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K v A

[2014] EWHC 3850 (Fam)

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Case No: OX13D00310
Neutral Citation Number: [2014] EWHC 3850 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2014

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

K	**Applicant**
- and -	
A	**Respondent**

- -
- -

Edward Kirkwood (instructed by **Churchers Bolitho Way**) for the **Petitioner**

The Respondent in person but not represented at the hearing

Hearing dates: 24th October 2014

- -

Judgment

Mrs Justice Roberts :

1. This is a preliminary issue hearing which arises in the context of ongoing divorce proceedings between a petitioner wife and a respondent husband. In circumstances which I shall explain, the issue which I have to resolve is whether the purported marriage between the parties celebrated in Pakistan in 2005 should be recognised in this jurisdiction as a valid and subsisting marriage which would entitle the petitioner to proceed with her current petition seeking its dissolution, and her related application for various financial remedy orders flowing therefrom.

2. In terms of the jurisdictional basis for the determination which I am being asked to make, whilst not framed as such in terms of a formal application, the relief sought by the

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petitioner is a declaration pursuant to section 55(1)(a) and (b) of the Family Law Act 1986 to the effect that the marriage was at its inception a valid marriage and that it subsisted as such on 18 March 2013, being the date upon which her current petition was issued.

3. The matter comes before the court by means of a slightly unusual route.

4. The parties are parents to two children, who are now respectively aged 7 and 4 years old. Prior to the demise of their relationship, the family home was in Oxford, which is where each of the parties continues to live in separate households. The petitioner and the respondent share the care of the two children pursuant to an order made in the Oxford County Court by His Honour Judge Hughes in August 2013. That order was made in the context of long-running and protracted proceedings brought under the Children Act 1989. One of the issues which surfaced during the course of those proceedings was the petitioner's application for permission to take the two children to Pakistan for the purposes of a visit to family members living in that country. In the context of their removal from the jurisdiction of England and Wales, the court was invited to consider the protection available to the respondent father in securing their return in the event that it might have proved necessary to engage the co-operation of the Pakistani courts.

5. For these purposes, the court directed that a single joint expert should be appointed to prepare a report dealing with the respondent's ability to recover the children from Pakistan in the event of the petitioner's unwillingness to return them at the conclusion of any period in respect of which the English court might grant her limited permission to remove them. By this stage of the proceedings, the children were represented by a Guardian and it was she who had carriage of the instructions which were delivered to the single joint expert, Professor Martin Lau, a barrister and Professor in South Asian Law at the Law Department of the School of Oriental and African Studies ('SOAS') at the University of London.

6. To set the issue in its proper context, I need at this point to say something about the parties. The petitioner is a Sunni Muslim, whereas the respondent is a member of the Ahmahdi faith. At the time of the celebration of their marriage in Lahore on 21 September 2005, both parties were resident and, it appears, domiciled in Pakistan. The petitioner was living with her parents in Lahore and the husband had also provided a residential address in that city where he was working as a businessman.

7. The Ahmahdi Muslim community is a dynamic and fast growing international movement within Islam. Founded in 1889, it spans over two hundred countries with many millions of members. Although Ahmahdis share many common beliefs with mainstream Sunni Muslims, there are a number of doctrinal divergencies between them. For the purposes of this judgment, it is not necessary for me to set them out here. The Ahmahdi community in

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Pakistan (of whom there are some 3 million) was formerly regarded as Muslim until a change in local domestic law in 1974. From that date onwards, Pakistan's legislative body adopted a law declaring Ahmahdis to be non-Muslims. They were no longer entitled to call themselves Muslim without attracting criminal sanctions, or to profess the Islamic creed publicly, or to call their places of worship mosques. Of particular significance for these purposes is the fact that they cannot use standard procedures under Muslim law to marry and, in particular, cannot marry in Muslim mosques. Of fundamental significance to the issue before me is the fact that under Pakistani law, there is doubt as to whether a marriage between a Sunni Muslim and a non-Muslim would be regarded as legally valid.

8. The implications of a Nikah marriage between two members of the Ahmahdi community in Pakistan were considered at some length by Parker J in *R v M* [2011] EWHC 2132 (Fam). The issue for the court in that case was whether, under the rules of private international law, the court should or must recognise as effecting a valid marriage a wedding ceremony celebrated in Islamabad, Pakistan in 2007. In declaring itself satisfied that the marriage in that case had been informally but, importantly, recognised for all purposes in the Pakistani State and was thus entitled to formal recognition in this jurisdiction, Parker J set out at some length the effect of the expert evidence which she heard from Professor Menski, Professor of Law at SOAS and from Dr Ayaz OBE, chair of the English Ahmahdi Association.

9. In that case, it was accepted that there was no issue with regard to form and capacity. The respondent's case in *R v M* had been that the marriage was not valid in either Pakistan or England unless and until it had been registered. Without such registration, on his case, it had effect only at a religious level within the Ahmahdi community.

10. Disposing of that argument and highlighting the issues which can arise in this context, Parker J said this :

> '17. I deal, firstly, with the assertion that it was necessary to register this marriage, or possible to register it, in England. So far as English law is concerned, there is no registration procedure in respect of a foreign marriage. If a domestic marriage is not recognised in this jurisdiction, then these parties must, if they wish to have a validly recognised marriage, undergo a civil or religious ceremony in this country which takes place in accordance with the Marriage Acts. There are indeed some marriages regarded as binding at a cultural and religious level in this jurisdiction which this jurisdiction does not recognise, in particular, religious marriages which take place in the Muslim community, because a Nikah marriage here is, as indeed are Hindu and other marriages, not recognised unless it takes place in a venue which is registered. The effect of non-recognition is graphically illustrated by the decision of Sir Christopher Sumner in *AAA v ASH* [2009] EWHC 636 (Fam). The consequences of non-recognition are very serious for the parties.

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Children are illegitimate, which is a matter of some consequence because of the provisions for acquisition of parental responsibility by a father. There is no right to divorce unless the marriage is recognised here; thus these proceedings. If there is no divorce in these proceedings, there is no consequential right to claim any form of financial provision pursuant to the Matrimonial Causes Act 1973, and any children can only be supported pursuant to Schedule 1 of the Children Act 1989. *AAA v ASH* concerned a father whose child had been removed to the Netherlands. He had registered the child's birth in England as a married father relying on a Nikah certificate, there being no necessity for the mother to consent to this. The question was: had this birth been validly registered by the father as a married father, as opposed to pursuant to section 4 of the Children Act 1989, as amended, as an unmarried father in English law, which requires the mother's agreement to register. Sir Christopher Sumner held that the birth had been invalidly registered and that the father did not have parental responsibility.'

