Neutral Citation Number: [2024] EWCA Civ 203

Case No: CA-2023-000703

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE MOSTYN
[2023] EWHC 404 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 March 2024

Before:

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE MOYLAN
and
LORD JUSTICE HOLROYDE

- -

Between:

MANOUCHEHR SHILANI TOUSI	**Appellant/ Respondent**
- and -	
NATALYA GAYDUKOVA	**Respondent /Applicant**

- -
- -

Tim Scott KC, Max Lewis and William Horwood (acting pro bono) for the **Appellant**
Christopher Hames KC and Katherine Gittins (instructed by **Caveat Solicitors**) for the **Respondent**

Hearing date: 5 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The issue at the heart of this case is the jurisdiction of the court to make an order for the transfer of a tenancy under s.53 and Schedule 7 to the Family Law Act 1996 ("the FLA 1996"). These provisions give the court power to transfer the tenancy of, broadly stated, the family home between spouses or former spouses (and civil partners), by paragraph 2 of Schedule 7, and between cohabitants or former cohabitants, by paragraph 3 of Schedule 7.

2. The specific question raised by this appeal is whether the term "cohabitants" in paragraph 3 includes the parties to a void marriage or whether they are only within the scope of paragraph 2 which gives the court power to make an order "on making a divorce, nullity of marriage or judicial separation order or at any time after making such an order".

3. The resolution of this issue has, frankly, been side-tracked by other legal points which, as set out below, are not relevant to that core issue. The provisions for the transfer of a tenancy are clearly intended to provide a prompt remedy in particular in respect of former cohabitants. It is, therefore, very regrettable that some two years after the wife made her application, it remains unresolved.

4. This is a second appeal being an appeal from Mostyn J's ("the judge") decision, [2023] EWHC 404 (Fam), on appeal from the unreported decision of Recorder Allen KC ("the Recorder"). As in the judgment below, and as is conventional, I propose to call the parties the husband and the wife although it is accepted that they never contracted a valid marriage.

5. At the hearing before the Recorder, the husband appeared in person and the wife was represented by Ms Maxwell. At the hearing before the judge, the husband was represented by Mr Lewis and Mr Horwood, both acting pro bono, and the wife was represented by Ms Gittins. At this appeal, the husband was represented by Mr Scott KC (who was unable to attend the hearing), Mr Lewis and Mr Horwood, all acting pro bono, and the wife was represented by Mr Hames KC and Ms Gittins. I am very grateful for their respective written and oral submissions.

6. The Recorder made a transfer of tenancy order in favour of the wife. As referred to further below, he did not determine whether the parties were married. In his position statement for the hearing before the Recorder, the husband submitted that, because the parties were married, an order could only be made "when proceedings for divorce, nullity or judicial separation … are taken" and that the order "cannot take effect" before the divorce/nullity is finalised. In his judgment, the Recorder noted that there was an issue between the parties as to whether they were married. They agreed that there had been a ceremony in Ukraine in 1997 which the husband contended had created a valid marriage, while the wife contended that it had not. The Recorder decided, however, that it was not necessary for him to determine the issue because, if the parties were married, he had power to make an order under paragraph 2 of Schedule 7 to the FLA 1996; and, if the parties were former cohabitants, he had power to make an order under paragraph 3.

7. The difficulty with the approach taken by the Recorder is that the power to make an order under paragraph 2 only arises "*on making* a divorce, nullity of marriage or judicial

separation order or at any time after making such an order (whether, in the case of a divorce or nullity of marriage order, before or after the order is made final)" (emphasis added). In contrast, the power under paragraph 3 arises when the parties "cease to cohabit".

8. The husband was granted permission to appeal on one ground, namely, as amended at the hearing before the judge:

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

For reasons that are not clear, expert evidence on the validity of the marriage was only obtained very shortly before the hearing before the judge. This established, contrary to the husband's case, that the ceremony in Ukraine had not created a valid marriage. Accordingly, as the judge recorded at [2], it was "common ground that the parties did not enter into a legally valid marriage".

9. The judge undertook an extensive analysis of, among other issues, the law relating to nullity of marriage and the relevance of foreign law to the remedy available under English law in respect of an invalid overseas ceremony. I will deal with this in more detail below but, in summary, the judge's dismissal of the appeal was based on his conclusion that English law should apply the relief which would be available to the husband under Ukrainian law which was, at [82], "none at all". This meant, at [85], (i) that the 1997 ceremony "was analogous to a domestic non-qualifying ceremony generating no right to the grant of a nullity order"; (ii) that the parties "are thus not to be treated as spouses for the purposes of Paragraph 1 of Schedule 7"; and (iii) that "the power to transfer the tenancy was validly exercised by the Recorder".

10. It can be seen that, by implication, the judge must have decided that paragraph 3 of Schedule 7 applied. He did not, however, deal with this expressly which is, no doubt, why a Respondent's Notice has been filed to address this issue. I would also note that the husband's skeleton for the hearing before the judge referred to the "distinction" drawn in the legislation "between when a tenancy can be transferred in the context of a void marriage and in respect of … cohabitants" and that it was "the decree or order of nullity which unlocks the power to transfer a tenancy". The wife's skeleton before the judge accepted that the Recorder had been wrong when he said that he did not have to decide whether the parties' marriage was valid but also submitted that this did not undermine his substantive judgment because the parties were cohabitants with the result that the order had been lawfully made.

