Neutral Citation Number: [2020] EWCA Civ 122

Case No: B6/2018/2656

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
Williams J
[2018] EWFC 54

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2020

Before:

THE MASTER OF THE ROLLS
LADY JUSTICE KING DBE
and
LORD JUSTICE MOYLAN

- -

Between:

HER MAJESTY'S ATTORNEY GENERAL	**Appellant**
- and -	
Nasreen AKHTER (1)	
Mohammad Shabaz KHAN (2)	**Respondents**
-and-	
Fatima Mohammed HUSSAIN (1)	
SOUTHALL BLACK SISTERS (2)	**Interveners**

- -

Mr D Nagpal and **Mr A Habteslasie** (instructed by **the Government Legal Department**) for the **Appellant**
Mr C Hale QC, Ms V Roberts, Mr M Edwards and Mr H Langford (instructed by **BLM Law**) for the **First Intervener**
Mr M Horton *(*instructed by **Bar Public Access (Direct Access) Scheme)** for the **Second Intervener**
Mr N Goodwin QC (instructed by **the Government Legal Department)** as **Advocate to the Court**
The **Respondents** did not appear and were not represented

Hearing dates: 13 & 14 November 2019

Approved Judgment

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

Introduction

1. The Attorney General appeals from the decision of Williams J to pronounce a decree nisi of nullity. The ceremony which he determined entitled the Petitioner to a decree took place at a restaurant in London on 13th December 1998 ("the December 1998 ceremony"). It was an Islamic marriage ceremony, a Nikah, which the parties knew was of no legal effect and which they intended would be followed by a civil marriage ceremony compliant with English law.

2. The judge rejected the submission advanced on behalf of the Petitioner that the presumption in favour of marriage applied in this case because, as explained below, he rejected her evidential case that the court could presume that a second ceremony of marriage had taken place in Dubai when the parties were living there. As no party sought to argue that the December 1998 ceremony had created a valid marriage under English law, the judge said, at [6], that this left the issue of whether it created "what has become termed a non-marriage", or alternatively a void marriage which entitled the Petitioner to a decree of nullity under s. 11 of the Matrimonial Causes Act 1973 ("the 1973 Act").

3. As to the former, a non-marriage, the judge said, at [52], that it was "beyond argument that the concept of a form of marriage which was neither valid according to English law nor void has been accepted by the courts in … 11 cases … spanning a period of some 50 years". He decided, however, that the current approach, as applied in those cases, to the question "of whether what the parties did can properly be evaluated as an attempt to comply with the formalities required in English law to create a valid marriage", and was therefore "a ceremony within the scope of the" legislation, must "be supplemented" by his "conclusions in relation to some of the human rights arguments" which had been advanced on behalf of the Petitioner: see the judgment at [56], [92(a)] and [93]. He said, at [94] and [94(a)], that this required an approach which was "more flexible in particular to reflect the Article 8 rights of the parties and the children", and justified the court taking "a holistic view of a process rather than a single ceremony". Applying this "more flexible interpretation of s.11" of the 1973 Act, Williams J decided, at [96], that the December 1998 ceremony came within the scope of that section so as to entitle the Petitioner to a decree of nullity. It was "a marriage entered into in disregard of certain requirements as to the formation of marriage" and therefore void under s. 11(a)(iii).

4. Neither the Petitioner nor the Respondent has taken any active part in this appeal because they have reached an agreed settlement. Unusually, therefore, the court gave permission for the First Intervener, who is a petitioner in separate nullity proceedings, to intervene but limited to arguing matters of law. She has been represented by Mr Hale QC, Ms Roberts, Mr Edwards and Mr Langford, all of whom have acted pro bono. Southall Black Sisters, the Second Intervener, were also given permission to intervene. They have been represented by Mr Horton, also acting pro bono. In addition, the court is very grateful to the Attorney General for agreeing to instruct Mr Goodwin QC as Advocate to the Court to ensure, in particular, that any contrary arguments were put before the court. In the event Mr Goodwin has, effectively, supported the appeal. The Attorney General has been represented by Mr Nagpal and Mr Habteslasie. We are grateful to all counsel for their respective submissions.