11. Having referred to the well known rule of private international law explained by Dicey, Morris & Collins in the (then) current edition the Conflicts Of Laws which stipulates that a marriage will be considered to be formally valid when (and only when) certain conditions as to the form of celebration is complied with (in *R v M*, 'if the marriage is celebrated in accordance with the form required or (semble) recognised as sufficient by the law of the country where the marriage was celebrated'), Parker J went on to consider the expert evidence she had received from Professor Menski. At paragraph 21, she records that evidence under these eight points :-

'(1) Since Ahmahdis were declared non-Muslim in 1974 they cannot use standard procedures under Muslim law to marry and, in particular, cannot marry in Muslim mosques. They are not allowed to describe their own places of worship as mosques.

(2) In the personal law of Pakistan the religious ceremony creates the civil status, providing that it is based on a valid oral contract of marriage. There is no requirement, as in England, for a marriage to be celebrated in a registered venue, whether a place of worship or not, and for the registration to take place at the time of the ceremony.

(3) There are a number of religious minorities in Pakistan who marry pursuant to their religious customs, for example, Hindus, Jains, Sikhs, Christians and Buddhists. In addition, tribal groups have their own ceremonies. These marriages are treated as valid in Pakistan.

(4) Sexual relations outside marriage constitute a criminal offence in Pakistan.

(5) Muslims are required to register their marriages pursuant to the Muslim Family Laws Ordinance 1961. This "extends to the whole of Pakistan, and applies to all Muslim citizens of Pakistan, wherever they may be". Professor Menski says that this wording is absolutely

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clear and does not permit extension to Ahmahdis as non-Muslims, nor indeed to Hindus, Christians and other minorities. In 1984 Ahmahdis were prohibited through changes in the Pakistani criminal law from using the provisions of the Muslim Family Laws Ordinance.

(6) Section 5 of the Muslim Family Laws Ordinance 1961 provides that "every marriage solemnised under Muslim Law shall be registered in accordance with the provisions of this Ordinance". Registration takes place through the Union Council in Pakistan, which relates, Professor Menski tells me, and I accept, only to Muslims. There are penalties for non-registration. Professor Menski relies on the case of *Allah Rakha v the Federation of Pakistan*, Federal Shariat Court PLD 2000 FSC1 in which it was argued that the prescribing of a penalty for non-registration was un-Islmaic, and that the only requirement for the performance of Nikah in Islam is the presence of two witnesses. The Court said that the purpose of the legislation was to "regulate the procedure of Nikah in a Muslim country and to keep records of marriages which in turn entails the paternity of children". The word 'shall' does not mean 'must' and the requirement to register a marriage, which is an administrative provision, does not affect the underlying law of Pakistan, which is that it is the contract and the ceremony of marriage which creates the status of husband and wife. Professor's Menski's view, hotly disputed by the respondent and Dr Ayaz, is that this also applies to non-Muslim marriages. He says that since 1984, when the Ahmahdi community was prevented from registering marriages with the Union Council, that community has "had to create a customary marriage law", which he describes as an "Ahmahdi personal law". It is his view that although none of this is official or officially recognised in Pakistan, the Rabwah authority has come to be treated as equivalent to the Union Council. He stresses, however, that this does not affect the validity of the marriage, but only its proof and the way in which the marriage can come to be relied upon when dealing with officialdom in Pakistan.

(7) Authenticity of the Rabwah marriage documents is not in dispute. Professor Menski says that for a "normal" Sunni Hanali Muslim couple to have a Nikah Nami, i.e. a Nikah certificate, would be settled proof of marriage.

(8) It is Professor Menski's view that, providing that there is a valid contract of marriage, then this marriage is valid for all purposes. It is valid in the eyes of the parties, their families and their community. It was publicly announced on 9 November 2007 and would not have been consummated had it not been regarded as valid. To that the husband, of course, says that the fact that it is regarded as valid in his community does not mean that it is regarded as valid in Pakistan as a whole.'

12. Despite the expert's evidence in *R v M* to the effect that there were no court authorities either way as to the status of Ahmahdi non-registered marriages in Pakistan so far as he was

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aware, there was, as the judge found, no evidence that the Pakistani community in general treats Ahmahdi spouses as anything other than legally married and their children as legitimate. Professor Menski's evidence, accepted by the court, was to the effect that if there were to be a dispute which involved the marital status of parties married in an Ahmahdi customary ceremony, the marriage would be treated as valid upon evidence of the certificate being produced in order to support the existence of the marriage. There was also a strong presumption of marriage based upon cohabitation and reputation under Pakistani law and evidence as to marital status might be accepted by the courts irrespective of any formal registration or documentation. In reaching her conclusion, Parker J found that she was dealing with a marriage which was informally but, importantly, recognised for all purposes in the Pakistani State because officials would recognise the marriage based upon the evidence of the certificate in the ways outlined by Professor Menski. At para 31, her Ladyship said this :

> 'I do not accept that Ahmahdis, even though they are declared as non-Muslims, are in fact in any different position from adherents to other religious groups who also cannot register their marriages in Pakistan. It is quite clear to me, therefore, that this marriage should and must be recognised as valid in this jurisdiction.'

13. That case must, of course, be distinguished from the case with which I am dealing insofar as these parties entered into an inter-faith marriage which, under Islamic law as applied in Pakistan, would be treated as invalid.

14. Before, I turn to deal with the expert evidence which was before me, I need to say something more about the way in which the issue emerged from the contested Children Act proceedings which were ongoing in the Oxford County Court.

15. Professor Lau, the single joint expert, produced his first report on 28 January 2014. As a preface to that report, he set out his academic and professional qualifications. His current teaching and research position at SOAS involves intensive research on modern Pakistani and Indian law. He also maintains close associations and links to South Asian legal professionals, presents papers at international conferences and regularly visits South Asia for research and keeping abreast with current legal developments. He has regularly appeared as an expert witness in relation to both Indian and Pakistani law before the English courts. His report is expressed to be compliant with the CPR 2009 Part 35 and Practice Direction 25A FPR 2010.