11. The husband's grounds of appeal to this court challenge the judge's decision that Ukrainian law determined whether the parties were, as a matter of English law, entitled

to a nullity order and, in turn, that this also determined whether they were spouses for the purposes of Schedule 7. I gave permission to appeal both because I considered that the appeal had a real prospect of success and because it raised an important point of principle.

12. The wife has filed a Respondent's Notice contending that the judge should have dismissed the appeal because "the parties were never spouses within the meaning of the [FLA 1996] but were cohabitants; accordingly the learned Recorder had jurisdiction to make the order for the transfer of the tenancy".

13. For the reasons set out below, it is clear to me that the Recorder had the power to make an order under paragraph 3 of Schedule 7 because the parties were cohabitants within the scope of that provision. However, this is not for the reasons given by the judge with which, again as explained below, I respectfully disagree.

Factual Background

14. The husband and wife went through a ceremony of marriage at the Iranian Embassy in Kyiv, Ukraine on 12 December 1997. The wife was Ukrainian. The husband was Iranian and had moved to Ukraine to study in the mid-1990s. They remained living in Ukraine until 2000/2001 when they moved to the UK where the husband was studying for a PhD. He is now aged 52 and she is aged 51. They have two children, one of whom is an adult.

15. In 2010 the parties were granted a tenancy of the family home in their joint names by a Housing Association. The parties separated in 2019/2020. The wife and the younger child left the family home in May 2020 with the elder child joining them shortly afterwards. The husband has remained living there since then.

16. On 17 September 2021 the wife applied for the transfer of the tenancy of the family home under the FLA 1996. The wife had previously made an application for an occupation order which had been refused.

17. As set out by the judge, at [26]:

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

18. Although the parties thought they were legally married, the expert evidence obtained for the hearing before the judge clearly established that they were not. As the judge said, at [81]:

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

Proceedings

19. As referred to above, the wife issued her application for a transfer of tenancy order in September 2021. It was first determined by the Recorder's order on 15 February 2022. He carefully considered all the relevant factors and decided that the tenancy of the family home should be transferred to the wife with effect from 25 March 2022 with the husband being required to leave the property by 4 April 2022. As referred to above, the Recorder did not determine whether the parties were married as he did not consider it necessary to do so. He also noted accurately that, in any event, the hearing had not been "set up for such a determination" including because there was no expert evidence as to the effect of the 1997 ceremony.

20. The husband, still acting as a litigant in person, advanced 10 grounds of appeal. The first of these raised the issue of jurisdiction by reference to his assertion that the parties were married with the result, he submitted, that an order could not be made until there had been a divorce order.

21. The husband was given permission to appeal in respect of his first ground of appeal with the other grounds, which included grounds challenging the merits of the transfer order, being adjourned to the hearing of the appeal. The judge refused permission to appeal in respect of all the other grounds so the merits of the transfer order can no longer be challenged.

22. Expert evidence was obtained for the purposes of the husband's appeal to the judge. Two reports were provided prior to the hearing, dated 31 January and 2 February 2023. The clear effect of this evidence, as referred to above, was that the 1997 ceremony had *not* created a valid marriage under Ukrainian law. An additional report was obtained following the hearing before the judge to deal with issues which arose during the course of that hearing.

23. In the husband's skeleton for the appeal before the judge as prepared by counsel, it was submitted that the Recorder had been wrong to decide that he did not have to determine whether the 1997 ceremony had created a valid marriage. It was further submitted that "it is the decree or order of nullity which unlocks the power to transfer a tenancy" because "Parliament has expressly drawn a distinction between when a tenancy can be transferred in the context of a void marriage and in the context of mere cohabitation". It was suggested that the latter would also include parties to a "non-marriage" although it was recognised that this did not sit easily with the general proposition expressed by Lord Greene MR in *De Reneville v De Reneville* [1948] P 100, at p.111, namely that a void marriage was one which would be regarded "as never having taken place" and which could "be so treated by both parties to it without the necessity of any decree annulling it". It was also submitted that, in any event, the remedy or relief available was a matter of English law which, in this case, would be a nullity decree as the 1997 ceremony had created a void marriage not a non-marriage. *Burns v Burns* [2008] 1 FLR 813 and *Assad v Kurter* [2014] 2 FLR 833 were relied upon.

24. In her skeleton for the hearing before the judge, the wife accepted that the Recorder had been wrong when he determined that he did not need to decide whether the parties were validly married. It was submitted that, because "the parties were not legally married" (as established by the expert evidence), they were cohabitants within the meaning of paragraph 3 so the order had been "lawfully made". In addition, however, it was also

submitted: (i) that the 1997 ceremony had created a "non-marriage"; and (ii) that, if the court concluded that the marriage was void, the order should be varied to take effect from the date of the decree of nullity.