5. As the hearing of the appeal progressed, it became clear that this case in fact raises only two issues:

   (i) Whether there are ceremonies or other acts which do not create a marriage, even a void marriage, within the scope of s. 11 of the 1973 Act; and
   (ii) If there are, whether the December 1998 ceremony was such a ceremony, currently described as a non-marriage, or whether, as Williams J decided, it created a void marriage.

6. The most significant practical difference is that a non-marriage creates no separate legal rights while a decree of nullity entitles a party to apply for financial remedy orders under the 1973 Act. We propose to address issue (i) first by considering the legal position without reference to the human rights arguments, which led Williams J to adopt the more flexible approach referred to above, and then by considering those arguments and whether they support the approach he took. We then address issue (ii).

7. Finally by way of introduction, we would agree with Williams J's disquiet about the use of the term "non-marriage". Although we continue, largely, to use this expression in this judgment for consistency, in our view, if the concept exists at all, a better way of describing the legal consequences of what has happened is to use the expression, "non-qualifying ceremony" (as set out in paragraph 64 below).

Marital Status Summary

8. This case is concerned with the formal requirements, the formalities, of marriage under the law of England and Wales. Although we propose to refer only to marriage, we recognise that some of the questions raised might also apply to civil partnership.

9. A person's marital status is important for them and for the state. The status of marriage creates a variety of rights and obligations. It is that status alone, derived from a valid ceremony of marriage, which creates these specific rights and obligations and not any other form of relationship. It is, therefore, of considerable importance that when parties decide to marry in England and Wales that they, and the state, know whether what they have done creates a marriage which is recognised as legally valid. If they might not have done so, they risk being unable to participate in and benefit from the rights given to a married person.

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

11. As summarised below, the formal requirements by which a valid marriage can be "solemnized" are set out in the Marriage Act 1949 ("the 1949 Act"). The Law Commission is currently conducting a review of the law governing how and where couples can marry, announced in July 2019, having concluded in *Getting Married, A Scoping Paper*, December 2015 ("*The Scoping Paper*"), at [1.33], that there was a need for law reform for a number of reasons including "the perceived rise in religious-only

marriages, that is marriages conducted in accordance with the rites of a particular religion but without legal status". The Law Commission said, at [1.35], that this was a "serious issue" because they "will usually be classified as a 'non-marriage' in English law [with the] result that the parties to it have no legal status, are not counted as married, and have no protection in the event of the relationship breaking down and no automatic rights if the other party dies". That this is a serious issue is supported by the submission we have heard on behalf of Southall Black Sisters that the "total non-recognition … operates to the detriment of women and children". It is also referred to in *The Legal Treatment of Islamic Marriage Ceremonies*, Oxford Journal of Law and Religion, 2018, 7, 376-400, Professor Probert and Shabana Saleem.

12. Although the Law Commission concluded, at [2.1], that the current system "has become unduly complex", *The Scoping Paper* summarises succinctly, at [2.2], the currently available "routes into marriage" for opposite-sex couples as follows; see also *Rayden and Jackson on Relationship Breakdown, Finances and Children*, at [3.112]:

> "(1) A religious route into marriage where Anglican preliminaries are followed by an Anglican ceremony.
> (2) A civil route into marriage where civil preliminaries are followed by a civil ceremony either in a register office or on approved premises.
> (3) A mixed route into marriage where civil preliminaries precede one of four types of religious ceremony. The ceremony can be:
> (a) 'according to the usages of the Jews';
> (b) 'according to the usages of the Society of Friends' (Quakers); or
> (c) 'such form and ceremony' as the parties wish, in a place of religious worship registered for the solemnization of marriage (being a 'registered building'); or
> (d) 'according to the rites of the Church of England'."

Although the overall system might be described as complex, we would suggest that it is not difficult for parties who want to be legally married to achieve that status.

