Neutral Citation Number: **[2023] EWHC 249 (Fam)**

Case No: COP 13832348/BM21F00036

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:09.02.2023

Before :

MRS JUSTICE MORGAN

- -

COP13832348

Between :
COVENTRY CITY COUNCIL

Applicant

- and -
MK
(By his litigation friend, the Official Solicitor)

First Respondent

- and –
GK &MAK

Second and Third Respondents

BM21F00036

Between :
COVENTRY CITY COUNCIL

Applicant

- and -
GK &MAK

First & Second Respondents

- and –
MK
(By his litigation friend, the Official Solicitor)

Third Respondent

- -
- -

Mark Bradshaw (instructed by **Coventry City Council)** for the **Applicant**
Josh Radcliffe (instructed by **Maya & Co Solicitors**) for the **First and Second Respondents**

Kyle Squire (instructed by Star Legal by way of the Official Solicitor) **for the Third Respondent**

Hearing date: 8-9th December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 09.02.2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE MORGAN

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 children and members of their family 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.

Mrs Justice Morgan:

1. At this hearing I have been hearing applications in linked proceedings in the Court of Protection and the Family Division. The application within the latter set of proceedings arise within the context of a Forced Marriage Protection Order first made on 28th September 2021 without notice on Coventry City Council's application.

2. In the linked proceedings before me Coventry City Council ('the Local Authority') is the applicant in both. MK is the first respondent in the Court of protection proceedings and the third respondent in the FMPO proceedings. MK's parents GK and MAK are the second and third respondents in the court of protection proceedings and the first and second respondents to the FMPO proceedings. To minimise the scope for confusion in the light of the extent to which there is an overlap of the issues falling to be considered in each set of proceedings I will in this judgment refer to the respondents by initial.

3. The Local authority is represented by Mr Bradshaw. Mr Squire represents MK taking his instructions from MK's litigation friend the Official Solicitor. GK and MAK are represented together by Mr Radcliffe.

Background And Issues For This Hearing

4. MK is a 21-year-old man. He has mild learning disability and ADHD. Until 2nd May 2019 he lived with his parents who provided him with care, supported and looked after him. On 2nd May 2019, he moved to live in supported accommodation. He has remained there ever since. At the accommodation he receives a care package of 1:1 support, and sleep-in night support, provided by a care agency. He is deprived of his liberty at the placement. The funding of MK's care package is divided approximately two-thirds to one-third between the local authority and Coventry & Warwickshire Clinical Commissioning Group, respectively.

5. The application for a Forced Marriage Protection Order arose out of the discovery that there had been an arranged putative wedding between MK and a woman in Pakistan. GK and MAK accept that this took place over Whatsapp. MK attended the ceremony

from the UK, with the bride (A) being present in Pakistan. MK's grandfather was said to be present in Pakistan as his purported proxy.

6. The focus at this hearing has been on the status of that putative marriage, and in the light of the decision I make as to that, what if any remedy is to be afforded to the parties. Depending on the outcome, this may include whether it is in MK's best interests for an application to be made on his behalf for a decree of nullity, and/or whether, on public policy grounds, a declaration of non-recognition of the marriage in England and Wales should be made. The woman in Pakistan, A has been notified of the proceedings and does not wish to be involved or play any part in them. She has indicated that it is her wish to remain 'married' to MK. She will have to be notified of the outcome of these proceedings insofar as it relates to the marriage which she understands herself to have entered into. As appears from the expert evidence, there is likely to be significant cultural impact on her of a marriage which she had been understood by her family and community to have contracted. It requires of course no expert advice to realise the likely distress in simple human terms she will experience on any finding that her marriage is not valid and the life which she had expected to flow from it, including a move to the United Kingdom to join her purported husband will now be different. I bear both of those effects in mind as I make decisions on the applications before me.

7. No party before me disputed that the fundamental requirements for the marriage were not complied with whether that is in relation to either the law of Pakistan or to the law of England and Wales. Furthermore, there is no dispute that MK lacked capacity to marry at the relevant time.

8. Both Mr Bradshaw and Mr Squire have made detailed submissions on the issue of the putative marriage, Mr Radcliffe on behalf of GK and MAK expressed himself in his written submissions as 'neutral' on the issue of the validity of the marriage save that he conceded explicitly that MK lacked capacity to marry. He indicated that he did not wish to make any oral submissions on the question of the marriage or the relevant and applicable law. So it follows that to the extent that I express, within the context of an examination of the relevant law, it as being agreed by counsel, I mean agreed by Mr Squire and Mr Bradshaw but with no dissent (when given the opportunity) by Mr Radcliffe on behalf of GK and MAK.