25. The judgment sets out, at [26], that it "is common ground between the parties that they intended to create a valid legal marriage between themselves and that for at least 20 years they thought that they had". The judge then, under separate headings, addressed the "Formation of Marriage"; "the taxonomy of invalidity"; "the nature of, and grounds for, a void marriage"; "nullity and public policy"; "the Nullity of Marriage Act 1971"; "domestic ceremonies"; and "overseas ceremonies". I do not propose to summarise the extensive analysis of these issues as set out in the judgment. I would just note that, when dealing with the nature of a void marriage, the judge referred to *De Reneville v De Reneville*; *Kassim v Kassim* [1962] P 224; and the Law Commission's 1970 Report on *Nullity of Marriage* (Law Com. No. 33) ("1970 Report"). I deal with these further below.

26. As set out by the judge, at [65], it is "well established under our rules of private international law that the formal validity of a marriage celebrated overseas (*forma*) is governed by the *lexi loci celebrationis*". He then quoted from *Sottomayor v De Barros (No.1)* (1877) 3 PD 1 (CA), per Cotton LJ at p.5:

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

And also from *Berthiaume v Dastous* [1930] AC 79, 83 (PC).

27. The judge next suggested that there "has been some debate as to the width of [the] principle" that the law of the place of celebration determines "questions relating to the validity of the ceremony". He referred to *Burns v Burns* by way of example.

28. The judge's key conclusions as to the legal approach he should apply were as follows:

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

> [69] If, for example, the parties have disregarded the marriage laws of the other country when devising their marriage ceremony to such an extent that the court of the foreign law ('the foreign court') would, if the matter came before it, treat the ceremony as being entirely non-existent, giving rise to no entitlement to make a claim in court for anything, then, in my judgment, that too is a determination of a question "relating to" the validity of the ceremony, which is binding, provided that it is not obviously contrary to justice. The determination corresponds to our domestic concept of a non-qualifying ceremony and so the appropriate remedy would be dismissal of the application for a nullity order.
>
> [70] In contrast, if, for example, the foreign law determined that a ceremony was defective for want of compliance with the necessary formalities, and that therefore the marriage was void, but that the ceremony could be later ratified or validated by compliance with the formalities, then such a determination should likewise be regarded as being a question relating to the validity of the ceremony which, under our rules of private international law, is binding. That binding decision is that the marriage is not non-existent and therefore the appropriate remedy to be made by the English court is a nullity order."

The judge appears to acknowledge initially, at the beginning of [68], that foreign law determines only the question of validity. However, he then goes on to conclude that foreign law "does not necessarily come to a halt at the question of validity" but should also, if "not obviously contrary to justice", determine "the ramifications of invalidity". By this he appears to mean, principally, whether any remedy or relief would be available in the foreign court which "ramifications … should also be binding".

29. After, next, referring to a first instance decision of mine, *Asaad v Kurter* [2014] 2 FLR 833, the judge concluded:

> "[73] For the reasons stated above, I would go further than Moylan J. In my judgment, the "questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted" which fall to be determined by the foreign law encompass:
>
> i) the formal validity or invalidity of the ceremony; and
>
> ii) the ramifications of that finding under the foreign law.
>
> And provided that it is not contrary to justice, the relief awarded by this court should reflect those ramifications. It follows that expert evidence about the foreign law must address both of the above elements."

The effect of the judge's approach, in summary, was that the relief available under the foreign law should determine, "if not contrary to justice", the relief available under English law.

30. The judge's analysis of Ukrainian law led him to conclude, at [81], that;

> "When choosing between the alternative of a void and voidable marriage the closest English law concept to the Ukrainian legal treatment of this ceremony is a void marriage."

He dealt further with the marriage ceremony at [83]:

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

31. Although the "closest English law concept" was a void marriage, the judge went on to apply the approach he had formulated, at [73] (see paragraph 29 above) and considered, at [82], "what primary or consequential matrimonial relief, if any, could be awarded by an Ukrainian court". His answer was, "none at all". He considered this, at [85], a ramification of the invalidity of the 1997 ceremony which was "presumptively binding on him" and which it would "not be obviously contrary to justice to apply". The result was, as set out at paragraph 9 above, that "the 1997 ceremony was analogous to a domestic non-qualifying ceremony generating no right to the grant of a nullity decree". The parties were, therefore, not spouses for the purposes of paragraph 1 of Schedule 7.

Submissions

32. The husband submitted, in summary: (i) that the parties' marital status needed to be determined because the dates on which the court could make an order (and on which it took effect) were different under paragraphs 2 and 3 of Schedule 7 and depended on their status; (ii) that the judge had been wrong in considering that the relief or remedy available under Ukrainian law "presumptively" determined the relief or remedy available under English law such that the parties were not entitled to any remedy in respect of their marriage; and (iii) that the parties' marriage was void such that, under English law, they were entitled to bring nullity proceedings bringing them within the scope of, and only of, paragraph 2 of Schedule 7. Accordingly, a transfer of tenancy order could only be made on the making of a nullity order.

33. As to (i), as referred to above, the wife has conceded that the parties' marital status needed to be determined for the purposes of deciding whether paragraph 2 or paragraph 3 applied. The husband submitted that the judge had been right to decide, at [81], that the marriage was void. This was a conclusion which was clearly supported by the facts of this case and was in accordance with established precedent. It was submitted that

the judge's subsequent analysis was wrong and wrongly led him to conclude that there was no entitlement to a nullity decree. In his oral submissions, Mr Lewis submitted that the judge "began to go wrong" at [49], when he said:

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

Mr Lewis submitted that the judge's assessment, that the legislative choice to grant rights following a nullity decree was an "extraordinary concept", may have led him to adopt a flawed approach when deciding the relief available in the present case. He went further and suggested that the judge put "the cart before the horse" in that he decided, first, that the husband should not be entitled to bring a claim for nullity and financial remedies and, then, "did so" by denying him these rights.