13. Given the nature of the ceremony in the present case, we would emphasise that the above routes enable parties to have a religious ceremony of their choosing by taking the "route into marriage", referred to in the quoted paragraph (3)(c) above. Section 44 of the 1949 Act provides that a marriage in a registered building "may be solemnized … according to such form and ceremony as [the parties] may see fit to adopt". There are some additional formal requirements, in particular that the ceremony must take place in the presence of a registrar or an authorised person and two witnesses and that at "some part of the ceremony" the parties must state that they are legally free to marry and the "words of contract" (i.e. that they are marrying each other), as set out in ss. 44(3) or (3A). The section makes clear, however, that the marriage ceremony can take any form, which would obviously include an Islamic religious ceremony. An "authorised person" is a person authorised by the trustees or governing body of the registered building to be present at the solemnisation of marriages: ss. 43 or 43B. In saying that it is not difficult, we recognise, as highlighted by *The Scoping Paper*, at p.49, and in the article *The Legal Treatment of Islamic Marriage Ceremonies*, at p.382,

that a smaller proportion (and number) of places of worship for religions other than Christian have been registered for the solemnisation of marriages.

14. We would also point to the obligations imposed by the 1949 Act on those who are placed in a position of responsibility in respect of each of the above routes to ensure that there has been compliance with the required formalities. This is demonstrated by the existence of offences, now under the 1949 Act, which can be committed by those who solemnize a marriage (s. 75) and by authorised persons (s. 77) when they act contrary to certain of the required formalities. Although, as explained below, these offences only apply to ceremonies of marriage within the scope of the 1949 Act, their existence emphasises the important role those responsible for ceremonies of marriage have in ensuring that the parties know the legal effect of the ceremony in which they are participating.

15. Finally in this section of the judgment, while we recognise the nature and seriousness of the broader issues raised by the current structure and application of the regulatory framework, as referred to more extensively in *The Scoping Paper* and in other academic articles to which we have been referred, this judgment addresses only the issues mentioned in paragraph 5 above being those raised by this appeal.

Background

16. As stated above, the December 1998 ceremony took place at a restaurant in London. It was an Islamic ceremony of marriage conducted by an Imam. A certificate, which was not produced until 2006, records the name of the Petitioner's father as the Wali and is signed by him. It also records the names of two witnesses.

17. At the date of the ceremony the Respondent was working as a car salesman and the Petitioner as a trainee solicitor. Although the judge doubted the Respondent's true intentions, he was satisfied that the parties had agreed that the Nikah ceremony would be followed by a civil marriage ceremony. He also found that they understood that, without such a ceremony, they would not be legally recognised as being married. The Imam had informed the Petitioner's father that because the Nikah was not "registered" there would need to be a civil ceremony so that the marriage would be legally recognised. The Petitioner was aware of this and, as set out in the judgment below, "was concerned that her rights were not protected … and told the (Respondent) that they would be treated as cohabitees". No civil ceremony ever took place despite the Petitioner raising the issue with the Respondent on a number of occasions including shortly after the Nikah had taken place.

18. The Petitioner and the Respondent have four children. The family lived in England and, for a number of years, in Dubai. The marriage came to an end and the parties separated in 2016.

Proceedings

19. The Petitioner issued a petition for divorce on 4th November 2016. This relied on the December 1998 ceremony. The Respondent filed an Answer in which he contended that the parties were not legally married. In her Reply, the Petitioner relied on the presumption of marriage and, in the alternative, sought a decree of nullity under s. 11(a)(iii) of the 1973 Act.

20. As set out above, neither the Petitioner nor the Respondent contended that the Nikah had created a valid marriage. The Petitioner argued that it was a void marriage because of the failure to comply with the procedural requirements as to the formation of marriage set out in the 1949 Act. The Respondent argued that the Nikah was of no legal effect.

21. At the invitation of the judge, the Attorney General intervened in the proceedings. He argued that the Petitioner was not entitled to a decree of nullity because the ceremony did not create a void marriage. It was his case that the ceremony was of no legal effect.