9. The issues falling to be determined at this hearing may conveniently be summarised as follows:

   i) Is MK's marriage to A valid?

   ii) In the event that MK's marriage to A is not valid, what is the appropriate remedy to recognise the invalidity?

   iii) What should be the terms of any forced marriage protection order?

   iv) Is it in MK's best interests to remain living in the placement?

   v) Is it in MK's best interests to continue to receive care and support in accordance with the current care plan?

vi) Is any confinement consequent upon MK's care plan necessary and proportionate?

vii) Do any decisions need to be made in relation to MK's contact with A?

viii) What arrangements, in relation to MK's internet and social media use are in MK's best interests and if there are to be restrictions on his use what should be the extent of such and what should be the arrangements for reviewing them?

The Relevant and Applicable Legal Principles Engaged

10. I have been very greatly assisted by the diligence with which Counsel had set out the law in their respective documents. There was no dispute as to that which was relevant to my determination at this hearing and it is largely on Counsels' summary that I draw for what follows.

Lex Loci Celebrationi

11. As a basic tenet of international law, if a marriage is recognised by the country where it has been effected (the *lex loci celebrationi*), it will be recognised throughout the world see *Berthiaume v Dastous* [1930] AC 79 per the Privy Council:

> *'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 regitactum. 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 …'*

12. In *Apt v Apt* [1948] P 83, the Court of Appeal determined that a marriage by proxy, conducted internationally by the proxy, could be recognised in England and did not so offend against public policy that it was not to be recognised. It follows, that the *lex loci celebration* was the country where the proxy was present, rather than whether the intended party to the marriage was present.

13. More recently however in KC *v NNC* [2008] EWCA Civ 198, Thorpe LJ made the following observations:

> *One obvious reason why the place of celebration may be legally significant is that one contracting party may escape the rules as to the formation of marriage applicable in that jurisdiction. More than 60 years ago it was decided that recognition of a marriage by proxy in a foreign country was not contrary to English public policy: Apt v Apt [1948] P 83 (CA). But these courts have not had to consider a marriage by telephone with one spouse in country A and the other in country B. It is for English law to determine where is the place of celebration. It may be in country A, or in country B. Some foreign authors suggest, in the case of proxy marriages, that it should be regarded as celebrated in both countries, thus requiring compliance with the formalities of each: Rabel, Conflict of Laws, 2nd ed 1958, vol 1, pp 243-244*
>
> *In this court there was no investigation nor any argument as to the place of celebration. I would not wish to be taken to endorse whatever consensus was reached between the parties to the effect that the marriage was celebrated in Bangladesh. The important*

questions of law and public policy which arise must be left for decision in a case in which they arise and in which there is adequate evidence of the foreign law relating to the incidents of the marriage ceremony.

14. Mr Squire at this hearing has gone to the trouble to produce for me the footnote to which the reference to *Rabel, Conflict of Laws* refers as follows:

German writers are divided, whether to regard as places of the marriage ceremony both the place where the proxy has been authorized by the absent spouse and the place where the proxy participates in the ceremony (DEUCHLER, Festschrift Raape, supra n. 104, 83-92; Raape, IPR. 242; LG. Kiel (May 20, 1946) IPRspr. 1945-1949 no. 19, 15 Z.ausl.PR (1949/50) 578; LG. Hamburg (July 14, 1954) StAZ. 1955, 61) or whether only the place of the ceremony is relevant (NEUHAUS, 15 Z.ausl.PR. (1949/50) 580; BEITZKE

15. I have not at this hearing been referred to any authority which has led me to conclude that it is appropriate for the *lex loci celebrationi* to be two separate jurisdictions. I have confined myself in contemplating the possibility of there being operative for *lex loci* the jurisdictions of either Pakistan or England and do not cast my mind wider to try to consider an exhaustive list of other factual circumstances not applicable in the specific facts of this case. I have however taken note of the submissions made by Mr Squire that circumstances where there were or might be, two separate jurisdictions would, almost inevitably, lead to a marriage being void in one of the jurisdictions for want of formal validity, thus giving rise to confusion over the application of the basic principle that a marriage valid in one country would be recognised anywhere. Providing certainty where possible is what lies at the heart of that principle see ***Akhter v Khan*** [2020] EWCA Civ 122:

"The answer to the question of whether a person is recognized by the state as being validly married should be capable of being easily ascertained. Certainty as to the existence of a marriage is in the interests of the parties to a ceremony and of the state. Indeed, it could be said that the main purpose of the regulatory framework (summarised below), since it was first established over 250 years ago, has been to make this easily ascertainable, and, thereby, to provide certainty".

