Neutral Citation Number: [2025] EWFC 42

Case Nos: ZZ 21 D 62734 / 1660-0404-5491-6060

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4th March 2025

Before:

MR. NICHOLAS ALLEN KC

(Sitting as a Deputy High Court Judge)

Between:

SANDEEP KUMAR CHUGH

Applicant

- and -

LATIKA CHUGH

Respondent

The Applicant appeared in person

Ms. Elizabeth Darlington and **Ms. Annabel Barrons** (instructed via Advocate) represented the Respondent

Hearing dates:

19th – 21st February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 4th March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in public and may be published.

Nicholas Allen KC:

1) I am concerned with cross-applications in relation to (i) divorce proceedings brought in India which one party (the applicant) says are valid and should be recognised in this jurisdiction and one (the respondent) says are invalid and/or should not be recognised; and (ii) divorce proceedings brought in this jurisdiction by the respondent where the jurisdictional basis to do so is challenged by the applicant.

2) I previously directed the lead application to be the one to recognise the Indian divorce decree and to set aside the English decree. Hence my use of 'applicant' and 'respondent' despite the cross-applications.

3) For ease I shall refer to the applicant as 'H' and the respondent as 'W' respectively. No disrespect is intended.

4) H has acted in person (as he has largely done throughout save for having initially been represented by Dawson Cornwell in the summary return proceedings and for a time by Goodwins Family Law in the divorce proceedings). I understand he sought *pro bono* representation for this hearing via Advocate but was unable to secure the same. However, I am satisfied I have a full understanding of H's arguments and he was not disadvantaged. He attended the hearing remotely from India.

5) W was represented by Ms. Elizabeth Darlington and Ms. Annabel Barrons instructed via Advocate. They have acted *pro bono* throughout these proceedings and have also taken responsibility for the preparation of the court bundles. I anticipate these proceedings may have been far more complex and time-consuming than either Ms. Darlington or Ms. Barrons anticipated when they first took on the case *pro bono*. I am extremely grateful to them both for having acted in this way and for the considerable assistance with which I have been provided as a result.

6) I heard the final hearing over three days from 19th – 21st February 2025. In advance I was provided with (and read) an e-bundle running to 273 pages and position statements from both parties. On the morning of the first day, I gave permission to W to rely on a supplemental bundle of 73 pages as most of these documents ought to have been in the main bundle. I also gave permission to H to rely on an additional document (a copy of the Indian divorce judgment dated 20th September 2022). On the morning of the second day I gave H permission to rely on a second supplemental bundle of 107 pages (it being agreed on W's behalf that H had not been asked in advance of the final hearing which documents he would like to adduce and it being accepted that none of these documents were being seen by W for the first time). I was also confident that many of these documents would have been in the bundle had H had legal representation.

7) H produced one further document at my invitation overnight between the second and third day of the final hearing. He produced a further document during the course of his submissions. I refer to these further below. As part of their response Ms. Darlington and Ms. Barrons then sought to adduce a run of emails between H and the Single Joint Expert ('SJE') that had predated (and no doubt informed) her report. No objection was taken to the admission into evidence of H's further document and the run of emails on W's behalf and by H respectively.

8) Given the nature of this hearing (one party in person and one represented via Advocate) I gave the permissions sought and allowed both parties to address me in relation to the additional documents even though evidence had formally 'closed' at the end of the second day. I am unlikely to have been so lenient had the parties been fully represented by solicitors and counsel. Although admission of the additional documents in this way was somewhat unsatisfactory, it ensured the parties put before me all they wanted and also their right to a fair hearing.

9) At an earlier hearing on 6th February 2025 I had directed that if H should fail to file and serve his statement by 4 pm on 12th February 2025 he would be debarred from giving oral evidence unless he made a successful application on the first day of the hearing for permission to do so. I made such an order as H had failed to file his statement despite two orders that he do so by 4th March 2024 and 5th July 2024 respectively. He did not file his statement until 11.15 am on 13th February 2025. H therefore sought my permission to give evidence which was opposed on W's behalf. I granted permission both because I was satisfied by H's explanation for the delay and because I did not consider that W had been prejudiced by the late service (although I had given W permission to file a statement in response by 4 pm on 14th February 2025 it was accepted on her behalf that H's delay was not the reason why this was not filed).

10) I heard oral evidence from both parties. H's cross-examination of W was carried out by Ms. Maureen N. Obi-Ezekpazu who had been appointed as a QLR. The author of the SJE report, Ms. Sirajam Munira of Dr. Law Solicitors, was not called to give evidence. Thereafter I reserved judgment.

11) In this judgment I have not referred to every argument raised by the parties in their written and oral evidence or in submissions. I have however borne all that I read and was said to me in mind.

12) I remind myself that the burden of proof is on the party who makes a particular allegation/seeks a particular finding and the standard of proof is the balance of probabilities; no more and no less.

13) In considering the parties' evidence I gave myself the so-called 'Lucas' direction (named after *R v Lucas* [1981] QB 720) which can be over-simplified to be that just because a person may have lied about one thing it does not automatically follow that

they are lying about everything. I deliberately say 'over-simplified' because I am conscious that in *Re A, B, and C (Children)* [2022] 1 FLR 329 Macur LJ described the judge's self-direction (at [58]) as having been *"formulaic"* and *"incomplete"*, that (at [54]) such a formulation *"leaves open the question: how and when is a witness's lack of credibility to be factored into the equation of determining an issue of fact?"* and thereafter cited from the Crown Court Compendium of December 2020. I have given myself the entire self-direction as given in criminal proceedings and have read the relevant extracts from the Crown Court Compendium in full.

Background

14) H is 43. He is an Indian national. He now has British citizenship and Overseas Citizenship of India. H currently lives in India.

15) W is 40. She is an Indian national who was granted Indefinite Leave to Remain ('ILR') in the UK in November 2017. In January 2024 she acquired British citizenship through naturalisation. W surrendered her Indian passport in April 2024 (her official reason for doing so being her renunciation of Indian citizenship and her acquisition of citizenship of another country).

16) The parties married in Sonipat, India on 29th November 2010 under the Hindu Marriage Act 1955. W alleges that she has been the victim of coercive and controlling behaviour throughout the marriage. In December 2010 they moved to Singapore. In June 2011 the parties travelled to India in order for W to give birth. She gave birth the parties' elder child, N, now aged 13, in September 2011. N is an Indian national, with ILR in the UK and like W has now acquired British citizenship through naturalisation.

17) In September/October 2011 H moved to the UK on a work visa. W and N (aged six months) followed in March 2012 on a spousal/dependant's visa. In November 2012 the family home in London E7 was purchased in H's sole name. In February 2019, the parties' younger child, K, was born (now aged 6). K is a British national (and more recently acquired an Indian passport by virtue of W's nationality).

18) On 27th June 2019 the parties travelled to India via Bahrain. H states this was a permanent relocation and the decision to relocate was a consensual one reached with W (relying *inter alia* on an airfreight receipt dated 24th September 2019 for the shipping of 20 items to Delhi). W states it was simply a holiday (relying *inter alia* on return flights booked for H on 27th July 2019 and for her and the children on 10th September 2019 which H states were booked because return flights are often cheaper than one-way flights). W states (but H denies) that H took her and the children's passports and their Biometric Residence Permits ('BRPs') – which show visa status - from her on arrival stating that they would be used for K's Right of Abode application but leaving her effectively stranded in India. H states he then returned to England on 22nd July 2019 (five days earlier than he had originally booked) to wind up the family's affairs.

19) I heard much evidence in relation to the parties' intentions in June 2019. This was, however, an issue dealt with by Mostyn J in his judgment of 12th November 2021 (to which I refer further below). At [14] he referred to there being a *"vigorous dispute between the parties concerning the purpose of this journey"*. Thereafter having set out the parties' respective cases he stated as follows:

> [16] On balance, I conclude that this was intended to be a permanent relocation, although my mind has wavered considerably during the course of the case. What is clear is that relations between the parents entered a disastrous decline soon in India. Not before long, the mother had set herself on a path to separate from the father and to return to England with the children.

20) Later at [59] Mostyn J stated (emphasis added) *"I have found that it is **just** more likely than not that the family travelled to India in the context of a permanent relocation there".*

21) At the outset of the final hearing Ms. Darlington submitted I was not bound by this finding because (i) Mostyn J had said that *"my mind has wavered considerably"*; and (ii) it related to different (i.e. summary return) proceedings. W was also clear in her oral evidence that she did not accept this finding.