Judgment

22. The judge set out, at [2], the "central questions" which he had to answer as being: (a) whether the parties were "to be treated as validly married under English law by operation of a presumption of marriage"; and (b) if not, whether the marriage was "a void marriage, susceptible to a decree of nullity".

23. As to (a), the Petitioner relied on *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6 ("*A-M v A-M*") and argued that the court should presume that a valid ceremony of marriage had taken place in Dubai while the parties were living there. The judge rejected this argument because the evidence was clear, namely that the only ceremony which had taken place was the December 1998 ceremony. There was "no evidential foundation for a presumed second ceremony". This left no scope for the application of either of the presumptions, from cohabitation and reputation or from a ceremony followed by cohabitation. The issue was the legal effect of the known ceremony.

24. As to (b), the Petitioner argued that the December 1998 ceremony was sufficient to create a marriage which was void pursuant to s. 11 of the 1973 Act. The concept of a non-marriage was challenged, save (as expressed by the judge at [15(d)]) for "situations which properly warrant the description such as actors acting a scene or parties playing a game". It was also submitted that this concept conflicted with Articles 8, 12 and 14 and Article 1 of the First Protocol ("A1P1") of the European Convention on Human Rights ("the ECHR").

25. The judge rejected the Petitioner's general challenge to the concept of a non-marriage which he considered was established by the line of 11 cases, starting with the Court of Criminal Appeal's decision in *R v Bham* [1966] 1 QB 159, at [46]. This meant that the issue of whether the court could grant a decree of nullity depended on whether what had taken place in this case amounted to a non-marriage or was a marriage which (as expressed by the judge at [94(a)]) "purports to be of the kind contemplated by the" 1949 Act and, therefore, "within section 11" of the 1973 Act. He set out, at [92], the "starting point in relation to the interpretation and application of section 11 [as being] the net result of the series of cases considered by Moylan J" in *A v A (Attorney General intervening)* [2013] Fam 51 ("*A v A*"). In summary these were that: (a) "Unless a marriage purports to be of the kind contemplated by the [1949 Act] it will not be within section 11"; (b) "What brings a ceremony within the scope of the Act or at what stage the cumulative effect of the failures is to take the ceremony wholly outside the scope of the 1949 Act has to be approached on a case by case basis"; and (c) the court should take various factors into account. We set out, in paragraph 27 below, the specific factors

referred to by the judge, as adapted by him following his conclusions as to the effect of the "human rights arguments" advanced by the Petitioner.

26. Having set out the "starting point", Williams J concluded, at [93], that this "approach must also be supplemented as a result of my conclusions in relation to some of the human rights arguments". After referring, at [93], to his conclusions as to the effect of Articles 8 and 12 of the ECHR he stated, at [94], that the court's approach to determining whether a ceremony is sufficient to bring it within the scope of the 1949 Act "should be somewhat more flexible in particular to reflect the Article 8 rights of the parties and the children". This meant, he said at [94(a)], that "[w]hen considering the question of a marriage the court should be able to take a holistic view of a process rather than a single ceremony". He then adapted the relevant factors as follows, by adding, at [94], the words appearing in italics:

> "(a) whether the ceremony or event set out or purported to be a lawful marriage *including whether the parties had agreed that the necessary legal formalities would be undertaken*; (b) whether it bore all or enough of the hallmarks of marriage, *including whether it was in public, whether it was witnessed whether promises were made*; and (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage; *and (d) whether the failure to complete all the legal formalities was a joint decision or due to the failure of one party to complete them*".

27. The judge's ultimate conclusion, at [96], was that "this marriage falls within the scope of section 11 and was a marriage entered into in disregard of certain requirements as to the formation of marriage". This conclusion was based on the factors present in this case, set out at [95], which included that the Petitioner and the Respondent had been "embarking on a process which was intended to include a civil ceremony"; that the "nature of the ceremony … 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"; and included "the best interests of children as a primary consideration".