16. Pakistan is not a member of the 1980 Hague Child Abduction Convention. Having considered aspects of the UK-Pakistan Judicial Protocol set up in 2003 and its application in the Pakistan courts, Professor Lau went on to consider local Pakistani law as it applies to the custody of minor children. At paragraph 44 of his first report, he considered the impact of the

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legal status of the marriage between these parents. At paragraph 46, he said this :

> 'Islamic law, as applied in Pakistan, does not allow a Muslim woman to marry someone who is not a Muslim. As a matter of Islamic law, as applied in Pakistan, any such marriage would be regarded as void ab initio. Reference can be made to Fyzee, Asaf, "Outlines of Muhammadan Law", fourth edition, OUP 1974 stating that *"The marriage of a Muslim woman with a non-Muslim is declared by the Koran to be batil, void and not merely irregular"*.[p.99]'

17. Whilst he had not been able to identify any case in point in his first report, Professor Lau nevertheless highlighted the risk (and he put it at no more than a risk) that, as a matter of Pakistani law, the respondent father's position in the Pakistan courts might be vulnerable if it were determined that his sons were not the legitimate offspring of a valid marriage. He said this :

> '48. I hasten to add that in the absence of any judicial pronouncement on the validity of a marriage of a Muslim woman to an Ahmadi *[sic]* husband the above is not a firm conclusion but is only raised as a possible outcome.
>
> 49. I think that given the very difficult human rights' situation of Ahmadis in Pakistan, there could also be pressure on a Pakistan court to refuse to order the return of the children to the custody of the Ahmadi father. However, given that the Supreme Court of Pakistan is committed to keeping an active interest in the implementation of the Protocol, I would think that at the level of the Supreme Court the risk of religious prejudice having an impact on the outcome of any application by the father is greatly reduced. However, applying Islamic law to the question of the validity of the marriage is not an exercise in prejudice but in law: if the marriage is held to be invalid the son will be regarded as illegitimate and as a result the mother would be declared the sole guardian of her child. In these circumstances, even the Pakistani Supreme Court could refuse to order the return of the children to the UK.'

18. No doubt as a result of that indication, the English court declined to grant the permission sought by the mother to remove the boys to Pakistan, although it may well be that she declined to proceed with that application.

19. The issue as to the potential invalidity of the marriage having been raised in this context, there was a further directions hearing in the Oxford County Court on 18 March 2014. By this stage there were before the court not only the petition seeking formal dissolution of the marriage, but also a claim for financial remedy orders flowing from such dissolution. The preliminary issue was duly transferred to the Family Division to be dealt with by a High Court Judge and, on 10 June 2014, at a further directions hearing in the Central Family Court,

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District Judge Aitken gave both parties permission to rely on both the original and a subsequent addendum report prepared by Professor Lau on 11 March 2014. Both parties were required to file evidence as to the circumstances of their marriage in Pakistan and provision was made for service of the court bundle on the Queen's Proctor in order that he might give consideration as to whether or not he wished to intervene in these proceedings.

Representation and the evidence before me for the purposes of the hearing on 24 October 2014

20. When the matter came before me on 24 October 2014 for the final determination of the preliminary issue, the petitioner was represented by counsel, Mr Edward Kirkwood. The respondent has acted in person throughout these proceedings. He had filed with the court a very short written statement relating to the circumstances of his marriage in Lahore in September 2005, together with a slightly longer letter to the court. A copy of that letter was made available to the petitioner and her legal team.

21. In that letter (which is dated 12 October 2014), the respondent joined issue with a number of factual points flowing from the petitioner's narrative account of their wedding celebrations (none of which take the matter as to the essential validity of the marriage very much further). He also made it plain in his letter that he had nothing else he felt he could add or contribute to the hearing, that he had no objections to the hearing going ahead in his absence, nor had he any further questions to put to the joint expert, Professor Lau. He asked the court to excuse his presence. I pause at this point to say that, whilst dated 12 October 2014, that letter did not in fact reach me or the court until later in the morning of the hearing and its production was only secured by the good offices of the court staff who had tracked it down to the court offices in Oxford whence it had been sent. Contact was made with the respondent by telephone and he indicated that he was unable to attend court.

22. I had before me in the court bundle which had been prepared for these purposes copies of both parties' Forms E setting out their financial positions. The petitioner is a 38 year old student and mother. She is training to be a teacher and lives in rented accommodation in Oxford and owns no property apart from a few items of personal jewellery. She is dependent upon state benefits, including income support, and receives no remuneration from any form of paid employment. The respondent is a 47 year old 'business consultant'. He lives with his mother in rented accommodation in Oxford. According to his financial disclosure, he has no assets, debts of some £36,000, and an income of just over £10,000 per annum.

23. Neither side sought an adjournment of the hearing, notwithstanding the absence of the respondent. It seemed to me in these circumstances that there was little to be gained from adjourning the hearing in order to require the attendance of the respondent. Mr Kirkwood, on

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behalf of the petitioner, explained to me that his client was continuing to incur legal costs which she could ill afford. Neither party had required the attendance of Professor Lau to whom each had had ample opportunity to put additional questions.

24. As to the position of the Queen's Proctor, I was taken to correspondence within the bundle from the Treasury Solicitor's Department which confirmed that matters concerning declaratory relief in relation to the petitioner's marital status was not a matter for the Queen's Proctor and, in this instance, the Attorney General declined to intervene in these proceedings.

25. Thus, Mr Kirkwood was left to hold the baton in terms of the legal arguments to be advanced on behalf of his client, the petitioner. Before me was his written skeleton argument, as well as a small bundle of authorities. I should, at this point, record my gratitude to him for the courtesy which he extended to the court. In the absence of any neutral intervention from the Queen's Proctor, the Attorney General, or an *amicus curiae*, he nevertheless sought to develop what might be regarded as appropriate counter-arguments to his principal submissions on the law and was entirely open in terms of the proper limits of the exceptions to any particular rule of law or principle on which he was relying. Throughout, he had the interests of his client at the forefront of his submissions but his assistance to the court on various questions which I raised during the course of argument was extremely helpful.

26. As Mr Kirkwood concedes, supported by the researches of Professor Lau, this is an area where there does not appear to be any settled authority as a matter of either English or Pakistani law. Professor Lau was specifically asked to comment upon the view he had earlier expressed in relation to the potential invalidity of a marriage between an Ahmahdi father and a Sunni Muslim mother in the light of Parker J's judgment in *R v M*. As he points out in his addendum report, that case does not address the question of an inter-faith marriage between an Ahmahdi husband and a Sunni Muslim wife under the laws of Pakistan. Rather, it centred on a different issue, namely whether the fact that an Ahmahdi could not register his marriage under the provisions of the Muslim Family Laws Ordinance 1961 (because he is not by Pakistani law regarded as a Muslim) would render the marriage legally invalid, albeit it that it was regarded as religiously valid by the Ahmahdi community. As Professor Lau also points out, *R v M* does not state the precise rule of Pakistani law which allows Ahmahdis to enter into an Ahmahdi marriage which is regarded as legally valid save for the express finding of Parker J that there was a strong evidential presumption of a marriage based upon cohabitation and reputation.

27. In his addendum report, Professor Lau records that the legal basis for the validity of such a marriage (ie. between two members of the Ahmahdi community) can be found in the Punjab Laws Act 1872, a statute to which reference was not made in the judgment in *R v M*.