22) In her closing submissions Ms. Darlington confirmed W no longer sought to go behind this finding. She was right not to do so. It is a finding of fact and one that has not been challenged. The fact that it was made in different proceedings is irrelevant. I am wholly satisfied I am bound by it (and, if not, then I am equally satisfied I should not consider going behind it).

23) On moving to India the family took rented accommodation in the same building as the home of H's mother, sister, and younger brother in Noida. From October/November 2019 H was seconded by his then employer to New York. On his case it was a short-term project but his return was delayed by the Covid-19 pandemic.

24) Meanwhile, the relationship between W and H's parents seriously deteriorated. W alleges that H's relatives harassed and abused her and the children, both physically and psychologically. H makes equivalent allegations against W's family.

25) In early March 2020 W and the children moved out of the family home and moved to live with her parents in Sonipat, a city in Haryana state and about 60 miles from Noida. She complained to the Indian authorities about H's conduct and that of his family. In September 2020, the police issued a First Information Report ('FIR') about W's complaint (which was subsequently cancelled by the police on 26th November 2020).

26) In late September 2020 W applied for Indian passports for herself and the two children which she received the following month.

27) H returned to India in October/November 2020 when Covid-19 restrictions were eased and flights resumed. Thereafter there was (at least on W's case) at attempt to make the parties' marriage work. This included H swearing an Affidavit in late October 2020 in which (as Mostyn J observed at paragraph [24] of his judgment of 12th November 2021) H *"acknowledged, and largely admitted, [W's] police complaint"* and he "*undertook to return the identification and traveling documents if those were in his possession or, if necessary, to support [W] in renewing the documents; acknowledged his "past misdeeds"; and appears to recognise some interference from his family."* However this reconciliation (if this is what it was) did not last long.

28) In February 2021 H's petitioned W for Restitution of Conjugal Rights in India in accordance with section 9 of the Hindu Marriage Act 1955.[1] Such an application if granted, requires the defendant spouse to resume living with the petitioner and, if they do not subsequently do so within one year, the petitioner can file for divorce. In essence it enforces the right of one spouse to the *"society"* of the other spouse.

29) H withdrew this petition in November 2021 between the hearing before Mostyn J and judgment (it being one of the protective undertakings he offered if the court ordered N to be returned to India).

30) In April 2021 W obtained replacement BRPs granting one-time entry for W and N to the UK until 8th May 2021. On that date W and N returned to UK without informing H. They did so on the basis of their ILR which would otherwise have lapsed on 28th June 2021, being two years after they had left England. K did not travel with them. He did not have ILR and therefore would not have been admitted on arrival without a visa (or court order or H's consent) and W was unable to secure one for him. H had refused to consent to W applying for a British passport for him. K was left with W's family with whom he remains living. The two siblings have therefore now been separated for approaching four years.

31) The parties (and their wider families) have been locked in consistent litigation in both England and India since this time.

32) In England, in June 2021 W initiated proceedings under the FLA 1996 [ZE 21 F 00409] seeking a non-molestation order and an occupation order permitting her to move back into the family home (which H had tenanted against W's wishes). More recently she brought a committal application against H in relation thereto. In July 2021 H initiated proceedings in the High Court alleging W had abducted the two children (he was unaware that K remained in India) and seeking their summary return [FD 21 P 00458]. It is this application that was heard by Mostyn J on 2nd – 3rd November 2021 and in which in his judgment of 12th November 2021 he made the finding in relation to the

[1] *"When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly."*

parties' travel to India in June 2019. H has also applied for a defined contact order in relation to N [ZE 24 P 00032].

33) Within his judgment of 12th November 2021 Mostyn J was critical of both parties: he was critical of W for not having made it clear that K had remained in India. At [40] he stated that W *"lured the court into error by failing to disclose that she had only removed [N] to the UK and that [K] remained in India. This crude subterfuge, which was always going to be found out, does the mother no credit at all"*. W states that she did this because she feared K would be abducted by H or his family if he knew K was still in India (a fear which she states subsequently turned out to be well-grounded). As to H, Mostyn J described as *"very unwise conduct"* an incident in September 2021 when H grabbed K (W alleges this was an attempt to abduct him) and got into a physical confrontation with W's mother.

34) Mostyn J concluded:

> [67] Since June 2019 neither parent has behaved well towards the other. [H] has harassed and bullied [W] in the ways I have described. [W] has behaved deceptively and high-handedly. She has not conducted her case with propriety for which I had to admonish her at the start of the case.

35) In India there have been several sets of proceedings in which both parties are fully represented by lawyers: H petitioned for *habeas corpus* in respect of K, W has applied for permission to remove K to England and Wales, there are criminal proceedings against W's father, her brother and her wider family (where H is the alleged victim of an assault on 16th September 2021 in which he states he suffered two cracked ribs and other injuries and took six months to recover), there are criminal proceedings against H arising out of an alleged attempt to kidnap K in relation to which he is subject to *"regular bail"* including not being able to leave India without the court's permission and (potentially) having to surrender his passport, and criminal proceedings against W and her father where (I believe) H's mother may be the alleged victim. According to H there are also defamation proceedings brought by H against W and her family.

36) The bundle includes copies of several warrants issued for W and her father's attendance at court. In her oral evidence W said H *"files cases every day"* and that three had been listed for hearing on 19th February 2025 (the first day of the final hearing). H's written evidence confirmed he would need to attend a hearing in relation to W's application to set aside the Indian decree on 19th February 2025 and he also attended a criminal hearing on 21st February 2025 (but he was able to attend the English hearing on both days because of the time-difference).

37) I am far from satisfied that I have a full understanding of the number of criminal and civil proceedings in India in which both parties are or have been involved and the details thereof. It is, however, clear that they are numerous (and this may be something of an understatement).

38) Specifically in relation to divorce, H applied in India on 5th July 2021 [No. 609/2021]. A final Indian divorce judgment was given the Family Court, Gautam Buddha Nagar, Uttar Pradesh which dissolved the marriage on 20th September 2022 and a divorce decree issued on 28th September 2022.

39) The decree was granted on an *ex parte* basis as there was no engagement in these proceedings by W.

40) On 8th August 2023 W applied in India to have this decree set aside on the grounds of procedural fairness, lack of proper notice, and failure to participate in the process. There have been numerous hearings in relation to this application including one on 19th February 2025 (i.e. the first day of the final hearing) which I believe was the fifteenth such hearing. W's application is now listed for further consideration on 20th March 2025. W contends that the decree was set aside on 28th October 2024 (as H had failed to engage in the proceedings) and having latterly engaged he is now seeking to restore the same. H contends that the decree has not been set aside.

41) I queried with Ms. Darlington and Ms. Barrons as to the appropriate way forward in light of this dispute (which I could not resolve) and where in any event the position in relation to the Indian divorce had not been finally determined and where any such determination is potentially subject to a (lengthy) appeal process that could easily take several years.

42) It was agreed on W's behalf that I should determine H's application on the basis that there was (and would continue to be) a valid Indian divorce without prejudice to W's position in the Indian proceedings. If I recognised the divorce and the decree was subsequently held to be valid, that would be the end of the matter. If I recognised the divorce and the decree was subsequently set aside - and this remained the position after any appeal process - then in effect my order would fall as there would no longer be any decree to recognise and W could thereafter pursue her English decree. If I did not recognise the decree, then whatever happened thereafter in India in relation thereto would be irrelevant.

43) W filed her divorce application (petition) in England on 30th July 2021 (issued on 14th August 2021). She stated that both parties were habitually resident in England and Wales. Decree nisi was made on 21st December 2021. Thereafter W issued a financial remedy application on 3rd February 2022.

44) I first heard the case on 23rd May 2023 sitting as a Recorder in the 'shorts list' at the Central Family Court when W's financial remedy application was listed for directions (it having already had two First Appointments). Recognising the need for judicial continuity (a total of 15 previous hearings in this jurisdiction had been heard by 14 different judges) I reserved the divorce and financial remedy proceedings to myself.

45) Other judges subsequently heard further FLA 1996 proceedings before these and the CA 1989 proceedings were transferred to me by Her Honour Judge Probyn on 8th January 2024. Given its complexity (and with permission) I have since 5th February 2024 heard all aspects of this case sitting as a Deputy High Court Judge.