34. As to (ii), the husband challenged the judge's conclusions, at [68], [73] and [85], that "the binding determination [of] the foreign law" extends to the "ramifications of invalidity"; that these include the relief or remedy which would be available under that law; and that this should be "presumptively binding" on the English court such that the relief or remedy available under the foreign law would, in effect, determine the relief or remedy available under English law. It was submitted that this question is not determined by foreign law, let alone "presumptively" so. This was "a major departure" from previous decisions which was wrong in law.

35. A number of reasons were advanced in support of this submission. First, the judge wrongly applied the formulation from *Sottomayor v De Barros (No. 1)* when he decided, at [69], that the relief or remedy available under the foreign law is "a question 'relating to' the validity of the ceremony". This was wrong because, it was submitted, the relief available, or not available, is determined by the law governing the dissolution and annulment of marriages, not the law governing the formation of marriages. This was "an important conceptual and juridical distinction".

36. Secondly, English family law almost invariably applies the *lex fori*. The validity of foreign marriages is an exception to this general approach and, it was submitted, there is no good reason to extend that exception to the decision whether to grant any (and if so, what) remedy. That is a matter of English law and the English court "should not be constrained by the approach of the foreign court, let alone treat it as presumptively dispositive". Why, Mr Lewis asked during the course of his submissions, should the remedies available under Ukrainian law in the event of proceedings taking place there have any relevance to the remedies available in English proceedings consequent on the breakdown of their relationship here? In his submission, the former have "no place" in the determination of the latter, especially when, he added, the effect of the judge's

approach was to disentitle the parties from obtaining the English law remedy that would otherwise be available to them.

37. Thirdly, the emphasis in the judge's approach on the relief which might be given in the foreign court puts form over substance in a misplaced application of this court's decision in *HM Attorney General v Akhter & Ors* [2021] Fam 277.

38. Fourthly, that the judge's approach would lead to many cases (such as the present) where the couple had lived together for many years in the belief that they were married, but find on the breakdown of the marriage that no matrimonial relief is available. It was submitted that the court should "lean strongly in favour of opening the door to matrimonial relief in cases where the parties have believed themselves to be married, and have lived their lives on that basis".

39. It was also submitted that the judge's approach was flawed because it was not clear and would lead to practical difficulties. What remedies or relief were relevant? It was submitted that an examination of the remedy (if any) available "following a finding of invalidity in a foreign court is not straightforward". There might be remedies available under the foreign law which are not available under English law. For example in both *Burns v Burns* and *Berthiaume v Dastous* the foreign law provided a remedy based on the doctrine of "putative marriage" in California and Quebec respectively. I would also note that since 2002 under Ukrainian law parties to, what is described in translation as, a "so-called in-fact marriage relations" have rights and remedies in respect of property acquired during their cohabitation.

40. As to (iii), it was submitted that paragraphs 2 and 3 of Schedule 7 are mutually exclusive. A party to a void marriage is not a "cohabitant" within the scope of paragraph 3 but is within, and only within, the scope of paragraph 2. The latter's provisions make clear that this paragraph applies to a party to a void marriage and that an order can only be made in conjunction with a "nullity of marriage order". The definition of cohabitants in s.62 of, and the provisions of paragraphs 12 and 13 of Schedule 7 to, the FLA 1996 were also relied upon, in particular to seek to meet the case advanced on behalf of the wife that only voidable marriages are within paragraph 2. None of these provisions, it was submitted, suggest that void and voidable marriages are to be treated differently. Similarly, the term "party to [a/the] marriage" is used in the Matrimonial Causes Act 1973 ("the MCA 1973") and the Matrimonial and Family Proceedings Act 1984 in respect of a party to a void marriage as well as a voidable marriage. It was submitted that this distinction should not be introduced into the FLA 1996 when there is no such distinction in respect of financial remedies available, for example, under the MCA 1973.

41. I can summarise the wife's submissions much more briefly because they had a narrower focus.

42. Mr Hames' principal submission was that the only issue which needed to be determined was whether the parties were or were not married. If they were not validly married, it was submitted that the court had power to make a transfer of tenancy order pursuant to the provisions of s.53 and paragraph 3 of Schedule 7 because the parties were cohabitants as defined by s.62(1). This issue had not been expressly addressed by the judge and was, therefore, supported by the Respondent's Notice.

43. As to the parties' status, it was clear from the judge's judgment that the parties did not enter into a legally valid marriage. It had been unnecessary for the judge to decide whether the marriage was void or a non-qualifying ceremony as, in either case, the court had power to make a transfer of tenancy order pursuant to the provisions of paragraph 3 of Schedule 7. In both circumstances, the parties were cohabitants for the purposes of that paragraph; cohabitants being defined by s.62(1) as "two persons who are neither married to each other nor civil partners but are living together as if they were a married couple or civil partners". Accordingly, even if the marriage was void and the parties had the right to seek a nullity decree, their rights under Schedule 7 were not confined to paragraph 2. Parliament cannot have intended that parties to a void marriage were required to obtain a nullity order before being able to obtain a transfer of tenancy order.