Essential Validity – Capacity

16. There is within the authorities recognition of a distinction as to validity of a marriage between essential validity and form. Capacity to marry has long been recognised as an essential validity. Capacity to marry is governed by the 'dual domicile' test, which states that the test of capacity is to be governed by the law of the state in which a party is domiciled. MK's domicile is the United Kingdom. All parties before me accept that applying the test as set out in the Mental Capacity Act 2005, MK lacks capacity to decide to marry. I have been referred by counsel to the extent to which there is debate as to whether lack of capacity allows the court to refuse to recognise the marriage.

17. Mr Squire has drawn my attention to ***NB v MI*** [2021] EWHC 224 (Fam) and the views expressed therein by Mostyn J that it is an inappropriate exercise of the inherent jurisdiction to make declarations of non-recognition except in the most limited of cases. This is because it cuts across the statutory regime of the Matrimonial Causes Act 1973, and particularly s.58(5)(a) which provides:

"No declaration may be made by any court, whether under this part or otherwise –

a. That a marriage was at its inception void…"

Mostyn J surveyed the authorities and doubted their reasoning. Whilst recognising that marriages of those who lack capacity to decide to marry may be abusive, he did not consider that a declaration of non-recognition provided any further protection. Mr Squire in his review of the law submitted to me that whilst the comments by Mostyn J are obiter and at first instance, they nevertheless warrant careful consideration. Naturally I accept that.

18. *KC v NNC & Ors* [2008] EWCA Civ 198, which is factually similar to the present case, caused the Court of Appeal to consider the question and it decided that an English court could refuse to recognise a marriage which would be voidable pursuant to 12(c) of the 1973 Act, if it offended against the essential validity criteria. Per Wall LJ:

"[60] I acknowledge of course, as I have to, that, as a matter of English domestic law, section 12(c) of the 1973 Act renders the marriage between IC and JK voidable rather than void. It does not, however, in my judgment follow that the English courts are bound to recognise the marriage as valid. To put the matter another way, the status conferred by sections 12 and 16 of the 1973 Act on the marriage is in no sense inconsistent with the High Court's capacity to refuse it recognition".

Later in the Judgment Wall LJ further quoted from *Veraeke v Smith* [1983] 1 AC 145, where it was said by Lord Simon:

"There is abundant authority that an English court will decline to recognize or apply what would otherwise be the appropriate foreign rule of law when to do so would be against English public policy; although the court will be even slower to invoke public policy in the field of conflict of laws than when a purely municipal legal issue is involved."

Formal Validity

19. I have to consider at this hearing where it is clear that there is lack of formal validity whether it is void marriage susceptible to an application for nullity, or whether it is a non-qualifying ceremony. Questionable ceremonies are to be classified on a case by case basis, relevant factors including (but not being limited to): (a) whether the ceremony or event set out or purported to be a lawful marriage; (b) whether it bore all or enough of the hallmarks of marriage; (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage; and (d) the reasonable perceptions, understandings and beliefs of those in attendance.

20. If I conclude that *lex loci celebrationi* is Pakistan, and the marriage is a void marriage, both Mr Squire and Mr Bradshaw submit that I could make a decree of nullity pursuant to s.14 MCA which provides:

(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.

(3) No marriage is to be treated as valid by virtue of subsection (1) if, at the time when it purports to have been celebrated, either party was already a civil partner.

21. In this respect my attention has been drawn to the observations in *Burns v Burns* [2007] EWHC 2492 (Fam):

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.

…

48. However, the parties fulfilled all the local requirements as to capacity and the like, as did the marriage ceremony itself. Every case, of course, in this regard is in the end fact specific, but in this case, I regard the shortcomings in the preliminary process as the merest of technicalities. Enough, of course, to render the marriage invalid, but nowhere near to the category of cases where the marriage can be described as a non-marriage and so disentitles the petitioner even to a nullity decree.

