

MEDIA SUMMARY

Her Majesty’s Attorney General (Appellant) v Nasreen Akhter and Mohammed Shabaz Khan (Respondents) and Fatima Mohammed Hussain and Southall Black Sisters (Interveners) [2020] EWCA Civ 122

On appeal from: [2018] EWFC 54

JUDGES: Sir Terence Etherton MR, Lady Justice King and Lord Justice Moylan

Numbers in square brackets are references to paragraphs in the judgment

The issue

The central issue on this appeal is whether the respondent Nasreen Akhter (“the Petitioner”), who had an Islamic marriage ceremony which did not comply with the requirements of English marriage law, was entitled to a decree of nullity under section 11 of the Matrimonial Causes Act 1973 (“the 1973 Act”). Section 11 sets out the grounds on which a marriage is void. A person whose marriage is void because of the failure to comply with the required formalities is entitled to a decree of nullity with the consequence that they may apply to the court for financial remedy under the 1973 Act. A contrary argument was made in this case that the ceremony was insufficient to create even a void marriage and so there was no entitlement to a decree of nullity, with the consequence that there was no right to apply for financial provision.

The factual background

The Petitioner and Mohammed Shabaz Khan (“the Respondent”) had an Islamic marriage ceremony (a Nikah) on 13 December 1998 at a restaurant in London. They knew that this had no legal effect. They intended to follow the Nikah with a civil marriage ceremony that would be compliant with English law. They have four children. The family lived in England and, for a number of years, in Dubai. No civil ceremony ever took place. The parties separated in 2016.

The Petitioner issued a petition for divorce in November 2016. The Respondent filed an Answer in which he contended that the parties were not legally married. In her Reply, the Petitioner claimed, among other things, a decree of nullity under the 1973 Act. She contended that it was a void marriage because of the failure to comply with procedural requirements. The Respondent contended that the Nikah was of no legal effect.

At the request of the Court, the Attorney General intervened in the proceedings. His contention was that the ceremony was of no legal effect and so the Petitioner was not entitled to a decree of nullity.

The judgment below

The issue was tried by Mr Justice Williams. He considered the effect of Articles 8 and 12 of the European Convention on Human Rights (“the Convention”), and concluded that they led to a more flexible view of marriage as a process rather than a single ceremony. He said that he took into account that the Petitioner and the Respondent had been embarking on a process which was intended to include a civil ceremony, which would have created a valid marriage, and that the nature

of the Nikah ceremony in which they had participated bore all the hallmarks of a marriage in that it was held in public, witnessed, officiated by an Imam, involved the making of promises and confirmation that both the husband and wife were eligible to marry. He said that he also took into account the interests of the children as a primary consideration. In the light of all those matters, the Judge concluded that the marriage fell within the scope of section 11 of the 1973 Act as a marriage entered into in disregard of certain requirements as to the formation of a marriage.

The appeal

The Petitioner and the Respondent having reached an agreed settlement, the Attorney General has conducted the appeal in the Court of Appeal. The Court gave permission to intervene to the First Intervener, who is a petitioner in separate nullity proceedings, and to Southall Black Sisters. The Court has also had the benefit of an Advocate to the Court to put any contrary arguments. In the event, the Advocate to the Court supported the appeal.

The decision on the Appeal

The Court of Appeal unanimously allows the appeal and sets aside the order of Mr Justice Williams. The Court finds that, in this case, no marriage ceremony took place in respect of which a decree of nullity could be granted. [128].

Reasons for the decision

The appeal focused on two issues [5]:

- (i) whether there are ceremonies that do not create a marriage within the scope of English law (section 11 of the 1973 Act); and
- (ii) if there are, whether the December 1998 ceremony was such a ceremony, or whether, as Mr Justice Williams decided, it created a void marriage.

As to issue (i), the Court of Appeal finds that there can be ceremonies – which the Court calls “non-qualifying ceremonies” - that do not create a marriage, or even a void marriage, under English law and so do not entitle a party to a decree of nullity or financial remedies. [65, 121].

The Court does not accept that the Convention leads to a different conclusion and, in particular, that it supports a flexible approach to the interpretation of section 11 of the 1973 Act. The Court considers that neither Article 8 (right to respect for private and family life) nor Article 12 (right to marry and found a family) nor Article 1 of the First Protocol to the Convention (right to peaceful enjoyment of property) supports such an approach. Nor does the Court consider that the interests of the minor children are engaged on this issue, whether by virtue of the UN Convention on the Rights of the Child or otherwise. The proceedings cannot properly be described as an action concerning children. Further, it cannot be said that the best interests of a child can turn what was neither a void nor a valid marriage into a void or valid marriage.

As to issue (ii), the Court of Appeal finds that the December 1998 Nikah ceremony did not create a void marriage because it was a non-qualifying ceremony. The parties were not marrying “under the provisions” of English law (Part II of the Marriage Act 1949). The ceremony was not performed in a registered building. Moreover, no notice had been given to the superintendent registrar, no certificates had been issued, and no registrar or authorised person was present at the ceremony. Further, the parties knew that the ceremony had no legal effect and that they would need to undertake another ceremony that did comply with the relevant requirements in order to be validly married [123]. The determination of whether a marriage is void or not cannot, in the Court’s view,

be dependent on future events, such as the intention to undertake another ceremony or whether there are children [104], [125].

There is no justification for treating the civil ceremony, which the parties intended to undertake, as having in fact taken place, when it never did. This might result in a party being married even if they change their mind part way through the process of formalising the marriage [126]. That would be inconsistent with the abolition of the right to sue for breach of an agreement to marry by section 1 of the Law Reform (Miscellaneous Provisions) Act 1970 [126]. The parties' intentions cannot change what would otherwise be a non-qualifying ceremony into one which is within the scope of the Marriage Act 1949.

NOTE:

This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document. The full judgment of the Court of Appeal and a copy of this media summary are available at www.judiciary.uk.