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Section 5 of that Act provides as follows :-

> '5. *Decisions in certain cases to be according to Native law*. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be –
>
> (a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished and has not been declared void by any competent authority;
>
> (b) the Muhammadan law, in cases where the parties are Muhammadams, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is referred to above.'

28. Section 5(a) of the Punjab Laws Act 1872 allows Ahmahdis to enter into a marriage as a matter of 'custom' in accordance with their own community practices. However, according to Professor Lau, in the case of Muslims, the reference to 'custom' in section 5(b) of the 1872 Act has been abolished by subsequent legislative enactment, namely the Muslim Personal Law (Shariat) Application Act 1937 and its successors, the most recent of which is the West Pakistan Muslim Personal Law (Shariat) Application Act 1962. Section 2 of the 1962 Act provides in terms that 'notwithstanding any custom or usage, in all questions regarding …. marriage,….. the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims'. He tells me in his expert report that the phrase *'subject to the provisions of any enactment for the time being in force'* could be read as making the 1962 Act subject to section 5 of the Punjab Laws Act 1872, thereby reintroducing custom as a source of family law for Muslims. However, the phrase has been held to be contrary (repugnant) to the injunctions of Islam by the Supreme Court in a case referred to as *Federation of Pakistan v Muhammad Ishaq Khan* PLD 1983 SC 273. As a consequence, in any question relating to the validity of a marriage, where the parties are both Muslims, then Muslim personal law will apply.

29. This is an inter-faith marriage. From the perspective of Ahmahdi 'custom', according to Professor Lau, the marriage of an Ahmahdi husband and a Sunni Muslim wife is likely to be regarded as valid. This conclusion results from an application of section 5 of the Punjab Laws Act 1872 which entitles members of that community to have their marriages considered as legally valid. However, as he points out in paragraph 14 of his addendum report, from the perspective of Islamic law as applied in Pakistan, the marriage is invalid. There is, he tells me,

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and I accept, a large body of case law to the effect that, under Pakistani law, a Muslim woman cannot marry anyone but a Muslim and that a marriage to a non-Muslim would be regarded as invalid and void ab initio. He points to a single decision which suggests that a marriage between a Muslim woman and a Christian man might be regarded as valid, albeit it that (i) the observation was mere obiter dicta and (ii) it involved a specific conversion by the Christian husband to the Muslim faith in advance of the celebration of the marriage : *Zubair Hussain Siddiqui vShakeela Khanum* 2006 CLC 1099. This authority seems to me to be of little assistance since the court specifically referred to the need to test properly the evidence relating to conversion. (*'I would like to clarify that if a person claims himself to be a Muslim but believes in something which is against the basic articles of faith such as, in the case of Ahmedis/Qadianis, he shall be treated as a non-Muslim'*; and later, *'Secondly, a Muslim female marrying a Christian shall not become non-Muslim merely by fact of such marriage though it would be a sinful act, and shall not be deprived of his[sic] right of inheritance from her Muslim parents'.)*

30. In this case, the evidence from the parties (which I accept) is that when they formed a relationship in October 2004, the petitioner was studying as an overseas student for a Masters degree at the University of London. She was born in England and holds a British passport as evidence of her citizenship. Each of her parents is Sunni Muslim and she was brought up from early childhood to believe in the tenets of that faith. She tells me in her statement that she continues to practise her faith and believes in the five pillars of Islam. She prays regularly to the prophet, Mohammed. In his written statement, the respondent states that she had told him that she would convert to the Ahmahdi faith prior to the celebration of the marriage. He was reluctant to encourage such a conversion without a clear understanding that she had espoused its doctrines and beliefs. There was no such conversion and I am satisfied that, at the time of the marriage, the petitioner was an active adherent to the Sunni Muslim faith. There appears to be an issue between these parents in relation to their children's religious upbringing. It is the respondent's case that the children were always going to be (and have, in fact, been) brought up as Ahmahdis. Each of the boys holds a Pakistani passport and official identity card, issued to them on the basis that they are Ahmahdis. In her written evidence, the petitioner tells me that the original intention was that they would be brought up as Sunni Muslims, albeit that they should be free to choose their own religious beliefs once of an age and understanding to do so. For present purposes, I accept that the children are presently following their father's religious beliefs and regularly attend the local Ahmahdi mosque for prayers.

31. At the time of the Nikah ceremony on 21 September 2005, the petitioner was living in the home of her parents in Lahore which is where the ceremony took place. The respondent was living with his mother in Islamabad. The petitioner was aware when she married the

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respondent that he held to a different faith. An Ahmahdi maulvi (a religious scholar) conducted the marriage ceremony and celebrations continued over the course of three days. Family members on both sides attended. The petitioner's brother and uncle acted as her witnesses whilst the respondent's brother and a family friend acted as his.

32. Immediately following the Nikah ceremony, this couple lived together as man and wife and the marriage was duly consummated. The respondent paid a dowry to the petitioner as a mark of his respect for the marriage contract which was subsequently registered with the Ahmahdi mosque (albeit after a delay of over two years, the reason for which is not apparent).

33. The parties remained in Pakistan for the first four years of their lives together. In September 2009, the petitioner moved to England with their elder son (who was then 2 years old) in order to study at university. The following month, she was joined by the respondent and, for the next six or seven months, they lived in London. The respondent returned to Pakistan in June 2010 and it was at that point that the relationship between them appears to have broken down, notwithstanding the fact that the petitioner was by then pregnant with their younger son.

34. It is the petitioner's case in these proceedings that this marriage should be recognised as valid and in accordance with Ahmahdi custom. She points to the fact that all local formalities were complied with and it was duly registered at the Ahmahdi mosque. She tells me that no objections have ever been raised by any of the family members or friends who attended the Nikah ceremony and, as far as she is aware, all the legal requirements were complied with. It is only in the context of the ongoing Children Act proceedings in this jurisdiction that any questions as to the validity of the marriage under English law have been raised.

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35. In terms of the respondent's stance, the contents of the letter which he wrote to the court on 12 October 2014 suggest that he takes a position of neutrality in relation to these issues. Whether or not he has adopted a different position in previous statements put before the court, I know not, but I was not told of any contrary assertions he has made. He did not seek to defend the divorce petition when it was served on him, and complied with his obligations in terms of financial disclosure when the petitioner launched her claims for financial remedy orders. In these circumstances, and against the background of all the evidence which I have read, it seems to me that I can properly proceed from the basis that, until receipt of Professor Lau's first report in January 2014, each of the petitioner and the respondent believed themselves to be validly married to one another in accordance with Ahmahdi custom and neither had any reason to anticipate that their marriage, as such, would not be recognised as a valid marriage either under the laws of England and Wales or under Pakistani law.