49. Accordingly, I find that section 14 is precisely targeted to this situation. The purpose of the nullity provisions of the Matrimonial Causes Act 1973 , introduced by the 1971 Amended Legislation, was to ensure that where parties intended to marry and went through the proper process but it was in some way or other flawed, the court could nevertheless adjudicate upon their financial affairs as if they had been married. That legislation is in the interests of public policy and justice. It was designed precisely, it seems to me, to meet this kind of situation, and section 14 to meet the situation where the marriage is a foreign one. Accordingly, on the basis of the amended petition, I will grant a decree nisi of nullity.

22. In *Asaad v Kurter* [2013] EWHC 3852 (Fam) Moylan J concluded that it was for the English court to determine what remedy, if any, was available under English law to a petitioner who had failed to establish the existence of a valid marriage governed by foreign law. At para 86 of his judgment, Moylan J said:

'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 in this 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 goes beyond deciding that the marriage is either

> *valid or invalid. …… 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.'*

Of particular relevance and utility in the circumstances of the case before me is the summary which Moylan J returns to at para 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 is 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.' ([2008] 1 FLR 813)'.*

Evidence

23. At this hearing I heard evidence from the jointly instructed expert professor Rehman. He had first been instructed as a single joint expert pursuant to the order of HHJ Tucker on 28th January 2022 and provision for addendum reporting and extensions of time for questions and responses were made within the orders of Roberts J. Professor Rehman is professor of law at Brunel University with an expertise in Islamic Law International Human Rights Law and Pakistani Family Laws.

24. In the days immediately preceding this hearing I received correspondence from the solicitor acting for GK and MAK inviting me to direct that he should not attend to give evidence. Mrs Justice Roberts had made provision in her order of 8th August 2022 for his attendance unless it was agreed by all parties that there was no need for it. In the face of what appeared to be a request that was not agreed by all parties, I did not see good reason to interfere with the arrangements made by Roberts J and to dispense with his attendance. Strongly urged on me also by Mr Radcliffe was a submission that I should set aside or otherwise interfere with the way in which Judges case managing the matter at earlier hearings had provided for the costs of the expert to be met. It will be necessary to return to that.

25. A further preliminary issue arose in relation to another event shortly before the hearing when, in what appears prima facie to be a breach of the FMPO tickets had been bought for MAK and MK to travel to Pakistan on the Monday after the listed hearing. There was discussion between counsel about whether I should hear evidence from the social worker for MK about the discovery of the purchase of those tickets. In circumstances where the updated information is that MAK has been interviewed by the police and

bailed to 1st March next year and the question of any breach of the FMPO is being dealt with by the criminal justice system it was agreed that I need not hear from the social worker. I have also – beyond seeking Mr Radcliffe's assurance on direct instructions from his clients, that all expired as well as existing passports, whether issued by the Pakistan or United Kingdom authorities for MK , have been handed over to the police – not considered at this hearing any issue as to a breach which will take its course in the police investigation. It was therefore unnecessary for me to hear evidence on updating matters from the social worker whose written evidence I have within the trial bundles

26. Professor Rehman in his 3 helpful reports had considered carefully the requirements and formalities for Islamic and Pakistani marriages. A Muslim marriage is essentially a contract of civil law between a man and a woman. Under Muslim personal law, the marriage (Nikah) is perceived as a contract of civil law between two consenting persons of sound mind, who have attained puberty. The contract can be oral or in writing. The Nikah is effected simply by an offer and an acceptance. The declarations of offer and acceptance are pronounced by the parties, or by their vakil (lawyer/representative) or wali (guardian) acting on their behalf. The requirement is that the marriage must be conducted in the presence of free witnesses: two men or one man and two women.

27. These Islamic schools of jurisprudence (known as Madhahib), he reported, are generally followed on a geographical basis, with the majority of Muslims in Pakistan following Sunni Islam. The marriage contract is the only valid requirement in concluding a marriage under Islamic law; requirements such as privacy between the husband and wife or the consummation of marriage are not essential to the conclusion to valid marriage (although these factors might be legally relevant for the dissolution of the marriage) and requirements for valid marriage. However, there are some variations and differences in practice (for example, in relation to the role and authority of the marriage guardian).