Legal Structure

28. As referred to in paragraph 9 above, marriage creates an important status, a status "of very great consequence", per Lord Merrivale P in *Kelly (orse. Hyams) v Kelly* (1932) 49 TLR 99, at p. 101. Its importance as a matter of law derives from the significant legal rights and obligations it creates. It engages both the private interests of the parties to the marriage and the interests of the state. It is clearly in the private interests of the parties that they can prove that they are legally married and that they are, therefore, entitled to the rights consequent on their being married. It is also in the interests of the state that the creation of the status is both clearly defined and protected. The protection of the status of marriage includes such issues as forced marriages and "sham" marriages.

29. As noted in *The Scoping Paper*, at [1.2], "a wedding is a legal transition in which the state has a considerable interest". This interest is reflected in the statutory system of

regulation designed to ensure that both the parties and the state know what is necessary to contract and when a valid marriage has been contracted. As referred to below, the statutory regulation of the prescribed formalities required to effect a valid marriage was first introduced in 1753 to create certainty in response to the difficulties being caused by what were known as "clandestine" marriages. Certainty remains in the public interest because, as again identified in *The Scoping Paper*, at [1.2], "it should … be clear when [a marriage] has come into being".

30. Upholding the status of marriage, where possible, is also a matter of public policy. This can be seen, for example, from *Vervaeke (formerly Messina) v Smith* [1983] AC 145, in which it was held that the upholding of the status of marriage is a doctrine of English public policy law. One of the issues in that case was the effect of the parties' intentions, namely that they did not intend to live together as husband and wife, on the validity of the marriage. The facts of that case were very different from the present case but they provide the context for some general observations made by Ormrod J (as he then was) at first instance which were quoted with approval by Lord Hailsham of St. Marylebone LC, at p. 151H – p. 152E, as being "a correct statement of English law", as follows:

> "Where a man and a woman consent to marry one another in a formal ceremony, conducted in accordance with the formalities required by law, knowing that it is a marriage ceremony, it is immaterial that they do not intend to live together as man and wife. It is, of course, quite otherwise where one of the parties believes that the ceremony is something different, e.g., a formal betrothal ceremony as in *Kelly (Orse. Hyams) v. Kelly* (1932) 49 T.L.R. 99 ... or as in *Mehta (Orse. Kohn) v. Mehta* [1945] 2 All E.R. 690, a ceremony of religious conversion. In such cases the essence of marriage, the mutual exchange of consents accompanied by the formalities required by law, is missing and such marriages are, therefore, void or perhaps voidable. On the other hand, if the parties exchange consents to marry with due formality, intending to acquire the status of married persons, it is immaterial that they intend the marriage to take effect in some limited way or that one or both of them may have been mistaken about or unaware of some of the incidents of the status which they have created. To hold otherwise would impair the effect of the whole system of law regulating marriages in this country, and gravely diminish the value of the system of registration of marriages upon which so much depends in a modern community. Lord Merrivale in *Kelly (Orse. Hyams) v. Kelly*, 49 T.L.R. 99, 101 said: 'In a country like ours, where the marriage status is of very great consequence and where the enforcement of the marriage laws is a matter of great public concern, it would be intolerable if the marriage of law could be played with by people who thought fit to go to a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it.' See also the observations of Hodson J. in *Way v. Way* [1950] P. 71, 79, approved by the Court of Appeal in *Kenward v. Kenward* [1961] P. 124, 133 and *Silver v. Silver* [1955] 2 All E.R. 614."

Lord Hailsham then went on to say, at p. 152E, that "in the light of the quotation from Lord Merrivale … it [could not] seriously be contested that the law as there enunciated is based on grounds of public policy".

31. This aspect of public policy is also reflected in what Ormrod J said in *Collett v Collett* [1968] P 482, at pp. 491F and 492, about the "general approach of English law to the question of the formal validity of a marriage":

> "The control of the formation of marriage in this country has a long statutory history, much of it intended to prevent clandestine marriages. The general tendency has been to preserve marriages where the ceremonial aspects were in order rather than to invalidate them for failure to comply with the statutory provisions leading up to the ceremony.
>
> […]
> In my judgment, the principle which emerges from the corpus of legislation regulating the formation of marriages in England and from the reported cases arising therefrom is that, if a ceremony of marriage has actually taken place which, as a ceremony, would be sufficient to constitute a valid marriage, the courts will hold the marriage valid unless constrained by express statutory enactment to hold otherwise. This is consistent with the traditional concept both of the common law and of the canon law that the essence of marriage is the formal exchange of voluntary consents to take one another for husband and wife."