36. So where does this leave me ?

37. According to Professor Lau, Pakistani law does not provide any clear answer to the way this apparent conflict of law could, or should, be resolved. The Special Marriage Act 1872, which was referred to in the case of *R v M*, makes provision for civil or secular marriage but it has no application to the present case because it does not apply to Hindus or Muslims absent a clear renunciation of either of those particular faiths. Professor Lau reminds me that, in the case of a Muslim, a renunciation of Islam would constitute an offence of apostasy. As I have said, all the evidence points to the fact that the petitioner was a Sunni Muslim before she went through the ceremony of marriage with the respondent and has remained a practising Muslim ever since.

38. Whilst India reformed its family law with the enactment of the Special Marriage Act 1954, which allows for purely civil marriages without requiring parties to renounce their religious beliefs, no such reform has occurred in Pakistan. Thus, whilst inter-faith marriages in India are now possible despite any rules of personal law, there is no equivalent statutory provision under Pakistani law. Similarly, there is no clear answer to be extracted from the Muslim Personal Law (Shariat) Application Act 1962 because that Act only applies to cases where the 'husband' and 'wife' are both Muslims.

39. Professor Lau's most recent report has considered in some detail older Pakistani case law where the different systems of personal law were considered to be on an equal footing with no particular preference given to Muslim personal law. However, as he explains, more recent case law is predicated more firmly upon Islamic law : see, for example, *Mrs C M Samuel v (1) Mr C Samuel and (2) the State* PLD 1967 SC 334. That case concerned a charge of bigamy. The couple married under Christian law. Subsequently the husband (but not the wife)

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converted to Islam and married another woman as was permitted under Islamic law, but not Christian law. The Supreme Court in Pakistan held that the offence of bigamy had not been committed because the second (Muslim) marriage was not void. The case might therefore be considered to be an example of a clear preference for the application of Islamic law, despite the fact that the Christian wife was thereby left in a polygamous marriage, permitted under Islamic law but not under Christian law. The most recent case identified by Professor Lau concerns a decision of the Lahore High Court in 2012, *Arshad Peter v Shumaila* PLD 2012 Lahore 430. There the couple was married under Christian law. The husband converted to Islam and later divorced his wife under Islamic law. The Lahore High Court did not hesitate to recognise the validity of the Islamic divorce.

40. These cases all concern conflicts of personal law which have come about as a result of subsequent religious conversions after the celebration of the marriage. In the present case, there has been no such conversion. The potential conflict of personal laws as between this petitioner and this respondent was present as a factor at the point of time when the marriage was celebrated. As Professor Lau's report makes clear, older case law is unequivocal in holding that, under Islamic law, a Muslim woman cannot marry a non-Muslim man. By way of conclusion, the joint expert says this :-

> '24. On balance, I think that in the current legal culture of Pakistan, which expresses in cases of conflict a clear preference of Islamic law over other systems of personal law, it is likely that a Pakistani court would consider a marriage of an Ahmadi [sic] husband and a Muslim woman to be invalid and indeed void ab initio.'
>
> That view is nevertheless expressed from the foot of an equally candid acceptance by Professor Lau that there is no settled or clear answer to what view a Pakistani court would take.

Consideration of the position under English law

41. As is clear from the foregoing, the issue as to whether or not this marriage was valid under either English or Pakistani law does not appear to turn on whether the appropriate formalities were complied with locally but rather whether the parties had the status or capacity to contract a valid marriage.

42. Nevertheless, form is an important component in the equation. The starting point in terms of the recognition of foreign marriages as a matter of English law is set out in *Dicey,*

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Morris & Collins on the Conflict of Laws, 15th Edition. Rule 73 states as follows :-

> "1. Formal validity
>
> A marriage is formally valid when (and only when) any one of the following conditions as to the form of celebration is complied with (that is to say):
>
> (i) If the marriage is celebrated in accordance with the form required or (semble) recognised as sufficient by the law of the country where the marriage was celebrated; …".

43. As to the distinction between capacity to marry and form, Dicey states [para 17-004] :

> 'A marriage celebrated in the mode, or according to the rights or ceremonies, required by the law of the country where the marriage takes place is (as far as formal requisites go) valid'; and that
>
> 'In general the law of a country where a marriage is formalised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted.'

44. This proposition is confirmed by the well-known case of *Berthiaume v Dastous* [1930] AC 79, where the Privy Council held, at page 83:

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

45. It seems reasonably clear from the judgment of Parker J in *R v M* that, based upon the evidence of the expert in that case, Professor Menski (whose evidence was accepted by the court), barring issues of capacity in this case, there was no defect in terms of the *form* of the Ahmahdi ceremony in which the petitioner and the respondent participated. Given that, in *R v M*, both parties were Ahmahdis, Parker J was entirely satisfied that their marriage should be recognised as valid for all purposes under the laws of England and Wales.

46. In terms of an analysis of the different underlying factual matrix in this case, Mr Kirkwood poses three questions which require separate consideration :-

> i. whether, but for the apparent prohibition identified by Professor Lau, the ceremony complied with the local formalities such as to create a valid contract of marriage ?

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ii. the impact of the conflict of laws identified by Professor Lau; and

iii. whether or not the prohibition under Islamic Shariat law on an Ahmahdi marrying a Sunni Muslim in Pakistan should be recognised in this jurisdiction on the grounds that to do so would amount to discrimination which is of a degree to be considered unconscionable in the eyes of English law ?

i. Local formalities

The Nikah (Marriage Form)

47. I have within the papers a copy of the completed 'Nikah' marriage form. It is a formal document which has been completed in all material respects. The petitioner's father had provided all the information required about the 'bride' as her legal 'Waliyy' (or guardian) and this section of the form has been formally notarised and date stamped. There is a formal record of the Mahr (or financial gifts offered by the bridegroom or his family to the bride to signify her financial independence from her family on marriage) which was received, being 'Rs 25,00,000 (twenty-five lacs)' and jewellery. This was the petitioner's second marriage and the marriage form sets out the formal details of her divorce from her former husband. This information, too, has been formally completed (and dated) on the marriage form. The bride's agreement to the marriage contract and her acknowledgment of receipt of the Mahr is formally recorded by the petitioner's signature which was witnessed by two independent third parties.

48. In a separate section of the form, there appears a formal verification by the Ameer (or President) of the Jama'At (the religious council) of certain facts and matters. Section A (which makes provision for certification that the bride was born an Ahmadhi) has been deleted. Section B (confirming that her father was her legal Waliyy according to the law) has been completed. Section C confirms that the bride has signed the form of her own free will. Section D records the fact that the 'divorce' documentation has been verified and is attached to the Nikah marriage form. The formal signature of the Ameer appears at the foot of that section of the form with the date and an official stamp confirming his status as the presiding Ameer of the religious council in Lahore.

