaume v Dastous* [1930] AC 79. In its judgment in that case the Privy Council said:, p. 83:

> "If there is one question better settled than any other in international law, it is that as regards marriage – putting aside the question of capacity – locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all over the world … If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere …"

74. In my view, it is relevant to note the words used – "so-called" marriage and "no marriage". It is relevant because, as a matter of law, to quote Lord Greene MR in *De Reneville v De Reneville* [1948] P. 100, 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 .."

In *Kassim v Kassim* [1962] P. 224 Ormrod J (as he then was) said, p. 233:

> "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. It was clearly recognised that the sentence itself effected nothing. In *Hayes (falsely called Watts)* v. *Watts* (1819) 3 Phill. Ecc. 43, a case in which the "marriage" had lasted 18 years but was said to be void ipso facto by statute for want of the father's consent, Sir John Nicoll, Dean of Arches, said: "… though the parties did intend to contract a valid marriage, yet either of them has a right to the benefit of a

> declaratory sentence. No such sentence is necessary: but it is a matter of convenience to the parties that it should be given; and it is the duty this court owes to the public to declare the situation of the parties." In *Bowzer* v. *Ricketts (falsely calling herself Bowzer)* 18 (1795) 1 Hag. Con. 213 Sir William Scott Ch., in a similar case, said, 214: "The marriage Act declares marriages in such cases to be ipso facto void - the sentence of the Ecclesiastical Court is declaratory only, it does not make them void."

Although under English law we have developed the concept of a non-marriage to describe a situation in which not even a void marriage has occurred, a void marriage could otherwise be described as a non-marriage or even a non-existent marriage.

75. Having decided that the marriage was void, Ormrod J in *Kassim v Kassim* then had to decide whether to grant a nullity decree or merely a declaration that the "so-called marriage" was null and void. He decided that he should make a decree of nullity, p. 234:

> "In my judgment …. I have in fact no option. 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."

76. The marriage in the present case failed to comply with the formal requirements of Syrian law and, as a result, under Syrian law is not a valid marriage. Accordingly, it is not a valid marriage for the purposes of English law either. But, is it a void marriage or a non-marriage? The critical difference is, of course, that if it is the former the Petitioner is entitled to a nullity decree and the remedies consequent on such a decree, while if it is the latter, she is not entitled to any remedies at all beyond perhaps a declaration that she and the Respondent are not married.

77. This issue arose in *Burns v Burns* [2008] 1 FLR 813. In that case the ceremony at issue had taken place in California. As a result of the failure to comply with the formal requirements of Californian law, the marriage was not valid. Under Californian law it was not a void or a voidable marriage, both of which were specifically defined. It was an "invalid marriage" which might give rise to remedies under Californian law under the concept of a "putative marriage". It was, therefore, contended that the English court could not grant a decree of nullity because the marriage was not defined as a void or a voidable marriage by the law of the place of its celebration. It was simply an "invalid" marriage.

78. Coleridge J rejected that argument:

> "[44] The question in the end is quite a narrow one. Am I precluded from granting a decree of nullity in relation to a foreign marriage, which all accept is invalid by the local law, because that local law does not categorise this invalid marriage by its own terminology as void? Mr Moor says if it is not void in California, it cannot be void here, so no decree is obtainable. Mr Scott says once invalidity is established, the role of the foreign law is largely exhausted and the lex fori, ie England, produces the necessary remedies. I agree that the foreign law is the litmus paper by which validity is tested. Thereafter, our own law determines the remedy, in this case a decree of nullity.
> [45] 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".

Coleridge J goes on to mention, briefly, the situation of marriage ceremonies which 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 …". He did not consider that the marriage in that case was anywhere close to such a marriage.

79. I agree with Coleridge J's conclusion that it is for the English court to decide what remedy, if any, is available under English law. It is clearly for this court to decide whether any English law remedy should be provided. Although the Matrimonial Causes Act 1973 does not specifically provide that a nullity decree can be granted in respect of a foreign marriage this is clearly the intended effect of the 1973 Act as there is no suggestion that the court's previous power to do so was abolished. The Nullity of Marriage Act 1971 largely restated the law and the 1973 Act was a consolidating statute. There can, therefore, be no suggestion that the power identified by Ormrod J in *Kassim v Kassim* does not still exist.