44. It was also suggested, additionally, that it is possible to construe the reference to "nullity" in paragraph 2 of Schedule 7 as being limited to voidable marriages and not including void marriages.

45. Mr Hames also made, what he described as secondary or alternative, submissions in respect of the judge's analysis of the "ramifications" of the foreign law. Mr Hames submitted that, on one interpretation of the judgment, the "ramifications" of the foreign law did not "fix" the English remedy but were a means of assessing the "attitude of the foreign law to the ceremony in question". He acknowledged, however, that under the judge's approach the foreign law was presumptively dispositive of whether a party was entitled to a remedy in English proceedings.

Legal Framework

46. The following are the relevant provisions of the FLA 1996:

Section 53: "Transfer of certain tenancies

> Schedule 7 makes provision in relation to the transfer of certain tenancies on divorce etc. or on separation of cohabitants."

Section 62 defines "cohabitants" as:

> "(1) For the purposes of this Part —
>
> (a) "cohabitants" are two persons who are neither married to each other nor civil partners of each other but are living together as if they were a married couple or civil partners; and
>
> (b) "cohabit" and "former cohabitants" are to be read accordingly, but the latter expression does not include cohabitants who have subsequently married each other or become civil partners of each other."

As is frequently, if not invariably, the case in legislation there is no definition of spouse in the FLA 1996. Its meaning is only addressed in paragraph 1 of Schedule 7 which provides: "'spouse', except in paragraph 2, includes (where the context requires) former spouse". There is a similar provision in paragraph 1 in respect of cohabitant: "'cohabitant', except in paragraph 3, includes (where the context requires) former cohabitant".

Paragraphs 2 and 3 of Schedule 7 provide as follows (a Part II order includes a transfer of tenancy order):

> "2(1) This paragraph applies if one spouse or civil partner is entitled, either in his own right or jointly with the other spouse or civil partner, to occupy a dwelling-house by virtue of a relevant tenancy.
>
> (2) The court may make a Part II order –
>
> (a) on making a divorce, nullity of marriage or judicial separation order or at any time after making such an order (whether, in the case of a divorce or nullity of marriage order, before or after the order is made final), or
>
> (b) at any time when it has power to make a property adjustment order under Part 2 of Schedule 5 to the Civil Partnership Act 2004 with respect to the civil partnership.
>
> 3(1) This paragraph applies if one cohabitant is entitled, either in his own right or jointly with the other cohabitant, to occupy a dwelling-house by virtue of a relevant tenancy.
>
> (2) If the cohabitants cease to cohabit, the court may make a Part II order."

In addition, paragraph 12 of Schedule 7 provides:

> "12. The date specified in a Part II order as the date on which the order is to take effect must not be earlier than -
>
> (a) in the case of a marriage in respect of which a divorce or nullity of marriage order has been made, the date on which the order is made final;
>
> (b) in the case of a civil partnership in respect of which a dissolution or nullity order has been made, the date on which the order is made final."

Paragraph 13 provides:

> "13(1) If after the making of an order dissolving or annulling a marriage either spouse remarries or forms a civil partnership, that spouse is not entitled to apply, by reference to the making of that order, for a Part II order.
>
> (2) If after the making of a dissolution or nullity order either civil partner forms a subsequent civil partnership or marries, that civil partner is not entitled to apply, by reference to the making of that order, for a Part II order.
>
> (3) In sub-paragraphs (1) and (2) -

> (a) the references to remarrying and marrying include references to cases where the marriage is by law void or voidable, and
>
> (b) the references to forming a civil partnership include references to cases where the civil partnership is by law void or voidable."

47. The specific power to make a transfer of tenancy order was first given by s.7 of the Matrimonial Homes Act 1967 ("the MHA 1967"). It applied only to spouses and only when "the marriage is terminated by the grant of a decree of divorce or nullity of marriage". It can be seen, therefore, that nullity has always been a feature of the legislation. I would add, to deal with Mr Hames' additional submission in respect of paragraph 2, that there is nothing to suggest that "nullity" is confined to voidable marriages and does not include void marriages. The remedy granted in respect of both has always been a nullity decree. The only difference is the date on which the marriage is treated as being void.

48. The MHA 1967 was replaced by the Matrimonial Homes Act 1983 (s.7 and Schedule 1) ("the MHA 1983"). Some changes were made, as recommended by the Law Commission in its 1978 Report (Law Com. No. 86), including extending the power to judicial separation proceedings and making the power additionally exercisable after the decree (of divorce or nullity) was made absolute as well as before. Save for these limited changes, the substantive provisions remained the same and continued to require the grant of a decree.

49. The provisions in the MHA 1983 were replaced by the FLA 1996. Prior to this, the Law Commission had published its 1992 Report, *Domestic Violence and Occupation of the Family Home* (Law Com. No. 207). This pointed out, at [2.20], that:

> "If the parties are married, long term solutions are available in the form of an order transferring the tenancy under section 7 of and Schedule 1 to the Matrimonial Homes Act 1983 or ancillary to divorce proceedings under section 24 of the Matrimonial Causes Act 1973. But there are no equivalent provisions for cohabitants."