46) On 5th February 2024 I listed a contested hearing to determine H's application for the English court to recognise the Indian divorce and set aside the pronouncement of decree nisi. I identified the following questions to be considered and determined:

a) is there a valid decree nisi in the English proceedings, in circumstances where:

i) the English court was not made aware of proceedings in India prior to making decree nisi;
ii) H challenges the basis for the petition, being the habitual residence of the H and W; and
iii) should the basis of the petition be amended to an alternative jurisdictional ground; and

b) should the Indian divorce be recognised under FLA 1986, taking into account the following:

i) the need for the English court to ascertain the status of the Indian divorce for the purposes of Indian law;
ii) the fact that the decree nisi was pronounced prior to the decree(s) in the Indian proceedings; and
iii) W's case is that she was not made aware of the divorce proceedings in India prior to the decree being made.

47) Amongst the other directions made on that date I (i) recorded that H was formally deemed to have made application for the Indian divorce to be recognised under the FLA 1986; and (ii) stayed W's petition for divorce and her application for financial remedy pending the outcome of the contested hearing.

48) The final hearing was originally listed for 12th – 14th June 2024. However, it was clear when the case came before me on 7th June 2024 in relation to other applications (H's application for a defined contact order and W's application for an occupation order) that it was far from ready for hearing. I therefore adjourned the hearing and it was relisted for 19th February 2025.

49) If I do not recognise H's Indian divorce it was clarified on W's behalf that although she had ticked numerous boxes on the D8 attached to her Application Notice of 3rd February 2025, she sought permission to amend her petition to rely on (i) H's habitual residence;

and/or (ii) her sole domicile.

Applicable Law

50) The relevant provisions relating to recognition of the validity of overseas divorces are found in FLA 1986 ss46 and 51.

51) Section 46 provides so far as is material:

> Grounds for recognition
>
> (1) The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognised if—
>
> (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and
> (b) at the relevant date either party to the marriage—
> (i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or
> (ii) was domiciled in that country; or
> (iii) was a national of that country.

52) Section 51 provides so far as is material:

> Refusal of recognition
>
> (3) … recognition by virtue of section 45 of this Act of the validity of an overseas divorce, annulment or legal separation may be refused if—
>
> (a) in the case of a divorce, annulment or legal separation obtained by means of proceedings, it was obtained—
>
> (i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or
>
> (ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given.
>
> …
>
> (c) … recognition of the divorce, annulment or legal separation would be manifestly contrary to public policy.

53) I shall consider each of these sections in turn.

54) As for 'grounds for recognition' under s46 it was not contested on W's behalf that the process in India involved *"proceedings"*. This must be right as a judicial decision was required. It was also not contested that as at the date the proceedings commenced at

least one of the habitual residence, domicile or nationality requirements were satisfied (FLA 1986 ss46(1)(b) and 51(4)).

55) In *Kellman v Kellman* [2000] 1 FLR 785 at p797 Paul Coleridge QC (sitting as a Deputy High Court Judge) stated that the wording of s46(1)(a) is significant because:

> The use by the legislature of the word 'effective' is, in my judgment, quite deliberate. It does not require that the divorce is 'valid' merely that it is 'effective'. To my mind the expression 'effective' connotes a less rigorous standard than valid. In this particular instance 'effective' can mean a decree though invalid *per se* in the granting State is none the less treated as valid and so 'effective' by virtue of, for example, some supervening legal decision or legal or equitable principle, ie estoppel.

56) The word *"effective"* in this context must at the very least entail compliance with the terms of the relevant legislation.

57) I have had the benefit of an SJE report from Ms. Sirajam Munira dated 15th August 2024. Under *"Conclusion"* she stated that:

> Based on the available information and legal provisions, it can be said that the divorce between [H] and [W] which was pronounced in the Family Court in India, would be considered valid under the relevant personal laws, provided that the essential requirements of the respective laws were met, which can now only be decided by the Principal Judge of the Family Court Guatam Bush Nagar Noida in the Set aside application.

58) This expert evidence was not challenged by either party. In *TUI v Griffiths* [2023] UKSC 48 the Supreme Court held that the general rule in civil cases that a party was required to challenge by cross-examination the evidence of any witness on a material point if he or she wished to submit the evidence should not be accepted applied equally to expert witnesses as it did to witnesses of fact. Although it was also said that the rule is a flexible one and there are certain circumstances in which the rule might not apply, none of these apply to this case. There is no basis for me not to accept the expert evidence and I do so.

59) As for 'refusal of recognition' under s51 my attention was drawn to *Duhur-Johnson v Duhur-Johnson (Attorney-General Intervening)* [2005] 2 FLR 1042 per Jeremy Richardson QC (sitting as a Deputy High Court Judge) who at [44] reduced the relevant principles to six propositions:

> (1) The power contained in s 51(3) as a whole provides for wide judicial discretion. The provisions need not be exercised if the interests of the respondent spouse (as opposed to the petitioning spouse) are met by other means (an example of this is *El Fadl v El Fadl*). It seems to me that it is important to emphasise that those interests must be safeguarded. I would anticipate that this approach would only be adopted where the respondent spouse has no option under the overseas divorce law but to submit to the divorce. The important point to note is that the judicial discretion is wide and the

applicability of the section will vary depending on the many and varied circumstances of each case.

(2) When considering s51(3)(a)(i) a judge must ask whether reasonable steps have been taken by the petitioning spouse to notify the respondent spouse of the divorce proceedings in advance of them taking place.

(3) In answering that question the judge must look at all the circumstances of the case and the 'nature of the proceedings' in the overseas jurisdiction.

(4) Whether reasonable steps to notify the other party have been taken is to be judged by English standards, having regard to the nature of the overseas proceedings.

(5) Whether reasonable steps have been taken is a question of fact in each case (it must also be remembered that there are cases where reasonable steps have been taken but they were unsuccessful or, in rare cases, where it is entirely reasonable for no steps to have been taken).

(6) It is important to note that whether the respondent spouse has notice of the proceedings is not the issue. It is whether the petitioner spouse has taken reasonable steps to notify the other party. The focus of inquiry is upon the actions of the petitioning spouse, not simply a question of whether the respondent spouse knew about the proceedings.

60) Much of the argument before me focused on (4) and (6) above.

61) In *Olafisoye v Olafisoye (No. 2) (Recognition)* [2011] 2 FLR 564 per Holman J it was said at [34] there are two stages in the approach of the court: first an assessment or judgment whether such steps were taken ~~as~~ *"as should reasonably have been taken"*, and even if the court adjudges that they were not *"that merely opens the door or gateway to the second stage and an overall exercise of discretion whether or not to recognise the overseas divorce".*

62) The discretion to refuse recognition on grounds of public policy pursuant to s51(3)(c) is a much broader ground. It is a discretion to be used sparingly (*El Fadl v El Fadl* [2000] 1 FLR 175 and *Kellman v Kellman*). However as was stated in *Golubovitch v Golubovich* [2010] 2 FLR 1614 per Thorpe LJ, if this ground <u>is</u> made out, then (at [69]) there is no discretionary element and *"refusal of recognition must follow"*.

<u>Analysis</u>

63) On 10th August 2021 (i.e. about three months after returning to England) W executed in London a Power of Attorney in favour of her father. It gave her address as a property in London E7 and her father's Sonipat property. It stated *inter alia* as follows:

AND WHEREAS due to my residence at (sic) abroad, I'm unable to look after the legal matters related to my disputed marital life like annulment, RCR, maintenance, divorce, child custody,

DV case, Criminal cases, police complain (sic) in India, etc., I have decided to appoint and constitute an Attorney to look into all the affairs relating to legal proceedings.

My father can do or cause to be done in my name and on my behalf the following acts, deeds and things that is to say:-

3. To send and receive summons from the court;

64) H's divorce documentation gave W's addresses as follows:

W/o [W's father] R/o 25 Shivaji Colony, Sonepat (Haryana) – 131001. At present at: 73 Neville Road, London UK – E7 9QU. Also, at Bureau Veritas Consumer Products Services pvt. Ltd F-5, Sector 8 Noida – 201301 UP (India).

The second of these two address is one of the offices of W's now former employer.

65) The bundle includes two India Post printed receipts which state that on 7th February 2022 at 11.25 am two identically weighted letters/packages were posted by the Family Court to *"[W], PIN: 131001, Sonipat HR"* and *"[W], PIN: 201301 Noida UP"*. These correspond to the two addresses that were given in H's divorce petition.