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49. Whilst I do not need to set them out in detail, there are similar sections in the marriage form which have been completed by the bridegroom (ie. the respondent) which are all formally stamped and dated. His verification as an Ahmahdi has been formally authenticated by an Ameer of the religious council in Islamabad. All details relating to the formal announcement of the Nikah have been provided including the place of the ceremony, the date, the identity of the official performing the Nikah (who has also signed and dated the form) and the two formal witnesses to its celebration.

50. It is equally clear from the official stamp at the foot of the document that the Nikah marriage was subsequently registered in compliance with local requirements. The registration has been formally signed, dated and allocated a registration number by the official charged with these functions. As I have said, that registration did not take place until some time after the Nikah ceremony in August 2007.

51. In terms of local formalities, and following the decision of Parker J in *R v M*, it seems that this document would fall to be considered as settled proof of marriage for all purposes under Pakistani law. Professor Lau says nothing in his expert evidence about the subsequent delay in registering the certificate at the local Ahmahdi mosque or any contra-indicator such delay might present in terms of recognition of compliance with all local formalities. There is no challenge to the authenticity of the certificate which bears all the appropriate official stamps, signatures and dates, including that of formal registration (No. 309) on 27 August 2007.

52. The marriage was duly consummated following the ceremony and the parties set up a family home together where they raised together at least one of their children (the second having been born at a time when they were in the process of separating).

53. Further, there is nothing in the evidence before me to suggest that the various relatives and friends from both sides who attended the ceremony regarded the marriage as anything other than a binding contract of marriage between the petitioner and the respondent. It appears to have been acknowledged as such by family, friends and those within the wider local community. Certainly, until the breakdown of the marriage and the institution of the Children Act proceedings in this jurisdiction, there was nothing to suggest that either of the parties themselves had cause to regard themselves as anything other than legally married to one another.

54. In the absence of any evidence to the contrary, and in the light of *R v M*, I am satisfied that the ceremony of marriage in which these parties participated satisfied all the requirements of local formalities and, barring issues of status and personal capacity, was prima facie one which would otherwise have been recognised within the Ahmahdi

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community under local customary law.

ii. Conflict of laws

55. In the light of Professor Lau's evidence, this is the more difficult area.

56. It seems that, from the perspective of the respondent, there was no restriction on his ability to marry whomsoever he chose. As a member of the Ahmahdi community, he was free to contract a marriage within the Ahmahdi custom and it is likely to be regarded as valid under Pakistani law. It is only when the prism is turned to focus on the position of the petitioner as a Sunni Muslim that issues arise in relation to the essential validity of the marriage under Pakistani law.

57. Mr Kirkwood reminds me, quite properly, that Professor Lau does not attempt to provide a definitive answer to the question of the validity of this marriage under Pakistani law. In his first report, he expressed the view that he could not express a firm conclusion in the absence of any judicial pronouncement on the subject (para 48). He repeats the point in his addendum report when he states, at para 16, that 'Pakistani law does not provide any clear answer to the way this apparent conflict of laws could or should be resolved'.

58. In these circumstances, submits Mr Kirkwood, and in the absence of any settled law in Pakistan as to the status of an inter-faith marriage such as this, it is only possible to speculate as to the outcome of any judicial determination in Pakistan. He argues that this court cannot conclude that the marriage between these parties would be regarded as invalid in Pakistan because such a course would involve an attempt to 'second guess' not only the approach to be adopted but also the conclusion which might be reached.

59. Whilst I accept that Professor Lau has highlighted the absence of any settled authority on the point, I have to bear in mind his tentative conclusion at para 24 of his addendum report to the effect that the current legal culture of Pakistan appears to be expressing in cases of conflict a clear preference for Islamic law over other systems of personal law. Thus, I can no more rule out a finding that this marriage was invalid than I can a finding that it was a valid and subsisting marriage according to local Ahmahdi custom.

Role of the English court in this determination

60. I bear in mind that, under English law, there is a strong presumption in favour of marriage which arises from a ceremony of marriage followed by cohabitation. In *Rayden and Jackson on Divorce and Family Matters*, 18th Ed. Para 7.12, there appears the following

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passage :-

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

61. The presumption arises out of a combination of cohabitation and reputation : see, for example, *In re Shepard, George v Thyer* [1904] Ch 456 and *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6.

62. In the much more recent case of *Asaad v Kurter* [2013] EWHC 3852 (Fam), Moylan J had to determine the validity or otherwise of a marriage ceremony which had taken place locally in Syria in circumstances where it was an accepted fact in the case that certain of the formal requirements in respect of state permission (from the Ministry of Interior) and registration had not been complied with or fulfilled. On that issue turned the question as to whether the 'wife' was entitled to a decree of divorce or a decree of nullity. Moylan J held that the defects in the formalities were fatal to the 'wife's' case that there had been a valid marriage. She had relied, amongst other grounds, on the formal presumption of marriage arising from a ceremony of marriage followed by cohabitation. Because there was compelling evidence that the requirements necessary to effect a valid marriage under Syrian law were not fulfilled, Moylan J held that any presumption which might arise was clearly rebutted in that case. He granted the 'wife' a decree of nullity as opposed to divorce. In doing so, he rejected the 'husband's' case that this was a non-marriage which was no more than a 'blessing' which had no legal significance or consequences at all.

63. The present case with which I am dealing is, of course, different. There is no suggestion from any quarter, not least from the expert instructed in the case, that there were any defects in compliance with local formalities in the 2005 Lahore marriage ceremony. On the contrary, the Nikah marriage form was fully completed and duly notarised and registered as constituting a form of marriage between these two parties notwithstanding that it was abundantly clear from the face of that document (scrutinised by two different Ameers) that this was an inter-faith marriage between an Ahmahdi bridegroom and a non-Ahmahdi bride. It seems to me that both they and the official who performed the Nikah ceremony must be taken to have known the law and the formalities which were required. Thus, in terms of the presumption of marriage which is recognised under English law, what we have in this case is both proper compliance with local formalities and an immediate consummation of the marriage followed by settled cohabitation in a lengthy relationship which has produced two children. In terms of commonly accepted 'reputation' thereafter, there was, as I have said, no challenge from any quarter (familial or otherwise) as to the fact that these two parties were properly and legally married to one another until the issue arose in within the Children Act

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proceedings which flowed from the divorce. Each plainly believed that (i) they had gone through a proper and legal ceremony of marriage, and (ii) that they remained legally married to one another at the time when divorce proceedings were issued by the petitioner. The respondent did not seek the defend the proceedings and does not now seek to say that the marriage was invalid, void or a non-marriage from its inception.