The Report, at [6.6], expressed "the firm conclusion that the power to transfer tenancies at present contained in the Matrimonial Homes Act 1983 should be extended to cohabitants … We therefore *recommend* accordingly".

50. There is nothing in the Report which indicates that any consideration was given to the relationship between the proposed extension to cohabitants and the existing power nor to the particular position of parties to a void marriage. It does not, therefore, other than by its absence, provide any assistance on the interpretation of the provisions of paragraphs 2 and 3 of Schedule 7.

51. It is, therefore, a straightforward question of statutory interpretation. As explained by Lord Hodge in *Regina (O) v Secretary of State for the Home Department* [2023] AC 255 ("*R (O) v SSHD*"):

> "[29] The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context": (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.
>
> …
>
> [31] Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:
>
> > 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

52. I deal with my conclusions as to the scope of paragraphs 2 and 3 below.

53. I next deal with the effect on the parties' status of a void marriage. As submitted by Mr Lewis, it is clear that, for example in the MCA 1973, the words "marriage" and "spouse" (in s.11) and "parties to a marriage" (s.21) apply equally when the marriage was void. However, it is also clear, as set out in the judgment below at [39]-[42], that a void marriage does not have any effect on the parties' status. I have quoted above what Lord Greene said in *De Reneville v De Reneville* at p.111, namely:

> "a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it."

To the same effect is what Ormrod J said in *Kassim v Kassim* [1962] P 224 (quoted in the judgment below at [41]) and what the Law Commission said in its 1970 Report, at [3(d)]:

> "A void marriage is not really a marriage at all, in that it never came into existence because of a fundamental defect; the marriage is said to be void *ab initio*; no decree of nullity is necessary to make it void and parties can take the risk of treating the marriage as void without obtaining a decree. But either of the spouses or any person having a sufficient interest in obtaining a decree of nullity may petition for a decree at any time, whether during the lifetime of the spouses or after their death. In effect, the decree is a declaration that there is not and never has been a marriage."

Further, the 1970 Report commented, at [4]:

> "To require legal proceedings to be instituted before parties could regard themselves as free from a marriage which was palpably invalid because, for example, one party was already married to another or was under the age of 16, would, in our view, add needlessly to the expense to the parties and to the public. Hence, we maintain the view, shared by those whom we consulted, that this threefold distinction should be maintained .." (i.e. between valid, void and voidable").

54. I now turn to the legal framework relevant to the judge's conclusion, at [68], that "the foreign law not only determines the question of validity, but also determines the ramifications of invalidity (if found)". By this, as referred to above, the judge meant the relief or remedy available under the foreign law: what he termed, at [82], the "primary or consequential matrimonial relief, if any, [which] could be awarded by an Ukrainian court".

55. It is well established that the law of the place where the marriage was celebrated (the *lex loci celebrationis*) determines the formal validity of the marriage. This is clearly set out in *Dicey, Morris & Collins on the Conflict of Laws 16th Ed.*, at Rule 74(1), at [17R-00]:

> "A marriage is formally valid if (and only if) any one of the following conditions as to the form of celebration is complied with:
>
> (1) the marriage is celebrated in accordance with the form required or (semble) recognised as sufficient by the law of the country in which the marriage was celebrated".

And, at [17-003], which states:

> "A marriage celebrated in the form, or according to the rites or ceremonies, required by the law of the country where the marriage takes place, is (as far as formal requisites go) valid."

56. The same point is made in *Cheshire, North and Fawcett, Private International Law*, 15th Ed, at p.893:

> "There is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of the marriage, ie that an act is governed by the law of the place where it is done. Whether any particular ceremony constitutes a formally valid marriage depends solely on the law of the country where the ceremony takes place".

I would emphasise the reference to the *formalities* of the marriage and to a *formally valid marriage*. There is no suggestion in either *Dicey* or *Cheshire* that the principle extends any further than this.

57. The scope and effect of this principle are encapsulated in the following quotations, which the judge purported to apply. The first is from *Sottomayor v De Barros (No.1)* in which Cotton LJ gave the judgment of the court. I have set out the relevant quote, from p.5, above but I set it out again here:

> "The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted."

The important words are "relating to the *validity of the ceremony*" (my emphasis).

58. The second is from *Berthiaume v Dastous* in which Viscount Dunedin, giving the judgment of the Privy Council, said,

> "If there is one question better settled than any other in international law, it is that as regards marriage – putting aside the question of capacity – locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage."

Again, there is no suggestion in either of these decisions that the principle extends any further than the issue of the validity of the ceremony itself. In my view, it is clear from both that the foreign law determines the effect, and only the effect, of the *ceremony* for the purposes of determining, again only, the validity of the marriage.

59. That this is the extent of the relevance of foreign law also gains support from the wording of s.14 of the MCA 1973 which provides:

> "Marriages governed by foreign law or celebrated abroad under English law.
>
> (1) Subject to subsection (3) where, apart from this Act, *any matter affecting the validity of a marriage* would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11, 12 or 13(1) above shall -
>
> (a) preclude the determination of that matter as aforesaid; or
>
> (b) require the application to the marriage of the grounds or bar there mentioned except so far as applicable in accordance with those rules." (emphasis added)

The relevance of this provision is that it is confined to "the validity of a marriage".