66) It was initially suggested on W's behalf that these receipts may be fraudulent although her case was later revised to state that she did not accept that the receipts were valid, but she did not advance a positive case in relation thereto and the burden was on H to prove they were.

67) There is no evidence whatsoever of fraud and had it been pursued I would have rejected the same. I am also satisfied H has discharged the evidential burden upon him that these receipts are genuine not least because the tracking number on one of them (EU756746852IM) matches that on the envelope which was the second of the two documents he provided on the third day (his Indian lawyers having been been able to obtain the same that day from the court file). I am therefore satisfied the divorce documentation was sent by the court to these two addresses.

68) It was also suggested by W that as the addresses on the receipts were incomplete (the equivalent she said of addressing an envelope to *"W. London"*) they would not have been delivered or, if they were, not necessarily to the correct address. However, these were not the envelopes but the posting receipts and the envelope addressed to W at her father's address which was subsequently provided has the complete address of the property.

69) W then suggested that absent the tracking confirmation it was impossible to know whether the letters were delivered and if so where and who signed for them. The envelope that H subsequently provided has Hindi script on it under the words *"Returned 11/02/2021"*. H translated these words as *"Recipient is saying she is abroad and they*

refused to accept it". W translated them as *"She's outside India and the people in the house cannot take it."* Both are broadly similar and indicate that an attempt was made to deliver the envelope at W's father's property, it was said that W was abroad, and delivery was refused. It is of note in this context that in her oral evidence on the second day W stated that *"If my father had got it, he would have signed for it"* and *"[i]f he had got the petition he would have told me – and as he didn't tell me he didn't get it"*. It would appear from the subsequent provision of the envelope that at least the first of these two statement was incorrect.

70) It is of note that the outside of the envelope made it clear that the sender was the Indian Family Court. It also gave both parties' names as if in litigation (i.e. with *"v/s"*), included reference to the *"HMA"* (i.e. the Hindu Marriage Act), gave the case number and also the date of the next hearing (4th March 2022). Therefore anyone looking at the envelope would glean some understanding of what it may contain even if they refused to accept the same.

71) The first of the two additional documents provided by H on the third morning of the hearing was an extract from the court file. It stated *inter alia* in the certified translation from the Hindi that (on what was clearly 4th March 2022):

> Paperbook is presented. Advocate of [H] is present and admitted the registry receipt and tracking report on record. It is ordered that service on [W] on basis of refusal is enough. As per the tracking report, it has been refused to accept the Process. In support of tracking report affidavit is placed on record. Last opportunity is being provided to [W's] presence and W.S. for [W's] presence and W.S. to be presented on date 22-03.2022.

Thereafter on 29th March 2022 it is recorded that:

> Service on [W] on basis of refusal is enough.
>
> It has been denied to accept the Process. In Support of tracking report, affidavit is placed on record.
>
> Last opportunity for [W's] presence and W.S. 29-03-2022.

72) The document then records that W was absent on 29th March 2022 so the petition was to proceed against her thereafter *ex parte* to be presented on 26th April 2022.

73) I was invited on W's behalf to be extremely cautious of this document on the basis that it had been produced at the eleventh hour (albeit at my request at the end of the second day) and W therefore did not accept the veracity of the same. However, there is no reason for me to doubt its authenticity whether on this basis or otherwise. It is certified as authentic by a Notary Public. It is stamped as being *"Valid for foreign country out of India"*. I accept it was extracted from the court file by H's Indian lawyers and it is

genuine. It confirms that it was ordered that service on W on basis of refusal is enough which is consistent with what H had said in his earlier evidence.

74) The judgment of Smt Sneha Negi, Additional Principal Justice, Family Court, Gautham Budh Nagar dated 20th September 2022 – which granted H his divorce - stated *inter alia* as follows:

> Summons / notices were sent to [W] by the court, but [W] didn't appear in the court. On date 04.03.2022 this court has considered the service of the summon as sufficient to [W], on date 29.03.2022 the subsequent proceedings were proceeded further against the respondent as *ex-parte.*
>
> And later:
>
> It is evident from the examination of the paper book that despite the service of the summons being served the respondent did not appear in the court …

75) In my view it is clear from the foregoing that an attempt was made to deliver the divorce documentation at W's father's address but he (or someone on his behalf) refused to accept it and this refusal was sufficient for the Indian court to deem good service and thereafter to hear the case notwithstanding no appearance by W.

76) FLA 1986 requires the court to ask itself four questions:

a) was the divorce *"effective"* in India? – s46(1)(a);
b) what *"facts"* are implied by the official Indian divorce documents, and how does the level of W's *"participation"* in the proceedings govern whether they bind this court? – s48;
c) were *"reasonable"* steps taken to give notice or the ability to participate? – s51(3)(a); and
d) is there a public policy objection to recognition? – s 51(3)(c).

77) I shall address these four questions in turn.

<u>s46(1)(a)</u>

78) Based on Ms. Munira's expert opinion, which I accept, I find that a court in India would find the divorce was effective. As she states the decree of divorce *"is Valid as far as the Jurisdiction, domicile, and grounds are concerned"*. She concluded that the divorce *"would be considered valid under the relevant personal laws, provided that the essential requirements of the respective laws were met, which can now only be decided … in the Set aside application."*

79) Ms. Munira also opined that although a decree nisi had been made by the date of the Indian divorce this would not have been recognised as a divorce decree granted in a foreign jurisdiction.

s48

80) FLA 1986 deals with the evidential position of any express or implied facts in relation to the divorce, and differentiates between two scenarios namely (i) where both parties *"took part in the proceedings"* (s48(1)(a)), in which case any such findings are conclusive evidence of the facts found; and (ii) in any other case, such findings are *"sufficient proof unless the contrary is shown"* (s48(1)(b)). FLA 1986 s48(3) states that *"a party to the marriage who has appeared in judicial proceedings shall be treated as having taken part in them"*.

81) In *A v L (Overseas Divorce)* [2010] 2 FLR 1418 Sir Mark Potter P stated at [70]:

> There is no statutory guidance as to the precise meaning of the word 'appeared' in this context. However, it is plainly a word which requires something more than mere proof of service, whether by means of the active participation in the proceedings of the party concerned, either in person or through a representative, or at the very least by means of some formal step taken, at least equivalent to the entry of an appearance in English proceedings.

82) Neither party referred me to s48. However, as it is accepted that W took no active part in the Indian divorce proceedings before the decree was made (whether in person or through a representative) I proceed on the basis she did not *"appear"* in the proceedings before they were concluded, and therefore this opens up the possibility for me to decline to find the facts expressed or implied within those proceedings are true.

s51(3)(a)

83) In this context much emphasis was placed on W's behalf on the fact there is no reference in the Indian divorce proceedings to the Power of Attorney dated 10th August 2021. It was said (i) despite the breadth of its wording it needed to be specifically admitted/accepted/registered in each separate set of proceedings for it to be valid; (ii) W had originally executed it in relation to the Restitution of Conjugal Rights proceedings having received notice from the court by email of a hearing on 12th August 2021 and her wanting her father to attend on her behalf; (iii) H had confirmed to the SJE that it was not filed with/submitted within the divorce proceedings; and (iv) the SJE confirmed the same stating that it was *"not accepted and recognized by the Family Court of Noida"* and in the divorce decree of 20th September 2022 *"there is no whisper about the Power of Attorney of [W]"*.

84) Against this background it was said on W's behalf that if satisfied (as I am) H has discharged the evidential burden in relation to the postal receipt I am required to consider:

a) the propriety of the attempt to serve W at her father's address when the Power of Attorney did not extend to the divorce proceedings in India (and W could not file it in relation to them as (it is said) she did not know about them) and it is not referred to in any of the divorce documents; and

b) the divorce documents imply that W can be served (or at least contacted) at her father's address (i.e. H had made a positive statement that W could be contacted at that address when he knew she was not living there) and I ought to conclude the Indian court did not fully understand W was not living in India at all or was under a misapprehension that she was when it ordered service at that address to be good service.

85) In other words, it was suggested that (i) the Indian court may have erroneously authorised service on W's father acting as W's agent without the Power of Attorney having formally been admitted or registered; or (ii) the Indian court may have thought there had been service at address W was living at when this was not the case. In either case, despite the Indian court having been satisfied as to service, I should conclude that reasonable steps had not been taken to give W notice of the proceedings.