64. Moylan J's decision in *Asaad v Kurter* also raises the interesting question as to the role of the English court in determining the remedy which flows from a finding that there has been an invalid marriage contracted overseas. This was an issue which had to be grasped in that case because of the court's clear conclusion about the defects in the formalities of the purported marriage ceremony in Syria. In this context, the court in *Asaad* had to consider both sections 11 and 14 of the Matrimonial Causes Act 1973. Moylan J concluded that, for these purposes, it was for the English court to determine what remedy, if any, was available under English law to a petitioner who had failed to establish the existence of a valid marriage governed by foreign law. At para 86 of his judgment, Moylan J said this :-

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

He concluded, in para 97,

> 'In summary, in my view:
>
> (a) whether the defect makes the marriage valid or invalid is a matter to be determined by the applicable law, being in the case of the formalities of marriage the law of the place where the marriage was celebrated;
>
> (b) the English court must determine the effect of the foreign law by reference to English law concepts; if the applicable foreign law determines the effect of the defect by reference to concepts which clearly (or sufficiently) equate to the same concepts in English law then the English court is likely to apply those concepts; if the foreign law does not, then it is for the English court to decide which English law concept applies; and

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(c) in any event, it is for the English court to decide what remedy under English law, if any, is available for the reasons set out in *Burns v Burns* para 49.' ([2008] 1 FLR 813)

65. Here, the 'defect' which gives rise to the preliminary issue is not 'form' but 'capacity or status'. Mr Kirkwood directs me to *Dicey, Morris & Collins* which sets out a number of exceptions to the general proposition under Rule 73which governs formal validity (as set out earlier in this judgment). The question of inter-faith marriages is considered at para 17-008 which provides as follows :

> "In the law of a number of countries, adherents of certain religions may marry only in the form laid down by their religion …. In the conflict of laws, rules of this kind can produce a characterisation problem. In English law, these requirements would undoubtedly be classified as formalities, but in some countries concerned they would be considered an aspect of capacity …. It is hardly surprising, therefore, that their law should regard members of certain religions as being under an incapacity to marry except in the form prescribed by their church."

66. At 17-009,

> "Analagous problems can arise from the rule in some countries that parties may not marry in religious form unless both of them are members of the faith in question. If this rule is combined with that discussed in the previous paragraphs, the practical result would be to impose a ban on interfaith marriages. This is the situation in Israel, where Jews may marry only in the Jewish form, but such marriages are void if either party is not Jewish. Despite the fact that this rule precludes Jews from marrying non-Jews in Israel, English law regards it as relating to form. Thus where a non-Jewish woman resident (and presumably domiciled) in England went through a Jewish ceremony of marriage in Israel, falsely asserting that she was Jewish, the marriage was annulled by the English court for no-compliance with the formalities required by the *lex loci celebrationis*." (my emphasis)

67. A footnote to para 17-009 contains a reference to Exception 6 (to the general Rule 73). Exception 6 is set out in *Dicey, Morris & Collins* at 17E-155 (page 958) and reads as follows:

> "A marriage is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or either of the parties, is penal, discriminatory or otherwise contrary to public policy."

68. The footnote to para 17-009 to which I have referred above in the context of Exception 6 appears in the following form,

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> "A direct prohibition on marriages between persons of different religions would be regarded as discriminatory and would be denied recognition on public policy grounds."

69. As is clear from para 17-118, Exception 6 was limited by Dicey to marriages in England. However, the commentary continues,

> "As it is based on public policy, however, its scope will depend on the circumstances and, although an English court would be slow to apply English public policy to a marriage having no connection with England, the place of celebration is by no means the only relevant factor."

70. As Mr Kirkwood sets out in his detailed skeleton argument, the case law upon which Exception 6 stems dates back to the 19th century and is referred to in detail in the Court of Appeal's decision in *Sottomayor v De Barros (No 1)* (1877) 2 P.D., 81. That case concerned Portuguese nationals who were first cousins. They came to live in England and, after several years, married in a civil ceremony in London. Some seven years into the marriage, they returned to live in Portugal where they remained domiciled. Under Portuguese law, a marriage between first cousins was illegal unless authorised by papal dispensation. The petitioner sought a declaration that her marriage was null and void on the basis that she and the 'husband' were under a personal incapacity to enter into a contract of marriage as a result of the prohibition on marriages between first cousins under Portuguese law. That petition was dismissed. The Court of Appeal overturned that decision on the basis that (page 6):

> 'Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects….'.

71. When the matter was remitted to the (then) President in *Sottomayor v De Barros (No 2)* (1879) 5 P.D., 94 to determine various issues of fact which had been raised by the Queen's Proctor, he said this at pages 104 - 105:

> 'Numerous examples may be suggested of the injustice which might be caused to our own subjects if a marriage were declared invalid on the ground that it was forbidden by the law of the domicile of one of the parties. It is still law in some of the United States that a marriage between a white person and a "person of colour" is void ….. (The court then raised a number of hypotheses before continuing in this vein.) Mr Dicey, in his excellent treaty on Domicile, p. 223, answers these questions in the negative, and places these two cases under this head: "A marriage celebrated in England is not invalid on account of any incapacity of

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either parties, which though enforced by the law of his or her domicile is of a kind to which our Courts refuse recognition.

But on what principle are our Courts to refuse recognition if not on the basis of our laws ? If this guide alone be not taken, it will be free to every judge to indulge his own feelings as to what prohibitions by foreign countries on the capacity to contract a marriage are reasonable. What have we to do, or, to be more accurate, what have English tribunals to do with what may be thought in other countries on such a subject ? Reasons may exist elsewhere why coloured people and whites should not intermarry, or why first cousins should not. But what distinction can we properly draw between these cases, and why are they not both to be regarded in the same light here, namely, that as they are alike permitted by our laws we cannot recognise their prohibition by the laws of other countries as a reason why we should hold that such marriages cannot be contracted here.'