60. I do not propose to rehearse all the other authorities to which the judge referred. I would, however, note that they do not support the judge's view as to the relevance of the foreign law to the remedy or relief available under English law and, in particular, do not support his conclusion that the relief awarded by this court should reflect the "ramifications of invalidity" under the foreign law. Indeed, it was contrary to what Coleridge J said in *Burns v Burns*, at para [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."

And to what I said, also at first instance, in *Asaad v Kurter* when I applied the same principle enunciated in *Burns v Burns*, at [97(c)]:

> "… it if for the English court to decide what remedy under English law, if any, is available for the reasons set out in *Burns v Burns"*.

61. I also note the following from *Dicey*. First, at [19-083], the following passage appears under the heading, "Form of the decree":

> "In English law a decree of nullity of marriage is expressed to be retrospective in the case of a void marriage but prospective in the case of a voidable marriage. It might be argued that a foreign law determining an issue raised in the case should be relevant in determining the form of decree. It is submitted that this should rather be treated as a procedural matter, and so governed by the lex fori. Indeed, any other approach could produce acute difficulties where two or more leges causae existed."

Secondly, in the 1st Supplement to the 16th Ed, there appears the following observation in respect of the approach adopted by the judge in this case, at [19-073]:

> "It is submitted that Mostyn J.'s approach should not be followed. It is supported by no previous authority, seems inconsistent with the reasoning in cases such as *Burns v Burns* [2007] EWHC 2492 (Fam.), [2008] 1 F.L.R. 813, and the notion of "ramifications" under systems of law which may use concepts quite unlike those in English law would create great uncertainty."

Determination

62. It is clear, as is now accepted by both parties, that the court needed to determine whether the parties were validly married for the purposes of determining whether the court's power to make a transfer of tenancy order arose under paragraph 2 or paragraph 3. This was because, if the parties were married, paragraph 2 and not 3 would apply so that an order could *only* be made "on making a divorce, nullity of marriage or judicial separation order or at any time after making such an order" and could only take effect, pursuant to paragraph 12, when the divorce/nullity order was made final.

63. I next deal with the scope of paragraph 3. It is clear to me that parties to a void marriage are within the scope of paragraph 3 for the reasons set out below.

64. It is well established, as referred to above, that a void marriage has no effect on the status of the parties to the ceremony. As Lord Greene MR said in *De Reneville v De Reneville*, at p.111, the parties can treat "the marriage … as never having taken place" and they are not required to obtain "any decree annulling it". The 1970 Report made the same point at paragraph 3(d) and added, at paragraph 4 (both quoted above), that parties should not be required to take legal proceedings because this would "add needlessly to the expense to the parties and to the public". The remedy of a nullity decree is available but available at the option of the parties (or a person with sufficient interest). Accordingly, parties to a void marriage have the same status as unmarried people who are living together and therefore are, in general terms, cohabitants.

65. The next question is how the fact that the parties to a void marriage are, as a matter of law generally, in the same position as if there had been no ceremony of marriage at all and, therefore, cohabitants fit with the provisions of the FLA 1996.

66. I consider that it is clear that they *can* fall within the definition of cohabitants in s. 62(1). There are two parts. First, they must be "two persons who are neither married to each other nor civil partners of each other". On a plain reading, it is clear that parties to a void marriage come within this definition. Secondly, they must have been "living together as if they were a married couple or civil partners". This is an evidential issue which is why I have said that parties to a void marriage "*can* fall" within paragraph 3. That evidential hurdle is established in this case because the parties were clearly living together as a married couple. They are, therefore, *prima facie* within the scope of paragraph 3.

67. The next question is whether, as a matter of statutory interpretation, there is some reason why paragraph 3 does not apply to parties to a void marriage although they fall within the definition of cohabitants. As referred to above, I accept Mr Lewis' submissions that paragraph 2 applies to parties to a void marriage. It is impossible to interpret that provision as only applying to voidable marriages, as submitted by Mr

Hames. However, I do not accept Mr Lewis' submission that paragraphs 2 and 3 are mutually exclusive. There is, in my view, nothing to support interpreting these provisions as *requiring* parties to a void marriage to bring nullity proceedings and *excluding* them from bringing an application pursuant to paragraph 3.

68. I acknowledge that paragraph 3 does not expressly refer to parties to a void marriage. But, there is no reason for it to do so as they are "cohabitants". The only argument, as advanced by Mr Lewis, is that by necessary implication, they must be excluded from paragraph 3 because they are included within paragraph 2. In my view, neither the terms of paragraphs 2 and 3 nor the provisions of paragraphs 12 or 13 provide any justification for such an interpretation. Further, I can think of no reason why this should be so. Indeed, once the power to make a transfer of tenancy order was extended to cohabitants it makes evident good sense that parties to a void marriage should no longer be required to start nullity proceedings for the purposes of obtaining immediate access to justice in this way. Accordingly, adopting the formulation from *R (O) v SSHD*, at [31], "an objective assessment of the meaning" of the provisions of the FLA 1996 leads to the clear conclusion that parties to a void marriage can be cohabitants for the purposes of paragraph 3 of Schedule 7.