86) In support of this submission reference was made to *Duhur-Johnson* in which the husband sought a stay of the English divorce arguing the court was bound to recognise his Nigerian divorce as valid. The Nigerian court had ordered substituted service by the posting of the divorce petition to the property at which the wife supposedly lived but H had not informed the Nigerian court or his lawyers that W lived, or might live, in England. By the husband's failure to inform either his Nigerian court or his lawyers about the likelihood of the wife being in England, it was held the Nigerian court had been misled in a material way and hence the divorce was not recognised. Given that in this case H knew that W was not living at her father's property but was living in England and there was no order (or at least H had not produced an order) where there court had formally directed substituted service at W's father's address then *a fortiori* one attempt at service at this address was not *"reasonable steps"*.

87) Accompanying the first document H provided on the third morning of the hearing was an extract of what he said were the relevant procedural rules. I believe they were taken from the Code of Civil Procedure 1908 The First Schedule Order V (Issue and Service of Summons) (as amended). The relevant parts are as follows (emphasis added):

9. Delivery of summons by Court.—

(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, **or has an agent resident within that jurisdiction who is empowered to accept the service of the summons**, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer **to be served by him** or one of his subordinates or to such courier services as are approved by the Court.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court **with an endorsement** purporting to have been made by a postal employee or by any person authorised by the courier service **to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to**

accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

> Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

88) It is clearly unsatisfactory these rules were provided to me when they were and I have not had the benefit of SJE opinion specifically addressing these particular rules (albeit the Code of Civil Procedure 1908 is referenced several times in the SJE's report). However, doing the best I can I am satisfied that (i) the Indian court was satisfied that W had an *"agent"* resident within the jurisdiction of the court (i.e. her father) who was empowered to accept the service of the summons and, as there was no direction otherwise, the summons was validly served on him by an approved method; and (ii) the court was satisfied that W's agent had refused to take delivery of the summons when tendered to him and had declared that the summons had been duly served on W. This is of course consistent with what was recorded by the court on 4th March 2022 and in the Indian judgment of 20th September 2022.

89) I consider the focus on the Power of Attorney is something of a red herring. I am not tasked with determining whether service of the process at W's father's address would only be *"reasonable steps"* if it were done pursuant to his holding a Power of Attorney to act on W's behalf and if this is affected by whether or not the Power of Attorney had been formally admitted/registered within the Indian divorce proceedings. The question for me is ultimately a simple one: given that W was living in England and not India (and H knew this to be the case) in giving her father's address as (in effect) her primary address for service and where (as I have found) the court attempted to serve the documents but receipt was refused (for whatever reason) did H take *"reasonable steps"* to notify W of the divorce proceedings in advance of them taking place taking into account all the circumstances and the nature of the overseas proceedings, and judging the same by English standards as a question of fact.

90) I am satisfied that H did. This is the case whether or not there was a specific order of the Indian court directing service on W's father, whether or not the Indian court knew about the Power of Attorney (H stating to the SJE that the court was *"updated"* and *"informed"* about it but it was not *"submitted"*) and whether or not it had been formally accepted and recognised in relation to these proceedings.

91) I do not consider that although H knew W was living in England *"reasonable steps"* required her to be served in this jurisdiction at 73 Neville Road (being her *"last known address"*) or otherwise. In this context it is of note that when it was suggested to H that he knew W was living at that address he said it was a *"random guess"* as it was where

the parties used to live in shared accommodation. It is certainly unlikely that W would have wanted H to know where she was living in England (having returned there with N without informing him) and this is also consistent with the fact that when W filed her English divorce petition on 30th July 2021, she filed a C8 (confidential contact details) giving the Neville Road address.

92) Ms. Darlington relied on paragraph [41] of Mostyn J's judgment of 12th November 2021 in which, having referred to the issue by W of divorce proceedings, states that H "*has not responded to the divorce petition. In his evidence before me, the father appeared unwilling to consider divorce at this stage".* She submitted this supported the fact that W was not made aware of H's divorce petition even though H had applied for the same on 5th July 2021. In his evidence H stated he had been seeking to convey that if W agreed to come back to India he would withdraw his application. Whether or not this is correct, I do not consider that these words can bear the weight that Ms. Darlington seeks to put upon them: both because it could be a reference solely to the English proceedings and because in any event this was not the focus of that hearing.

93) Ms. Darlington also relied on an email from W sent to H's then solicitors (Goodwins Family Law) on 19th July 2023. This was sent in reply to an email from H's solicitors of the same date. I assume W had been served with H's Application Notice dated 18th July 2023 in which he sought a stay of W's financial remedy application *"as the Financial Matters have been dealt with in India"* and said *"[H's] Divorce Application was already issued in the Indian Court and finances are dealt with within those proceedings. A letter is attached to this application from [H's] Indian Lawyer dated 18 July 2023."* In her email in reply W stated *inter alia* as follows:

> Thanks for sending these documents over to me.
>
> This is the first time I had ever heard of the divorce proceedings [H] is mentioning. He never mentioned anything about the divorce being filed and the decree granted to him in 2022 to any of the courts in India or in the UK till date.
>
> Can you please ask [H] to provide the Original Certified copy of the Divorce Judgement and the Divorce Decree for which the translation has been attached.
>
> In addition, please ask [H] to provide all the statements/evidences that he filed during his divorce case in the Court in India with complete details including the date of filing, Name and address of the Court and the Judge who dealt with the case, any interim orders and notice(s) of service to the applicant [W]).

94) I do not consider that W is being entirely truthful in this email. It may be that given service of the divorce documents was refused W had not previously seen any of the Indian divorce documentation. However, as W accepted in answer to one of my questions, she has a *"normal"* relationship with her father and they frequently spoke about the various court cases in India in which she and he were involved whether as a

party or (in his case) also as representing W. I find that whoever was asked to receive the envelope with the summons (whether it was W's father or another individual) and refused to accept it informed W of the same particularly given what was written on the outside of the envelope. I am therefore satisfied notwithstanding what W said in this email this was not the first time that she had heard of the divorce proceedings.

95) I also do not consider that it can be said that the Indian court did not know W was not living in India at all or was under a misapprehension that she was. The SJE report states that the Family Court of Noida in India *"was aware"* that W was living in the UK before the case was filed (internal page 5 of 29). This is consistent with the fact that the divorce petition itself states W is *"at present"* at the 73 Neville Road address and paragraph 26 of the petition states H *"came to know"* that W was in London. This suggests the Indian court did understand that W was not living in India and/or was not under a misapprehension that she was.

96) Ms. Darlington was also critical of what she described as the somewhat evolving nature of H's case and, in particular, he had not suggested until the final day of the hearing that the divorce documentation had been served at W's father's address but receipt had been refused. Whilst this is a valid criticism, I consider it carries less weight when a party is acting in person in what is a complex case. Further, W's case also evolved in light of the additional documentation that was produced. I do not consider that this has any real bearing on the issues I have to determine.

97) For completeness, I note that (i) although H's divorce petition gave two email addresses for W he was aware from an email from W sent on 8th September 2021 that she had blocked receipt of any emails from him and they would all be deleted on arrival. He therefore could not have served the divorce proceedings on her by this route; and (ii) the bundle included W's application dated 8th August 2023 seeking to set aside the Indian divorce decree. It was accepted on W's behalf that above the word *"Applicant"* is W's father's signature. There is no express reference to (or record of) the fact that this had been filed pursuant to the Power of Attorney.

98) In light of my findings and this analysis I am satisfied that reasonable steps were taken and/or W had a reasonable opportunity to participate in the divorce proceedings.

99) If I am wrong about the foregoing and the fact that H served the proceedings at W's father's address and the work address of her employer meant that he did not take such steps to give notice as should reasonably have been taken and/or he did not give W such opportunity to take part in the proceedings as should reasonably have been given and/or W was being wholly truthful in her email of 19th July 2023, then I would still not exercise my discretion (*"may be refused"*) in favour of not recognising the divorce. I do not consider that W should be able to take advantage of the fact that service of the divorce summons/notice at her father's address was refused. In my view this would be the appropriate exercise of the two-stage process as described in *Olafisoye v Olafisoye*

(No. 2) (Recognition) – namely were the appropriate steps taken, and if not, should the court separately exercise its discretion. If the appropriate steps were not taken I would still therefore not exercise my discretion for this reason.