28. Pakistan's Family laws have formally incorporated the Islamic law of marriage through MFLO. Section 3 of the MFLO provides that the 'provisions of this Ordinance shall have effect notwithstanding any law, custom or usage, and the registration of Muslim marriages shall take place only in accordance with these provisions'. Section 5 of the MFLO, requires mandatory registration of all marriages performed under Muslim law. Section 5 provisions of MFLO include a requirement that every marriage solemnised under Muslim Law is to be registered in accordance with the provisions of the ordinance

29. Within his oral evidence before me he expanded his explanations to explain that whereas the Islamic marriage, could be oral or in writing, it was not the case that there was any need for a documentary record, it was the requirements for mandatory registration within the Pakistani law on incorporation of Islamic law of marriage by the *Muslim Family law Ordinance 1961* which had led to the requirements for written arrangements and recording.

30. The Nikah Nama in this case which he has examined carefully is an incomplete and invalid document. The significance of this is that the Nikah Nama records the contents of the Nikah and so it is that all information must fully and comprehensively provided within it. Here the document provided is incomplete as it fails to include answers to Question 9 on the document i.e. whether any vakil (lawyer/representative) has been appointed by the bridegroom in respect of which his full name, father's name and

residence must be noted. That is, Professor Rehman said when asked in his oral evidence, a serious defect. The tenor of his evidence before me was that had that been the only defect it would have been a matter of very serious concern to him but it was not.

31. On his examination of the document he found that there are also the deficiencies which he identifies in his report in respect of Question: 10. This relates to the names of the witnesses in the appointment of the bridegroom's vakil with their father's names and their residences. This too Professor Rehman was firmly of the view was a significant problem as to validity

32. There is equally he told me an absence of what was the evidence, by which MK's grandfather had the legal authority to sign the Nikah Nama as his vakil (representative). Since this is a marriage by WhatsApp (and MK is not physically present at the location of the marriage), that evidence by which the grandfather had been lawfully authorised as a vakil and thus lawfully authorised to sign the Nikah Nama – setting aside for the moment as I understood his evidence the other defects with that document – was crucial to the legitimacy of his role as a vakil.

33. It would be possible in Professor Rehman's expert opinion for the validity of the authority for MK's grandfather to act as his vakil to be evidenced by a valid special power of attorney duly attested by the Pakistan Consulate/High Commission in the United Kingdom and sent to his grandfather in Pakistan. There were however as professor Rehman was clear in his oral evidence two further difficulties – first though not his particular area of expertise he saw there were likely issues in relation to the capacity of MK to make such a power of attorney; second there could not be a retrospective legitimising of the vakil for the ceremony which had already taken place and accordingly it would require a new ceremony to be undertaken. Cross examined by Mr Bradshaw he was clear that it was not a route open to providing legitimacy for the purported marriage here

34. Within his written opinion Professor Rehman indicated that in the context of an invalid marriage, the cultural implications for MK are likely to be significant whether the court grants a decree of nullity on the basis that the marriage is void, or if it makes a declaration of non-recognition on the basis that the marriage is a non-marriage/non-qualifying ceremony. There would be considerable embarrassment within his immediate family and his community stemming from his inability to have the woman understood by that community to be his 'bride' travel from Pakistan to join him. Further embarrassment would flow from the fact that he would not be able to have what would be perceived as a normal married life which would be the expectation for young males within the community. When the question of the cultural implications for MK if the marriage was not valid was revisited in oral evidence professor Rehman was more diffident in respect of MK. He did not regard there as being much in the way of direct cultural implication (as distinct from personal disappointment) for MK himself though the Professor maintained his view as to the likely community and cultural embarrassment for his family. Specifically, when asked by Mr Bradshaw it was not the professors view that there was any likely impediment to MK participating, to the extent that he already does, in community events or being included as a member of the community because of any decision taken (by whatever route) by this court about his invalid marriage

35. His view remained that the cultural implications for A are likely to be extremely serious if the court grants either remedy. Orally he described the consequences as potentially 'devastating'. The typical response from the sort of community within which she lives in Pakistan is one which is extremely judgmental. Many members of her community and wider family would not be aware or understanding of the circumstances and reasons behind the English court's decision and she is likely to be consistently tormented for bringing her community or family into disrepute through this 'marriage'.