72. The President proceeded to hold the marriage as a valid one and dismissed the petition for nullity.

73. A more recent application of the principle appears in *Cheni v Cheni* [1965] P. 85. That case concerned the marriage in Egypt of an uncle and niece in accordance with Jewish rites. A child was born prior to the parties becoming settled and domiciled in England. According to the expert evidence received by the court, the marriage was valid under Jewish and Egyptian law and, although potentially polygamous at its inception, became irrevocably monogamous once the child had been born. Some years later the wife issued a nullity petition relying, amongst other grounds, on consanguinity. The English court (Sir Jocelyn Simon, then President) was prepared to assume jurisdiction notwithstanding that the marriage was potentially polygamous at its inception. Dismissing the nullity petition, the court held that there was no rule of law prohibiting the English courts from recognising marriages regarded as incestuous by general consent of Christian or other civilised nations. The true test was whether a particular marriage was so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law by which the marriage was valid. At page 98, the President said this:

'I believe the true rule to be that the courts of this country will exceptionally refuse to recognise and give effect to a capacity or incapacity to marry by the law of the domicile on the grounds that to give it recognition and effect would be unconscionable in the circumstances in question. The rule is thus an example of a wider class which has received authoritative judicial acknowledgement in our private international law. "No country is bound to recognise the laws of a foreign state when they work injustice to its subjects"' (quoting from the judgment of Cotton LJ in *Sottomayor (No 1)*).

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74. In the earlier case of *Chetti v Chetti* [1909] P.46, the Court had to consider what standards should be applied in considering such prohibitions and concluded that English legal principles applied. That case concerned an English wife who married a practising Hindu at a London registry office ceremony. He was, at the time, only temporarily resident in this country. After the marriage, the parties lived together in England and a child was born. They subsequently separated and, by the time the wife presented her judicial separation petition on the basis of his desertion, he was living in Madras and domiciled in India. The husband filed an answer denying the validity and legality of the marriage on the basis that, at the time of its celebration, he was and remained a Hindu domiciled in India. Under Hindu law and religion, which was his personal law as well as the law of his domicile, he was prevented from marrying anyone outside his own caste or who did not practise the Hindu religion. The wife contended that this was not a defence to her petition. The (then) President held that the religious disability which the husband relied upon was something which he was in a position to change at will that it did not create a status which led to an incapacity to enter a marriage contract in this jurisdiction. Further, there was no expert evidence before the court that the marriage would not be recognised in India. A decree of judicial separation was granted to the wife.

75. Mr Kirkwood takes me, finally, to para [17-116] of *Dicey, Morris & Collins* where it is stated :

> "For instance, priests and nuns are incapable of marriage by the laws of some Roman Catholic countries, but such an incapacity would not be recognised in England; nor would a prohibition on marriages between persons of different colours, religions or castes; nor any prohibition imposed for penal or discriminatory reasons. In other words, English law will not recognise a penal status affecting a particular class of persons although it may be recognised by the law of their domicile."

76. On this basis, he submits on behalf of the wife that if the parties in these proceedings were prohibited from marrying under Pakistani law, thereby rendering the marriage void in Pakistan, such a prohibition would fall squarely within Exception 6 and should not be recognised as a bar to recognition of the marriage in this jurisdiction.

77. These are interesting arguments and I have set them out so as to do full justice to the range of submissions which I heard, notwithstanding the absence of argument from the respondent and/or the Queen's Proctor. However, I have concluded from the basis of everything which I have heard and read that I do not need to travel down the road of Article 6 or the principles of unconscionability or discrimination.

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78. Based upon the evidence which was before me and the findings of fact in relation to the expert evidence which emerged from the judgment of Parker J in *R v M* (which, in turn, flowed from the expert evidence of Professor Menski, accepted by that court), I have reached that conclusion for the following reasons:-

i. I accept that under personal law in the courts of Pakistan, the religious ceremony creates the civil status, providing that it is based upon a valid oral contract of marriage;

ii. I accept, too, that there are a number of religious minorities in Pakistan who marry pursuant to their religious customs and whose marriages are treated as valid in Pakistan;

iii. absent any issues of personal religious conflict and capacity, a Nikah certificate would, in all other circumstances, be settled proof of marriage under Pakistani law;

iv. this marriage has always been treated as a valid marriage in the eyes of the parties, their families and their community;

v. the evidence of the Nikah marriage form exposes no defects in the formalities and, in relation to capacity, the official Ahmahdi maulvi who presided at the ceremony (an accredited religious scholar) must, in my view, be taken to know the law in terms of the capacity of these parties to enter into what all present appear to have accepted as a valid marriage ceremony;

vi. it was celebrated on 21 September 2005 in the presence of their respective family and friends and registered formally, albeit some time after the ceremony itself. In a similar way, I take the view that I am entitled to assume that the local official who undertook the formal registration process had full knowledge of, and understood the requirements for, such public official registration;

vii. under Pakistani law, as under English law, there is a strong presumption of marriage based upon cohabitation and reputation. In this respect, the two systems of law appear to be in harmony in terms of the underlying concept. This marriage was consummated after its celebration. The parties commenced a settled cohabitation thereafter and two children were born during its subsistence. Those children have always been treated by the parties as children legitimately born to them as married parents;

viii. until the issue arose in the context of the Children Act 1989 proceedings ancillary to the divorce, neither of the parties (or, indeed, anyone else to my knowledge) has questioned the essential validity of their marriage;

ix. Professor Lau's evidence in his first report was to the effect that the prospect of the courts in Pakistan holding the marriage of a Muslim woman to an Ahmahdi man to be

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invalid was not a firm conclusion but was raised by him only as a 'possible outcome';

x. there was, he said, and I accept, simply no authority or judicial pronouncement on the point;

xi. Professor Lau's evidence exposes the, as yet, unresolved question as to whether or not section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act 1962 can be interpreted as being subject to the provisions of section 5 of the Punjab Laws Act 1872, thereby reintroducing custom as a source of family law for Muslims. There is, as yet, no decision in the Pakistani courts which resolves the potential tension between this question and the decision in *Federation of Pakistan v Muhammad Ishaq Khan* (cited above);

xii. Further, there is, according to the expert evidence before me, no binding authority in the Pakistani courts as yet which conclusively answers the question of whether, absent an element of conversion to a common faith, an inter-faith marriage such as this would be held to be valid or invalid. Notwithstanding the provisional view which Professor Lau expresses, I have reached the conclusion that his report is not sufficiently clear for me to be able to say with sufficient certainty that this marriage would not be recognised in Pakistan;

xiii. in these circumstances, and in view of the fact that there is, as I find, no clear answer to the question as to whether or not this marriage would be considered valid under Pakistani law, I am able to proceed on the basis that the official Nikah marriage form and its subsequent formal registration gives rise to a presumption of a valid marriage which is not rebutted by any clear evidence to the contrary.

79. Accordingly, in my view, this marriage should be recognised as valid in this jurisdiction. Notwithstanding the absence of a formal application under section 55(1) of the Family Law Act 1986, I have treated the preliminary issue which was referred to this court as a formal application under the 1986 Act. The petitioner is entitled to a declaration that the marriage celebrated in Lahore on 21 September 2005 was, at its inception, a valid marriage, and that it subsisted as such on 18th March 2013, being the date upon which her current divorce petition was issued.

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