80. The "form of the decree" and its effect are governed by English law as the *lex fori*: *Dicey,* 18-042 and *Cheshire*, p.985. However, in respect of Coleridge J's conclusion that it is for English law "to decide its implications", as it does not appear that he was referred, in particular, to *Cheshire* on this issue, I propose to consider it in a little more detail.

81. The authors of *Cheshire* address the issue under the heading, "What law determines whether a marriage is void or voidable?" (p. 984). They come down firmly in favour of the rule being that the role of the proper law includes determining the consequences of the alleged defect:

> "Whether a marriage is void or voidable is merely a facet of the question whether it is valid or invalid. The law that determines

> its validity or invalidity must also determine what is meant by invalidity, i.e. whether it means voidness or voidability. The role of the proper law, whether it is the law of the place of celebration or the law of the parties' domicile, is to determine whether the alleged defect is sufficient ground for annulment and if so what consequences ensue … One of these consequences is the extent of the invalidity of the union, i.e. whether the marriage is merely voidable or void." (p. 984);
>
> "… the effect of the defect on the validity of the marriage will be determined not by the law of the forum but by that law which, according to English choice of law rules, governs alleged defects of that kind. Any other approach would be highly unsatisfactory where the marriage was void under the governing law of the forum notwithstanding its invalidity under the governing law would be to deprive the choice of law rule of any real impact" (p.985)

i.e. in respect of formal defects, the law of the place where the marriage took place.

82. This conclusion is reached on the basis that the question of whether a "marriage is void or voidable is merely a facet of the question whether it is valid or invalid". The example is given of lack of consent which renders a marriage void under Scots law and voidable under English law. This conclusion is supported by the *Law Commission Working Paper (1985) EWLC 89, Private International Law - Choice of Law Rules in Marriage* which, at para. 5.53, quotes a previous edition of *Cheshire & North* to that effect. *Cheshire* also refers to a number of authorities and to the fact that Professor Morris disagreed and was of the opinion that both the issue of whether a marriage is void or voidable and the form of the remedy are matters for the law of the forum.

83. The principal authority which supports the conclusion that it is the proper law which is applicable to the alleged defect which also determines whether the marriage is void or voidable is *De Reneville v De Reneville* [1948] P. 100 at 114; followed in *Casey v Casey* [1949] P. 420 at 429/430. In the former case Lord Greene MR said, at p. 114:

> "In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage. In *Brook* v. *Brook* 9 H.L.C 193 a case in which the marriage in Denmark (by the law of which country, assuming it applied, it was valid) of two

> persons domiciled in England was held to be void on the ground that although the lex loci governed the forms of marriage its essential validity depended on the lex domicilii of the parties. Lord Campbell L.C. said this at 207: "But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated." In the case of a void marriage, the matrimonial domicile contemplated will clearly be the same as that contemplated in the case of a voidable or non-voidable marriage, since the parties presumably intend to live together. In the present case, the matrimonial domicile was clearly French, and it is, in my opinion, to French law that the question whether the marriage was void or voidable on the grounds alleged must be referred."

84. It appears that the issue is being addressed in *De Reneville* and *Cheshire* on the basis that there are two choices, namely between a marriage being void or voidable, and, in the latter, on the implicit assumption that the terms used mean the same in the foreign law as in English law. Although *Cheshire* refers to the "extent of the invalidity" and "the effect of the defect", it does not directly address other alternatives such as that which existed in *Burns*, when the marriage was neither void nor voidable under Californian law, nor the situation where there might be the equivalent in this jurisdiction of a 'non-marriage'.

85. Do the authorities referred to in *Cheshire* support the conclusion that it is for the proper law applicable to the alleged defect also and *solely* to govern the "extent of the invalidity" or "the effect of the defect"? In my view, they do not, if it is being suggested that there is no place for English law in this exercise. I acknowledge that, in part, the nature of this exercise might depend on where the line is drawn between considering the effect of the defect and the nature of the remedy provided under English law as the *lex fori*.