36. Professor Rehman had been asked to consider whether there could be in Pakistan law in his view two different concepts of marriage as either a void marriage or a non - marriage/non qualifying ceremony. In his substantive report he indicated that there are those equivalent concepts in the law of Pakistan. He had not by his third report explained where the distinction would fall in that jurisdiction. In the course of his oral evidence whilst Professor Rehman spoke of degrees of invalidity, he did not give a firm view so as to assist with the delineation between those two. He declined to be drawn into a wider review of all circumstances which might arise but his unequivocal view was that this case the failings of formalities were fundamental to the validity of the marriage. All of the deficiencies were troubling but the absence of a Nakil was seemingly fatal as far as he was concerned

Discussion

37. On all of the evidence I am satisfied that in this case the *Lex loci* is Pakistan. In arriving at that conclusion, the following aspects have carried weight in my thinking:

    i) The Ceremony conducted was carried out in Pakistan

    ii) The purported Bride (A) was in Pakistan and present at the Ceremony

    iii) Whilst MK's grandfather was, I accept on the evidence of Professor Rehman, not properly and effectively appointed as his proxy, the attempt had been to appoint him and for his presence as Proxy to be in Pakistan

    iv) The Imam conducting the ceremony was also present in Pakistan

    v) Although as is now clear the Nikah Nama was deficient, there were attempts by way of Nikah to comply with Islamic law. In contrast to that there was no attempt at all to comply with the Marriage Act 1949 and the law of England and Wales

38. When I come to set against those factors any aspects which could suggest the Lex Loci is in England, the single feature which might indicate that is MK's own presence here, attending as he did by Whatsapp. I accept and agree with the submissions of both Mr Bradshaw and Mr Squire that that is insufficient to regard the lex loci as here when set against those which point to it being in Pakistan

39. Having determined that the *lex loci* is in Pakistan, I move to the status of the marriage. From the evidence of Professor Rehman I distil the following key points:

i) Since the marriage is conducted via WhatsApp and MK was not physically present at the location of the marriage a 'vakil' is required to be appointed to stand as proxy;

ii) A vakil must be appointed in a way that evidences the validity of the appointment

iii) this marriage is not valid in Pakistan for want of a 'vakil' appointed by MK via a special power of attorney duly attested by the Pakistan Consulate/High Commission in the United Kingdom and sent to the attorney (his grandfather) to act on his behalf in the ceremony.

iv) the Nikah Nama is otherwise deficient because only one witness is named.

v) Furthermore there are other questions on the Nikah Nama form which are unanswered and the effect is that in an overarching sense the document is incomplete and is invalid ;

vi) the marriage currently has no legal effect in Pakistan;

vii) to achieve legal recognition, it would be necessary to ensure a valid and fully completed Nikah Nama, and a valid marriage registration certificate that is not something which can be done retrospectively

From the foregoing it follows that the marriage is invalid (having regard to the formalities of the place in which the marriage took place) in Pakistani law.

40. Counsel for the Applicants and for MK centred their submissions helpfully on the approach taken in ***Asaad*** and in particular the steps set out at para 97 of the judgment of Moylan J which they each submit are likely to be of assistance given the similarity of the circumstances here. Having found that the marriage is invalid in Pakistan as I consider the matters identified by Moylan K at para 97 (b) in ***Asaad*** ,I reflect on the evidence I have heard from Professor Rehman. Within his written evidence he had been explicit in giving the opinion that there were in Pakistan Law concepts which sufficiently equated to the concepts of a void marriage and a non-qualifying ceremony (elsewhere referred to as a 'non-marriage). In his oral evidence, whilst maintaining that Pakistan law had those separate concepts, he was hesitant to say with certainty when asked, whether his view was that this situation fell into one or the other of those two situations. The emphasis of his evidence was that the defects were such that the ceremony was not one which was qualifying.

41. I conclude that the effect of the expert evidence here, differs from that which faced Moylan J in ***Asaad*** . It does not lead to an answer that Pakistani law has no separate concepts of a marriage being void or voidable or a non-marriage such that the outcome here could only be a void marriage. Since I am satisfied on the expert evidence that there are two equivalent concepts in Pakistani law, I am also satisfied that I may apply whichever is most appropriate to the facts of this case to determine the effect of the defect

42. Counsel submit that following through the reasoning in ***Asaad*** to 97(c) in any event, it is for me to decide what remedy under English law, if any, is available for the reasons set out in Burns v Burns para. 49. If a void marriage, a decree of nullity is available as a remedy. If nullity were the appropriate course, a best interests decision would be required as to whether the Official Solicitor should petition for such a decree. MK lacks capacity to marry and it would follow therefore also capacity to seek to nullify a marriage. I recognise that there may well be significant practical difficulties, including financial ones, involved in making such a petition.