100) In reaching this conclusion I bear in mind the comments in *Olafisoye v Olafisoye (No. 2) (Recognition)* per Holman J at [36] that *"[t]he effect of non-recognition here of a divorce which is effective in the country where it was made is the create a so-called 'limping marriage' i.e., that the parties are treated as still being married here, when they are not so treated elsewhere. That is so obviously undesirable that the court leans, so far as possible and consistent with the legislation and justice, against exercising a discretion so as to produce a limping marriage."*

s51(3)(c)

101) I have already rejected W's initial submission (one that in the end was not pursued) that the postal receipts on which H relies were manufactured. Having done so there is no basis upon which I can decline to recognise the divorce on public policy grounds.

102) I shall therefore recognise H's Indian divorce.

103) In reaching this decision I recognise that there are times when H's credibility has been properly impugned. These include:

a) the hearing before Recorder Stirling on 14th July 2021 when is recorded that that "*both parties confirmed no divorce proceedings, including any associated financial proceedings, had been instigated in any jurisdiction."* This is clearly untrue as H had applied for a divorce nine days earlier; and

b) the first hearing before me on 23rd May 2023 I was told by H that he had made an application to stay the English proceedings but neither W, her *McKenzie* Friend nor the court court had any record of receiving the same and H was unable to locate the same in his email 'sent' folder. I therefore directed H to file the application *"previously made"* by 20th June 2023 but it was a new application notice for a stay not an earlier one that H's then solicitors filed on 18th July 2023. I am therefore satisfied that H had not filed an application for a stay as of 23rd May 2023.

104) Although these are both instances of H not having told the truth they are not material to my analysis and decision.

Jurisdiction

105) Given my decision above I do not need to go on to consider the issue of the jurisdictional validity (or otherwise) of W's divorce petition of 30th July 2021. However in case I am wrong as to the foregoing I shall do so.

106) Following the UK's departure from the European Union, the law as to jurisdiction is as set out in DMPA 1973 s5(2) (as amended):

> (2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) on the date of the application—
> (a) both parties to the marriage are habitually resident in England and Wales;
> (b) both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there;
> (c) the respondent is habitually resident in England and Wales;
> (c.a) in a joint application only, either of the parties to the marriage is habitually resident in England and Wales;
> (d) the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made;
> (e) the applicant is domiciled and habitually resident in England and Wales and has resided there for at least six months immediately before the application was made;
> (f) both parties to the marriage are domiciled in England and Wales; or
> (g) either of the parties to the marriage is domiciled in England and Wales.

107) H is of course the respondent for the purposes of DMPA 1973 s5(2). As noted above it is (c) (i.e. "*the respondent is habitually resident in England and Wales"*) and (g) (i.e. *"either of the parties to the marriage is domiciled in England and Wales"*) upon which W now relies and in relation to which she wishes to amend her petition from (a) (i.e. *"both parties to the marriage are habitually resident in England and Wales"*).

Habitual residence

108) I sought to summarise the principles relating to habitual residence in *TI v LI* [2024] EWFC 163 (B) at [91] as follows:

a) habitual residence connotes a genuine connection between a person and a member state (*Z v Z (Divorce: Jurisdiction)* [2010] 1 FLR 694 per Ryder J at [42]; *V v V (Divorce: Jurisdiction)* [[2011] 2 FLR 778] per Peter Jackson J (as he then was) at [39]);

b) the definition of habitual residence is *"the place where the person has established, on a fixed basis, the permanent or habitual centre of his interests, with all the relevant factors being taken into account for the purpose of determining such residence"* (*L-K v K (No. 2*) [2007] 2 FLR 729 per Singer J; *Marinos* [*v Marinos* [2007] 2 FLR 1018]*; Z v Z*). It is not possible to have more than one habitual residence at the same time (*Marinos* at [38]; *Z v Z* at [41]);

c) in *Tan v Choy* [2015] 1 FLR 492 at [31] Aikens LJ identified that habitual residence required the satisfaction of three tests (i) that there is a permanence or stability in the residence of

the individual in the relevant territory; (ii) that this location is the centre of the person's interests; and (iii) the individual has, at the time, no other habitual residence;

d) the interpretation of habitual residence involves not a purely quantitative evaluation of the time spent by a person in a particular place but instead a qualitative evaluation of all the facts pertaining to an individual's links with a place (*Z v Z* at [37]). The enquiry is highly fact specific. An individual's centre of interests is identified by taking into account all relevant factors, including both intention and objective connecting factors (*Z v Z* at [41]). Intentions matter in the sense of the reasons for a party's actions (*V v V* at [38]);

e) the centre of interests does not have to be permanent but rather habitual (*L-K v K (No. 2)* at [38]) it must have a stable character (*Z v Z* at [41]);

f) the establishment of a centre of interests can take place over a long or a short time; length of time is not a conclusive factor (*L-K v K(No. 2)* at [38]; *Z v Z* at [37] and [40]); and

g) there is nothing to prevent the acquisition of an habitual residence simultaneously with the loss of a previous habitual residence or immediately after arriving in a country (*Marinos* at [89-90]).

109) Although Ms. Darlington made submissions in relation to H's habitual residence in England and Wales she did not press this particularly hard. I consider that she was right not to do so. Given that H has lived and worked in India since 27th June 2019 (save for the period of time he worked in the USA which was extended by Covid-19), has no family (save for W and N) in this jurisdiction and has family responsibilities in India, I reject the submission that H was habitually resident in England and Wales as at 30th July 2021.

Domicile

110) Ms. Darlington's primary focus was in relation to W's domicile and therefore, as it is common ground that W has domicile of origin in India, whether she had (re)acquired a domicile of choice in England and Wales between 8th May 2021 (the date that she and N returned to England) and 30th July 2021 (the date of filing of her petition).

111) The common law concept of domicile was summarised in *Barlow Clowes International Limited v Henwood* [2008] BPIR 778 per Arden LJ (as she then was) at [8]:

(i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it.
(ii) No person can be without a domicile.
(iii) No person can at the same time for the same purpose have more than one domicile.
(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.
(v) Every person receives at birth a domicile of origin.
(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise.

(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice.
(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious …

112) In *Udny v Udny* (1869) LR 1 Sc & Div 441 Lord Westbury stated:

> Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such case so soon as the change of purpose, or *animus manendi*, can be inferred the fact of domicil is established …

113) In *Inland Revenue Commissioners v Bullock* [1976] 1 WLR 1178 Buckley LJ stated that Lord Westbury's phraseology in *Udny v Udny* required some further definition:

> … I do not think that it is necessary to show that the intention to make a home in the new country is irrevocable or that the person whose intention is under consideration believes that for reasons of health or otherwise he will have no opportunity to change his mind. In my judgment, the true test is whether he intends to make his home in the new country until the end of his days unless and until something happens to him to make him change his mind.

114) A domicile of choice is therefore acquired by the combination of (i) residence in a country (which is this context means physical presence as an inhabitant); and (ii) an intention of permanent or indefinite residence (the *animus manendi*). These two elements must also co-exist.

115) The question whether a person has acquired the necessary intention sufficient to change a domicile is a question of fact and the burden of proof lies upon the propositus (i.e. W in this case). As to the standard of proof there are several authorities which suggest that it may go beyond the mere balance of probabilities. Whether or not this is correct, it has been said on numerous occasions (see for example *Steadman v Steadman* [1976] AC 536) that the burden of proving a domicile of origin has been lost is a very heavy one. This is because it has something of an 'adhesive' quality given (i) the burden is on whoever alleges that they have acquired a domicile of choice to prove it; and (ii) the acquisition of a domicile is regarded as a serious matter which is not lightly to be inferred from slight indications or casual words (*Winans v Another v Attorney-General* [1904] AC 287 and *Re Fuld, Decd (No, 3), In the Estate of; Hartley and Another v Fuld*

and Others [1968] P 675).

116) The court will view a person's conduct as a whole. Every case has to be assessed separately, with particular attention to the history and personality of the person in question. The importance of any one fact is relative: the real question is what the proper conclusion is to be drawn from all the circumstances.