86. It is clear that if, under the relevant proper law, the effect of the defect is to cause the marriage to be valid or to be invalid, the *lex fori* cannot alter this effect (save possibly in circumstances not relevant to the present case). However, I do not consider that the English court is bound solely by the foreign law's classification of the defect and, in particular, the effect of that classification if it is goes beyond deciding that the marriage is either valid or invalid. As Coleridge J says, the foreign law might adopt the same or might adopt very different classifications to that adopted by English law. There might be no sub-division into void, voidable and non-marriage. There might be different ways of expressing the same or similar concepts.

87. If the foreign law has the same or sufficiently similar concepts and classification to English law then it might be expected that *De Reneville* will provide the answer. But, in any event, and particularly when the foreign law does not have similar concepts, in my view the English court must determine the effect of the

foreign law by reference to English law concepts. This is addressed in *De Reneville* itself but is also required because it is for English law to decide whether the nature and effect of the defect are such as to entitle the petitioner to a decree of nullity or to some other remedy or to no remedy at all - be it a nullity decree or, albeit in a different context, some other remedy such a declaration in the form granted in *Westminster City Council v C and other* [2009] Fam 11; *SH v NB (Marriage: Consent)* [2010] 1 FLR 1927; and *B v I (Forced Marriage)* [2010] 1 FLR 1721. This is so even if, as a result, the English court might in part be said to be determining the effect of the defect, such as by deciding that the marriage was equivalent to a void marriage under English law when it was not so classified under the applicable foreign law (as in *Burns*).

88. In *Berthiaume v Dastous* the marriage, which had taken place in France, was void as a matter of French law. As a result it was held to be void as a matter of Quebec law. The Privy Council further considered the argument that because the marriage was void it could not also be a putative marriage under Quebec law. The only judge of the appeal court who had considered this issue, the others upholding the first instance decision that the marriage was valid, had dismissed this argument "with the curt observation that a putative marriage cannot be a marriage which is null", pp. 87/88. This argument was, however, rejected by the Pricy Council as being an "extraordinary proposition". Accordingly, although under international law there was no marriage, Quebec law applied to create what was known as a putative marriage which gave the 'wife' the right to alimony. This is not, perhaps, a surprising decision as the relevant article of the Civil Code of Quebec expressly referred to the civil effects of a marriage declared void.

89. In *Merker v Merker* [1963] P. 283 a marriage in Germany was, under German law, a non-existent marriage not a void marriage, a distinction said to be similar to the English law distinction between void and voidable marriages. Simon P. at p. 292:

> "German law draws a distinction between a Nichtehe or non-existent marriage and a nichtige Ehe or void marriage. A Nichtehe has no legal consequences whatever, although the parties may apply to the court for a declaration that the marriage apparently concluded by them was non-existent. Such a declaration is a mere recognition of a legal state which exists independently of the court's judgment; whereas in the case of a nichtige Ehe the judgment of a court is necessary to annul it. I understood that the distinction is similar in this respect to our own between void and voidable marriages. The same German courts have jurisdiction to declare marriages to be non-existent as can annul or dissolve them. Dr. Cohn was in no doubt that the marriage in this case was a non-existent marriage, because no registrar co-operated in its celebration."

90. In fact, a German court had declared the marriage null and void, as if it had been a "nichtige Ehe or void marriage", rather than declare it a non-existent marriage. Even though, as a result, a German court would regard the decree itself as a nullity, Simon P decided that it was entitled to be recognised by the English court

as annulling the marriage because the decree was pronounced by a foreign court of competent jurisdiction.

91. Simon P did not, therefore, need to address the effect under English law of a marriage being non-existent under German law. However, it seems reasonably clear, given the reference to the distinction under German law being similar to the English law concepts of void and voidable, that Simon P would have granted a nullity decree, assuming he had jurisdiction to do so, on the basis that a non-existent marriage under German law was similar, even if not equivalent, to a void marriage under English law.

92. If the approach referred to above was not adopted, the English court would have to endeavour merely to apply foreign law terms, in translation, even when they did not coincide with English law terms. It would be simplistic merely to take the words used such as 'non-existent' or 'non-marriage' and apply those words as though they were being used in English law terms especially when, as referred to above, a void marriage *could* be described as a non-existent marriage or even a non-marriage because no marriage will have been created. The English court must, in any event, decide whether, having regard to the English law concepts of void, voidable and non-marriage, the ceremony is one in respect of which the English remedy of a nullity decree is available.