Statutory Regulation of Marriage

32. We have set out, in paragraph 12 above, the broad summary set out in *The Scoping Paper* of the means by which a valid marriage can be contracted. It is not necessary for the purposes of this case to set out more than a very brief analysis of the regulatory framework governing the required formalities entailed in each of the individual "routes into marriage".

33. The statutory regulation of marriage started with the Clandestine Marriages Act 1753, known as Lord Hardwicke's Act. There is some debate about the extent of the problem but the long title, An Act for the Better Preventing of Clandestine Marriage, makes clear the Act's purpose. It was intended to "put an end to clandestine and irregular marriages", *Rayden on Divorce* 2nd Ed., 1926 at p. 36, paragraph 13 n (a). A clandestine marriage was a marriage conducted by a Church of England priest without any other formality and which, because of the lack of formality and its secret nature, meant that it was difficult to establish whether someone was or was not validly married.

34. The Act did not apply to marriages conducted in accordance with the usages of the Society of Friends (Quakers) or with Jewish rites but otherwise provided that only Anglican marriages which complied with the formal requirements set out in the Act would be valid. These included that a licence had been obtained or banns published and that the ceremony had taken place in a church or chapel in the presence of a priest and two witnesses. Any failure to comply with the stipulated requirements would result in the marriage being null and void. It also provided that the penalty for any celebrant

found guilty of solemnizing a marriage contrary to the provisions of the Act was transportation for 14 years.

35. The subsequent legislative history is summarised in *A v A* and it is not necessary to repeat it in this judgment. We would note only the following developments.

36. The stringent effect of the 1753 Act of non-compliance with the formal requirements was very significantly ameliorated by the Marriage Act 1823 and repeated in the Marriage Act 1836. The latter provided, in s. 42, that a marriage would only be void if both parties "knowingly and wilfully intermarry … under the Provisions of this Act" without complying with certain of the required formalities as specifically set out in that Act. The same wording now appears in s. 49 of the 1949 Act (which we set out in paragraph 41 below).

37. The Marriage Act 1836 effected another, more wide-reaching, change in that it removed the requirement that marriages, other than Jewish or Quaker marriages, had to be Anglican. As set out in *A v A*, at [48]: "marriages could be contracted by a ceremony at a register office or in any building (certified as a place of religious worship) registered for the solemnization of marriages and after a registrar's certificate had been issued as an alternative to banns or a licence. Non-Anglican places of worship had to have been duly registered and the ceremony had to take place in the presence of a registrar. The form and ceremony was such as the parties 'see fit to adopt' provided that at some point the parties declared that they knew of no lawful impediment to their marriage and said prescribed words to the effect that they took the other as their wife/husband". The requirement for a registrar to be present if the ceremony took place in a non-Anglican place of worship was removed by the Marriage Act 1898 which established "authorised persons" who could take the place of registrars.

38. The Marriage Act 1994 removed the requirement that non-Anglican marriages had to take place either in a register office or a registered building and created the concept of "approved premises". These are premises which have been approved by a local authority for the solemnization of marriages. Section 46 of the 1949 Act provides that: "No religious service shall be used at a marriage on approved premises".

39. As referred to above, Part I of the 1949 Act applies to a marriage according to the rites of the Church of England and Part II applies to a marriage under a Superintendent Registrar's Certificate. Each Part contains a section which sets out when a marriage will be void. We deal with these in reverse order, as the present case concerns Part II.