117) In their position statement Ms. Darlington and Ms. Barrons summarised their case as follows:

> 70. W points to the following indicators in support of her position that at the time of the petition the UK was her domicile of choice:
>
> a) From 2012 she had lived and worked in the UK;
> b) [K] was born in the UK;
> c) W was granted indefinite leave to remain in 2017;
> d) They resided in the property [in London], which they regarded as their permanent home in the UK;
> e) W has been employed in the UK since 2014 with her most recent employment commencing in January 2018; she was on maternity leave from 1st February 2019 with the intention of returning to work in October 2019 (however this was delayed due to being unable to travel back from India);
> f) W has paid all necessary taxes and NI contributions in the UK; no declaration of a transfer of residence for tax purposes was made either in the UK or India;
> g) In May 2017 W registered a company in her name and opened business accounts in the UK with the intention of starting and operating her own business; the company remains active, although W was removed as a director by H upon her return to the UK in May 2021;
> h) Between 2012 and June 2019 W was outside the UK for a total of 136 days only, including holidays;
> i) W maintained her bank account in the UK which contained approximately £20,000;
> j) W was compelled to accept temporary employment in India only in November 2020 in order to support herself and the children;
> k) [N] arrived in the UK at 6 months. She attended nursery and subsequently enrolled in school in the UK. [N] has always considered the UK her home;
> l) [N] participated in swimming, music, drama and gymnastics clubs;
> m) W continued to maintain close relationships and social connections with friends, colleagues, and community members during her absence. She regularly communicated with them and considered the UK to be her permanent home;
> n) W has kept her healthcare registration in the UK.

118) As I have set out above Mostyn J found W intended permanently to relocate to India in June 2019 and this finding is no longer challenged on W's behalf. It could, perhaps, be argued that as this finding was not specifically made in the context of a determination of W's domicile this does not bind me into finding that if W had acquired a domicile of choice in England prior to that date her domicile of origin revived on her return to India. This is not something that was argued before me. Whether or not I am bound by the

finding of Mostyn J, this is a conclusion I reach in any event. The question is therefore whether W acquired (or reacquired) a domicile of choice in England on her subsequent return.

119) Given that (i) no person can be without a domicile; and (ii) any circumstance that is evidence of a person's residence, or of their intention to reside permanently or indefinitely in a country, must be considered in determining whether he or she has acquired a domicile of choice there is no restriction on a domicile of choice being (re)acquired within a short space of time. Therefore the fact that only about seven weeks elapsed between the date W returned to England and the date of filing of her petition is just one fact or circumstance to be considered when considering the proper conclusion to be drawn.

120) I also consider that as part of considering *"any circumstance"* it is relevant that W was returning to England rather than moving to England for the first time. Therefore although many of the matters relied upon by W as set out above pre-date when her domicile of origin revived on her permanent relocation to India (assuming she had previously acquired a domicile of choice) they remain part of all the circumstances for me to consider.

121) Not all of the factors relied upon by W have equal weight (and some may have little or no weight). However taking them cumulatively and also given (i) the circumstances of W's return to England; (ii) she came with N; (iii) she would also have come with K had she been able to do so; (iv) within a month she had made an FLA 401 application for an occupation order that would permit her to move back into the family home in London; (v) she opposed H's application for summary return of N to India; and (vi) I am satisfied that she was more likely reacquiring a domicile of choice in this jurisdiction rather than acquiring one for the first time, I have come to the conclusion that it has been proved that by the date of filing of her divorce petition W had acquired a domicile of choice in this jurisdiction. This is the case even if the standard of proof goes beyond a mere balance of probabilities.

122) In reaching this conclusion, I also bear in mind that in January 2024 W acquired British citizenship through naturalisation and surrendered her Indian passport in April 2024 because of her renunciation of Indian citizenship and her acquisition of citizenship of another country. She has not chosen also to obtain (as H has) Overseas Citizenship of India). This action of course post-dates W's divorce petition by some considerable time. It can therefore do no more than at its highest shed some (retrospective) light on W's intentions as at late July 2021 but these actions are certainly consistent with someone who has acquired a domicile of choice in this country.

123) H did not address me at all in relation to domicile (or indeed habitual residence) in his submissions save to submit it would be unfair to allow W potentially to amend her petition at this stage and I should refuse her request that I do so. As a litigant in person,

it would not have been easy for him to do so. However, I have considered the points he made in writing namely (i) at the time of filing her petition W continued to work remotely for the Indian company Bureau Veritas which is based in Noida; (ii) the SJE considered the Indian divorce to be valid as W *"was domiciled in India preceding one Year of the petition"*; and (iii) a statement was made to the Indian courts on W's behalf on 11th February 2025 (as recorded in the Supreme Court's judgment of that date) that W is *"ready to come"* to India with N in mid-March 2025.

124) As to the first of these points, W was working remotely before she returned to England and thereafter she simply continued to do so. As to the second, different countries may have differing definitions of domicile, the SJE is an expert in Indian law, and this is an issue for me to determine. As to the third, I am satisfied that this is solely to visit her family in India (and as I understand it also to attend before the Indian court on 18th March 2025 to prove her *bona fides*) and W will only do so if satisfied that H (or his family) will not seek to retain N if she does so. The position is not one of an unqualified *"returning to India"* as H implied in his witness statement.

125) For completeness I should record that H also said he did not refer to the issues of habitual residence and domicile as *"he was told the focus is on the validity of Indian divorce, so in future if needed he should be given the opportunity to address this point as well."* I am unsure what H was (or was not) told and by whom but I do not consider his comments to be well-founded given that on 6th February 2025 I expressly adjourned W's application dated 3rd February 2025 to amend the grounds of her petition to be considered at the hearing which began on 19th February 2025.

Disposal

126) Although I shall recognise H's Indian divorce decree I do not consider that it is appropriate for me to dismiss W's application for divorce given the ongoing proceedings in relation to the Indian decree. As I have already observed, if W is ultimately successful in India and the decree is set aside then my recognition consequently 'falls' as there will be no foreign divorce for the English court to recognise.

127) In the circumstances I shall therefore maintain the stay in relation to the suit and W's financial remedy proceedings that I first imposed on 5th February 2024. If W's application to set aside the Indian decree fails, the decree nisi shall automatically be set aside, her divorce proceedings will be dismissed (including her application notice of 3rd February 2025 to amend the jurisdictional basis of her petition) and likewise her financial remedy application. If, however, W's application to set aside the Indian divorce decree is successful, W has liberty to apply to lift the stay in relation to the suit and the financial remedy application.

128) I make the following observations if W does apply to lift the stay:

a) the current jurisdictional basis of W's divorce petition is the habitual residence of both parties. I have found that an alternative jurisdictional ground, that of W's domicile of choice, would have been the correct one;

b) W's counsel have been unable to find authority on whether the court may give permission to amend the jurisdictional ground cited in a divorce petition after the granting of decree nisi/conditional order or whether the appropriate course is (say) an application for rescission;

c) given the date of W's petition (30th July 2021) the procedural rules are those in force before the rule changes on 6th April 2022 which coincided with the introduction of (so-called) 'no fault' divorce. FPR 2010 r7.13 (as then in force) state (i) no permission is required to amend a divorce petition prior to the filing of an Answer or an application for decree nisi; and (ii) permission is required to amend a divorce petition after to the filing of an Answer or an application for decree nisi. The rules are, however, silent as to whether a petition can be amended after decree nisi and if so whether permission is needed (although if it can be it is logical that permission would be required);

d) it could the case that the court cannot make such an amendment: the rules should be interpreted as meaning it is only prior to the making of the decree nisi when the petition can be amended. If so I assume the appropriate application would be for the decree nisi to be rescinded and permission then given to amend the jurisdictional grounds of the petition and the other party then be given an opportunity to file an Answer. This would be consistent with cases such as *Cazalet v Abu-Zalef* [2024] 1 FLR 565 which state that the circumstances in which a decree nisi can be rescinded include (as listed in *Re A and B (Rescission of Order: Change of Circumstances)* [2022] 1 FLR 1143 and in *NP v TP (Divorce: Application for Rescission of Order)* [2023] 1 FLR 270 per Cobb J) *"innocent (or otherwise) misstatement of the facts on which the original decision was made"* which may suggest that once a decision is made on a particular jurisdictional basis or set of facts that decision would need to be set aside/the decree nisi rescinded rather than simply amending the application form;

e) the contrary argument would be one drawn from authorities such as:

   (1) *Rogers-Headicar v Headicar* [2004] EWCA Civ 1867 and *R v R* [2006] 1 FLR 389 both of which suggest that it is the question of whether there is jurisdiction rather than the basis on which it is pleaded that is important (and the court is therefore not bound to accept the statement of jurisdiction made);

   (2) *M v P (The Queen's Proctor Intervening)* [2019] 2 FLR 813 where Sir James Munby P allowed the amendment of a petition post decree absolute where it had wrongly relied on two years' separation and the applicant wanted to substitute

unreasonable behaviour. Munby P thought this could be done by a purposive use of FPR 2010 r4.1(6). However, this was an amendment to the MCA 1973 s1(2) *"fact"* on which the petitioner relied to establish the ground for divorce (i.e. the marriage has broken down irretrievably) and not the jurisdictional ground;

(3) *X v Y (Rectification of Decrees)* [2020] 2 FLR 981 (Fam) where Sir Andrew McFarlane P allowed by the use of r4.1(6) the amendment of a petition which had incorrectly given the date of the parties' second marriage. However, again this was not an amendment to the jurisdictional ground; and

(4) *The Lord Chancellor v 79 Divorced Couples* [2024] EWHC 3211 where all the divorce applications were submitted on the first anniversary of their marriages, in other words, a day early. Albeit in the different context of the void/voidable debate, the Divisional Court (Sir Andrew McFarlane P and Her Honour Judge Lynn Roberts sitting as a Deputy High Court Judge) was critical of artificial and overly technical distinctions being drawn in this area and seemed to prefer a more purposive approach.

However, in *M v P*, *X v Y* and *The Lord Chancellor v 79 Divorced Couples* all the parties were seeking/hoping for the same result which was consistent with taking a purposive approach. The same might be said of *HK v SS* (*Reconciliation between conditional order and final order. Exercise of discretion r.7.19(6)(b))* [2025] EWFC (B) per His Honour Judge Simmonds. This is obviously not true in this case and may suggest that more caution would need to be exercised; and

f) it might also be argued that there is no need for the petition to be amended at all in relation to a jurisdictional ground. If the pleadings are not binding or determinative (i.e. jurisdiction either exists or it does not) and a decree has already been made, then query the advantage or necessity of amending the petition. The core exercise is that the court satisfies itself that it has jurisdiction an applicable ground and unlike in *M v P* (as to the wrong 'fact') or *X v Y* (as to the wrong date of marriage) the court does not need to amend the decree itself as the ground for jurisdiction to entertain the petition is not recorded on the face of the decree.

129) The above simply serves to demonstrate that this may well not be a straightforward procedural issue to determine. Given my decision to recognise the Indian decree it will now only arise if W is ultimately successful in relation to her set aside application in India and she applies (successfully) to lift the stay which shall remain in place. Given (at least so far as counsel were aware) the absence of any direct authority on the point I do not consider that it is appropriate for me to make such a determination unless and until it does.

130) I also observe that there remain several factual questions unanswered in this case including:

a) how H was able to cancel the Home Rights Notice which W first registered on 15th September 2020 when she first became aware that H was seeking to rent out the family home to which W objected. W alleges (and I suspect this may be right given H's oral evidence) H used the Indian divorce decree of 28th September 2022 for this purpose and effected its cancellation in January 2023;

b) whether when H remortgaged the family home (which he could only do after removing the Home Rights Notice) it was simply for a better rate or whether he raised upto £336,390 as the letter from HSBC dated 24th April 2023 stated that they had *"sent the funds"*. I use the word 'upto' as it is accepted there was an existing mortgage that would have needed to be discharged and understand W believes a further c. £285,000 may have been advanced. W only reinstated the Home Rights Notice on 22nd June 2023;

c) whether W was asked to leave her employment with Bureau Veritas in July 2021 because of an intervention by H; and

d) how W was able to obtain a CMS assessment for N from March 2022 when H was clearly outside the jurisdiction (with the assessment not being discharged *ab initio* until October 2023 when the CMS were informed H was not habitually resident in the UK).

131) However, these issues do not arise for determination at least at this stage.

132) I do not consider the stay can simply be open ended. There will therefore be a default provision that W's divorce proceedings and her financial remedy application shall both stand dismissed automatically on the tenth anniversary of my order if the Indian divorce decree has not been set aside by then/the proceedings finally determined and W has not applied to extend the stay in advance of that date. If the Indian decree has been set aside W should also apply to lift the stay by this date.

133) I record for completeness that Ms. Darlington and Ms. Barrons stated that if I was not persuaded as to the alternative jurisdictional grounds as they subsisted at the date of W's petition, it would be W's intention upon her petition being dismissed to file a further petition adopting the approach taken in in *Chai v Peng* [2015] 1 FLR 637. Given my findings this is not an issue I need to consider further.

Conclusion

134) I therefore conclude that (i) the divorce was valid and effective under Indian law; and (ii) this court should recognise the same.

135) H's application for recognition of the Indian divorce is therefore granted.

136) I do not, however, dismiss W's divorce proceedings at least not at this stage. I maintain the stay in relation to the suit and W's financial remedy proceedings I first imposed on 5th February 2024. If W's application to set aside the Indian decree ultimately fails, the decree nisi shall automatically be set aside, her divorce proceedings will be dismissed and likewise her financial remedy application. If, however, W's application to set aside the Indian divorce decree is successful, W has liberty to apply to lift the stay in relation to the suit and the financial remedy proceedings.

137) There will be a default provision that W's divorce proceedings and her financial remedy application shall both stand dismissed automatically on the tenth anniversary of my order if the Indian divorce decree has not been set aside by then/ the proceedings finally determined and W has not applied to extend the stay in advance of that date. If the divorce decree has been set aside an application to lift the stay is also to be made by the same date.

138) Having found that W had acquired a domicile of choice in this jurisdiction as at the date of filing of her divorce petition, consideration of the consequences of this shall be deferred unless and until W makes an application for the stay to be lifted.

139) H indicated that if he was successful in his application (as he has been in relation to recognition but not in relation to the jurisdictional basis of W's petition) I should order that W bear 50% of the costs of the SJE report.

140) This is a so called 'clean sheet' case to which FPR r28.2 and CPR Part 44 (as amended) apply so there is no presumption either of no order for costs or that costs 'follow the event' with the unsuccessful party paying the costs of the successful party. My view is the appropriate order in this case is no order for costs and I so order.

141) I shall continue to reserve all proceedings in this jurisdiction to myself.

142) Permission is granted to the parties for this judgment to be disclosed into any relevant proceedings in India.

Addendum

143) I circulated this judgment in draft to the parties on 26th February 2025 and asked to be sent suggested editorial corrections and any requests for clarification in the usual way. I received a small number of suggested corrections from both parties on 3rd March 2025

and have incorporated most of the same. I received no requests for clarification.

144) Ms. Darlington and Ms. Barrons confirmed they were instructed by Mrs. Chugh to seek permission to appeal on the grounds that I wrongly found that reasonable steps were taken to serve W when (i) H knew she was not living at the address at which the documents were served but was in fact living in England; (ii) there was no order for substituted service before the Indian courts; (iii) there was no evidence that W's father saw the envelope containing the documents, still less the contents thereof; and/or (iv) I failed to take into consideration the fact that the Indian court had subsequently set aside the decree (i.e. the Indian court was not satisfied that there had been effective service).

145) I do not consider these grounds either individually or collectively justify permission to appeal being granted. Without prejudice to the generality of the foregoing I observe (as I have done above) that H disputed the Indian court has set aside the decree and it was agreed this was not a dispute I could resolve. Permission to appeal is therefore refused.

146) In accordance with the *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* issued by the President of the Family Division on 19th June 2024 I indicated to both parties my provisional view that it was appropriate for this judgment to be published. Neither party objected to the same.

147) I also raised with the parties the issue of anonymisation beyond that which I had provided for in the draft judgment (given that technically this case was heard in open court). On Mrs. Chugh's behalf it was said she had no issue whether the parties' names were anonymised or not. H sought full anonymisation. Having carried out the *"balancing exercise"* espoused in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 which has regard to the interests of the parties and the public as protected by ECHR Articles 6, 8 and 10, considered in the particular circumstances of this individual case, I do not consider there are grounds for any greater anonymisation than I have already provided for. My reasons for this include (i) the case was technically one heard in open court; and (ii) none of the Indian judgments involving the parties appear to be anonymised.

148) That is my judgment.

NICHOLAS ALLEN KC