43. Neither counsel submits that I should find that this is a void marriage. Each invites a conclusion that this is a non-qualifying ceremony. Both submit however that if contrary to their positions, the outcome is one of the equivalent of a void marriage, the appropriate remedy would be that of a nullity decree. Mr Bradshaw draws support for his submission in that respect by pointing out that this would accord with the English law distinction whereby nullity is not granted for non-qualifying ceremonies, but generally is where there is sufficient in what has taken place at the ceremony to regard the marriage as having been entered into but being void.

44. Had I not accepted the expert opinion in the written reports of Professor Rehman that there were equivalent concepts in Pakistan law and been left with applying English law concepts, Mr Bradshaw's submission is that it would have been necessary for me to consider the features of the marriage and to consider he formalities by reference to the formalities of the Marriage Act 1949 and the Matrimonial Causes Act 1973. In the circumstances however that does not arise.

45. Mr Squire whilst making a clear submission that in this case I should take a route which leads ultimately to a declaration of non-recognition has made careful submissions as to the approach to be taken to essential invalidity for want of capacity as distinct from formal invalidity. The Official solicitor has given careful thought to the way in which the particular circumstances of MK inform her position on whether she invited me to make a declaration of non recognition for want of capacity and Mr Squire submission is that this is not a case in which he was coerced or forced in any sense felt by him to be against his will into a marriage. That being so, submits Mr Squire, the Court should, on balance, not reach the conclusion that it is sufficiently offensive to English Court not to recognise it on that basis. I accept his submission on that. Instead, he submits that in the light of Professor Rehman's unchallenged evidence I should make a declaration of non-marriage on the basis of a non-qualifying ceremony. After careful consideration I accept that submission in the factual circumstances of this case. I consider the events in Pakistan to be akin to a non-qualifying ceremony/non-marriage.

46. I am satisfied that it is the more appropriate determination on the evidence before me than a determination of a void marriage and an application for a decree of nullity. I am also satisfied that on public policy grounds, it is appropriate make such a declaration to ensure certainty and to protect MK from the implications of a forced marriage. that I make such a declaration on public policy grounds does not detract from the fact that the decision is one that I make on the fact specific circumstances here and is not intended as being of any wider application for other cases which are very likely to depend on their own factual circumstances.

47. Returning then to the questions at [8] which fall to be determined at this hearing, my determination as to the purported marriage answers the first two questions as to the

validity and any remedy. The third question relates to the terms of any FMPO. By the time of the end of the hearing, there was agreement as to the terms of such order and I was provided with an agreed draft. As a result the matters remaining to be considered are those which relate to Best Interests decisions

i) Is it in MK's best interests to remain living in the placement?

ii) Is it in MK's best interests to continue to receive care and support in accordance with the current care plan?

iii) Is any confinement consequent upon MK's care plan necessary and proportionate?

iv) Do any decisions need to be made in relation to MK's contact with A?

v) What arrangements, in relation to MK's internet and social media use are in MK's best interests and if there are to be restrictions on his use what should be the extent of such and what should be the arrangements for reviewing them?

48. There is no controversy as to the first three. Final declarations have already been made that MK lacks capacity to:

i) Conduct proceedings;

ii) Make decisions as to his residence;

iii) Make decisions as to his care and support needs;

iv) Decide to engage in sexual relations;

v) Enter into a tenancy agreement;

vi) Make decisions as to his use of social media and internet.

49. On all the evidence before me he is well settled in the placement. He has a good relationship with his parents and so far as contact with them is concerned will continue to see his mother. His contact with MAK will now be affected by the imposition of bail conditions following the arrest of MAK for breach of the FMPO. The plans for his care and support needs are amended so as to provide for a programme of educative work. MK's social worker has exhibited an updated care and support plan and a risk assessment from the care provider in relation to his social media and internet use and access to pornography. It is the local authority's intention to review these restrictions once MK has completed his educative work around sex and relationships, discussed below.

50. The restriction on access to the internet and in particular restricting his access to pornography is one that caused me some disquiet given his age and situation. I had been troubled by the way in which the local authority appeared to couch the need for it in terms of the convenience and comfort of younger female staff in terms of managing MK's behaviour (which was less challenging when access to the internet was restricted) rather than it arising out of the focus on his needs. I have however heard submissions from the Local Authority, which are strongly supported by the Official solicitor, first

that the restrictions in that regard are intended to be limited in time to the period during which educative work (as to which more below) is provided to MK and second that whilst the reference to the convenience and comfort of younger female staff is a matter of concern arising as it does from MK's uninhibited behaviour, it is the knock on effect of that and the potential for it to de-stablise his care and otherwise settled placement which is the real driver for the restrictions.