69. I next turn to the question of whether the marriage in this case was a void marriage or was, as the judge found, "analogous to a domestic non-qualifying ceremony". As I think will be clear from the above, it was unnecessary for the judge to engage with this issue. Once it was clear that the marriage was at least void, the court had jurisdiction to make an order under paragraph 3.

70. However, because the judge dealt with the issue at some length and it might have an impact in other cases, I propose to deal with his conclusion, at [68], that "the binding determination by the foreign law does not necessarily come to a halt at the question of the validity of the ceremony" but "determines the ramifications of invalidity (if found) … provided that it is not obviously contrary to justice".

71. For the brief reasons set out below, I disagree with the judge's conclusion on this issue. In my view, it is clear that the remedy or relief which would or might be available if proceedings were taking place in the country in which the marriage or alleged marriage took place are irrelevant to the remedy or relief available under English law. Also, for the avoidance of doubt, it is not necessary to consider what remedy or relief would be available for the purposes of deciding how the marriage is to be classified as a matter of English law: i.e. void, voidable or a non-qualifying ceremony. This is wrong as a matter of principle and would add an unnecessary factor which would potentially be difficult and expensive to determine.

72. The simple principle is that the formal validity, and *only* the formal validity, of a marriage is determined by the law of the place in which the marriage was celebrated. This clear principle has been well established certainly since *Sottomayor v De Barros (No. 1)* and has not previously been questioned. Nor has it previously been suggested that this principle might have wider "ramifications" as suggested by the judge. Indeed, with all due respect to the judge, there is nothing in any of the relevant authorities which supports his view that the principle extends to the "ramifications of invalidity". The principle is confined to the simple question of the formal validity (or invalidity) of the marriage and goes no further.

73. I can see no warrant for extending this principle to include the remedy or relief available under the foreign law if proceedings in respect of the ceremony were taking place in that country. As submitted on behalf of the husband, there is a fundamental distinction between the law governing the formation of marriages and the law governing the dissolution and annulment of marriages. The remedies or relief which might be available under the latter are distinct from the former. As was submitted, this is "an important conceptual and juridical distinction".

74. There is, in particular, no warrant for limiting the English court's powers to grant a decree and, consequentially, relief under the MCA 1973 and/or under the FLA 1996 by reference to the relief which would, or would not, be available in the event of proceedings taking place in the country in which the ceremony of marriage was conducted. In my view, there is no justification for depriving a party of a remedy available under English law simply because there would be no remedy available under the foreign law in the event of proceedings having taken place in that country. The remedies available are a matter and solely a matter of English law.

75. Equally, the remedies which might be available under the foreign law are not relevant to the issue of formal validity. I entirely agree with what is said in *Dicey*, the 1st Supplement, at [19-073], as quoted above. The introduction of "the notion of 'ramifications'" extending beyond the validity of the ceremony "would create great uncertainty". For example, how would the judge's approach apply if, as submitted on behalf of the husband, there was a remedy available under the foreign law but which was not available under English law? How could that be presumptively dispositive? As set out in Dicey, at 4-011, "a remedy which is discretionary according to English law cannot be demanded as of right in an English court merely because this is possible according to the *lex causae*".

76. Further, the judge's approach adds another layer of complexity. Certainly, if this was required as a matter of principle, it could not be avoided. But, when considering whether the law should be extended as the judge proposed, it is relevant to consider whether it would achieve more or less clarity and certainty. In my view, again as suggested in *Dicey,* it would introduce less clarity and certainty. The extent of the relevant "ramifications" is not clear. Additionally, the complexity and cost inherent in enquiring into the remedies available under foreign law were referred to in the submissions. It would require expert evidence. In the present case, there was a single joint expert who was clearly well qualified to give relevant evidence but, nevertheless, three reports were required before the judge had the material which he felt he needed.

77. In my view, the position is as set out in *Burns v Burns* and *Asaad v Kurter*. It is for the English court to determine what remedy is available and this, inevitably, requires the English court to determine, if the marriage is invalid under the foreign law, whether, by reference to English law concepts, the marriage is void, voidable or a non-qualifying ceremony.

78. In the present case, the judge determined, at [81], by application of what I would call the conventional approach, that "the closest English law concept to the Ukrainian legal treatment of this ceremony is a void marriage". If he had stopped there, as in my view he should have, his conclusion would have been unimpeachable.

79. The combined effect of the above is: (i) the marriage in this case was a void marriage; and (ii) the court had jurisdiction to make a transfer of tenancy order under paragraph 3 of Schedule 7.

Conclusion

80. In conclusion, for the reasons set out above, in my view the husband's appeal must be dismissed. The Recorder had jurisdiction to make a transfer of tenancy order pursuant to the provisions of paragraph 3 of Schedule 7. As referred to above, the merits of that order are not open to challenge. Further, the time for the enforcement of that order has long since passed. However, I would propose that we grant a further period of 6 weeks from the date of our order to enable the arrangements for the transfer to be effected.

Lord Justice Holroyde:

81. I agree.

Sir Andrew McFarlane, President of the Family Division:

82. I also agree.