93. Returning to *De Reneville*, Lord Greene MR identified the need for the English court to determine the effect of the foreign law by reference to English law concepts. He said, at p. 115:

> "I have pointed out the difficulty which arises by reason of the applicability of French law and the omission to appreciate its applicability. But I think that in the circumstances the petitioner ought to have an opportunity of submitting (if she be so advised) that the issue should be sent back to the judge to ascertain whether by French law the marriage is void or voidable for either and if so for which of the two reasons put forward in the petition. The decision of the judge on this question, should we consider that the petitioner ought to be allowed to raise it, would carry the consequences which I have indicated. We will hear argument on this matter when my brethren have delivered their judgments. I may add that it would be for the English court, after hearing evidence of French law, to decide whether in French law the marriage was void or voidable not merely in a verbal sense but in the sense of the words as understood in this country, that is, as indicating or not indicating as the case might be, that the marriage would be regarded in France as a nullity without the necessity of a decree annulling it."

The critical issue is whether, under French law, the marriage would be regarded as a nullity or merely voidable as those terms are understood in English law. The reason for this is to seek to avoid changing a marriage from a void one to a voidable one and vice-versa because of their potentially different consequences.

However, the English court in determining the effect of the foreign law is applying "the words as understood" under English law.

94. I have been referred to a number of other authorities but the only additional one I propose to address in this judgment is *Hudson v Leigh* [2013] Fam. 77. The case concerned a ceremony which had taken place in South Africa. The evidence from the two South African legal experts adduced by the parties was, on one side, that the ceremony effected a valid marriage and, on the other side, that it effected a void marriage. Bodey J preferred the evidence that it was a void marriage under South African law and found that, in South Africa, the petitioner would be entitled to a decree of annulment rather than divorce. However, and despite the fact that the relevant defects were governed by South African law, being in respect of the formalities of marriage, Bodey J addressed the issue of whether the ceremony created a void (or voidable) marriage or no marriage at all. Further, he determined this issue by reference to English law and English legal concepts and decided it had effected a "non-marriage" which did not entitle the petitioner to a nullity decree.

95. It does not appear to have been argued that the effect of the defect on the validity of the marriage should be determined solely by South African law. Counsel for the Petitioner argued that there was no such concept as a "non-marriage" in English law. Counsel for the respondent contended that the ceremony was a "non-marriage" under English law:

> "[44] Mr Mostyn supports this argument by referring to academic works on the topic and to three decided authorities. In Joseph Jackson's seminal book *The Formation and Annulment of Marriage*, 2nd ed (1969) the author states, at pp 85–86, under the heading "Distinctions between void and non-existent marriages" that:
> "The question whether a marriage is void, voidable or valid presupposes the existence of an act allegedly creative of a marriage status. In concubinage and the like, no act of the requisite nature exists. In those places where a marriage requires a declaration before a registrar or priest, a private and secret declaration of consent does not create any kind of marriage, not even a void one … a void marriage is still a marriage in the sense that it has to be distinguished from the non-existent marriage or mere cohabitation of man and woman …"
> Then in *Rayden & Jackson on Divorce and Family Matters*, 18th ed (2005), vol 1(1), para 7.4 it is stated that "a void marriage must be distinguished from a non-existent marriage …", reliance for that proposition being placed on *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage) [2001] 2 FLR 6* and *Gandhi v Patel [2002] 1 FLR 603* .
> [45] Mr Mostyn also seeks support from an article "When are we married? Void, non-existent and presumed marriages" (2002) 22 LS 398, by Rebecca Probert, lecturer in law at the University of Warwick. There the author expressly recognises the concept and entity of "a non or non-existent marriage", arguing, at p 402:

> "it is clear from the logic—or lack of logic—of the Marriage Act 1949 that a concept of non-marriage is necessary, since a marriage conducted outside the framework of the Act can be neither void nor valid."

96. This case is relevant because, albeit it appears without argument, the effect of the defects under South African law was not determinative of the English court's decision as to the effect of the defects and the consequential remedy available to the parties.

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* para. 49.

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.

101. Accordingly, I find that the Petitioner is entitled to a decree of nullity.