51. I have been provided with evidence that the local community learning disability trust has been engaged to provide tailored 1:1 educational provision for MK, addressing consent, sexual acts, sexuality, gender and safe sex, relationships (including marriage) and online safety. The trust is in the process of assessing MK's level of attention so as to plan the structure and timescale for the course. It is recognised that MK's capacity and also the need for restrictions on his access to the internet including to pornography will need to be revisited once the work has completed and the timescale for the work is likely to dictate the timing of such a review.

52. Mr Radcliffe on behalf of GK and MAK takes a different position to that which the Local Authority and the Official solicitor adopt. He does not disagree with the imposition of the restrictions proposed but does take issue with the timing and to an extent the reasoning behind any restriction, in the sense that GK and MAK submit there are additional reasons of a religious and/or moral character. He has submitted to me that MK is a member of a family whose members are strictly observant of the Islamic Faith; it is not in keeping with MK's faith to be having access to pornography Amongst the tenets which he would be expected to follow (and submits Mr Radcliffe, had he capacity would choose himself to follow) is that he would not engage in masturbation. The practice of masturbation, submits Mr Radcliffe, is something which the Islamic Faith and Abrahamic faiths more generally deprecate. For the purposes of this hearing I am prepared to take that submission at face value. The use of pornography by MK and his access to it submits Mr Radcliffe encourages his interest in masturbation and so on behalf of GK and MAK he invites me at this hearing to authorise the restrictions on MK's internet access permanently. I am not prepared to sanction or to consider sanctioning so significant a restriction on the liberty of a young man in his 20s on the evidence before me. On a best interests basis I will authorise it in the terms which the Local Authority and the Official solicitor invite me to. I will approve the care plan, which has been made available to me as a working document in its finalised form

53. The final aspect of the matter which is necessary to return to at this stage are those submissions made on behalf of GK and MAK in respect of the costs of the single joint expert. These have been most helpfully set out in detail in writing by Mr Radcliffe and were amplified orally. Whilst it is conceded that the FMPO order of 8th August 2022 specifies that the GK and MAK shall bear, collectively, one half of the cost of Professor Rehman's attendance, Mr Radcliffe submits that I should vary that order for the following reasons (which I paraphrase from the detail of the oral and written submissions).

    i) GK and MAK have not sought to challenge the findings of Professor Rehman and conceded as much through counsel in Position Statement filed in advance of the hearing of 5th July 2022 before Roberts J. The concession made is that there is no valid marriage between MK and A.

ii) It follows from that, that how the Court determines that the non-validity (accepted by all) of the ceremony, or purported ceremony, which took place in September 2021 has been rendered "academic" within the meaning of *Hutcheson v Popdog Ltd & Anor* [2011] EWCA Civ 1580.

iii) There will be no practical difference to any of the Respondents, including the MK arising out of the different orders available to the Court.

iv) By analogy Hutcheson, in which it was held, at paragraph 15 thereof, that, a precondition of "academic" appeals ought to be, "*The Respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced*" it is therefore unjust for GK and MAK to have to fund, in part, the attendance of a witness whose evidence has no bearing whatsoever on their case (albeit that it is conceded that it was proper that they were joined as parties to application).

54. Whilst I recognise that this is a creative submission made on strongly held instructions it is not one which I find holds any attraction. There may be other circumstances in which the analogy to the appellate situation is apposite, but this is not it. The instruction of the expert was necessary and sanctioned as such by the court pursuant to part 25. The detailed case management by Roberts J on 8th August 2022 provided a mechanism whereby in the event that the parties were able to agree that attendance was not necessary he need not attend (and thus the cost of his attendance avoided). The parties were not agreed. His evidence was required. I do not accept the submission that the outcome as to how the Court is to treat the invalid marriage and the remedy consequent upon that decision is properly to be regarded as academic. Were it so it would not have required determination. Nor do I accept the submission that the fact that GK and MAK, the respondents to the application for a FMPO which has been continued at this hearing, did not seek to cross examine or challenge his findings provides a reason to vary the order of Roberts J and I decline to do so.

55. I will invite Counsel to draw up orders which give effect to this judgment and to submit them for approval. I should like finally to express my thanks for the care and diligence which has been evident in the way that the matter has been prepared and presented.