40. We, first, set out the provisions of s. 26 of the 1949 Act which, whilst not comprehensive, list the principal methods by which the marriage of a man and a woman and, in some circumstances, of same sex couples "may be solemnized" under Part II:

> "26 Marriage of a man and a woman; marriage of same sex couples for which no opt-in necessary
>
> (1) The following marriages may be solemnized on the authority of two certificates of a superintendent registrar—
>
> (a) a marriage of a man and a woman, in a building registered under section 41, according to such form and ceremony as the persons to be married see fit to adopt;

> (b) a marriage of any couple in the office of a superintendent registrar;
> (bb) a marriage of any couple on approved premises;
> (c) a marriage of a man and a woman according to the usages of the Society of Friends (commonly called Quakers);
> (d) a marriage between a man and a woman professing the Jewish religion according to the usages of the Jews;
> (dd) a qualifying residential marriage;
> (e) a marriage of a man and a woman according to the rites of the Church of England in any church or chapel in which banns of matrimony may be published ...".

In order to obtain certificates from a superintendent registrar, each of the parties must give notice as required by s. 27 of the 1949 Act (and following sections).

41. Section 49 in Part II sets out when non-compliance with the required formalities will result in a marriage "*under*" (our emphasis) Part II being void:

> "If any persons knowingly and wilfully intermarry *under* the provisions of this Part of this Act—
>
> (a) without having given due notice of marriage to the superintendent registrar;
> (b) without a certificate for marriage having been duly issued, in respect of each of the persons to be married, by the superintendent registrar to whom notice of marriage was given;
> (c) …
> (d) on the authority of certificates which are void by virtue of subsection (2) of section thirty-three of this Act;
> (e) in any place other than the church, chapel, registered building, office or other place specified in the notices of marriage and certificates of the superintendent registrar;
> (ee) in the case of a marriage purporting to be in pursuance of section 26(1)(bb) of this Act, on any premises that at the time the marriage is solemnized are not approved premises;
> (f) in the case of a marriage in a registered building (not being a marriage in the presence of an authorised person), in the absence of a registrar of the registration district in which the registered building is situated;
> (g) in the case of a marriage in the office of a superintendent registrar, in the absence of the superintendent registrar or of a registrar of the registration district of that superintendent registrar;
> (gg) in the case of a marriage on approved premises, in the absence of the superintendent registrar of the registration district in which the premises are situated or in the absence of a registrar of that district; or
> (h) in the case of a marriage to which section 45A of this Act applies, in the absence of any superintendent registrar or

> registrar whose presence at that marriage is required by that section;
>
> the marriage shall be void."

We do not need to refer to section 49A which contains additional provisions in respect of same sex marriages.

42. Section 25 in Part I sets out when non-compliance with the required formalities will result in a marriage "*according* to the rites of the Church of England" (our emphasis) being void. We do not propose to set out the provisions of this section because the specific formalities listed are not relevant in this case. The relevant element is that the marriage must have been "according" to the rites of the Church of England.

43. In summary, therefore, s. 49 only applies when the parties "knowingly and wilfully intermarry *under* the provisions of this Part of this Act". Likewise, section 25 of the 1949 Act, only applies when the parties "knowingly and wilfully intermarry *according* to the rites of the Church of England".

44. We deal with non-marriages below but, as Mr Nagpal submitted, these provisions support the conclusion that there is a threshold which must be crossed before a ceremony or other acts will be within the scope of the 1949 Act at all. The words "according" and "under" must have some meaning. In our view, they support the conclusion that to "intermarry *according to* the rites of the Church of England" requires a marriage that can, at least, be said to be according to these rites. Similarly, the words "intermarry *under* the provisions of this Part of this Act" must mean more than simply the performance of a ceremony of marriage in England. It must be a marriage which can be defined or described as a marriage being contracted *under* Part II of the 1949 Act.

45. As is pointed out in the article referred to above, *The Legal Treatment of Islamic Marriage Ceremonies*, at p. 390, when dealing with the intention of the parties, "it is only where the parties 'intermarry under the provisions of [the] Act' that the court is directed to consider whether they did so knowingly and wilfully". In the view of the authors, with which we agree, "it would be wrong in principle for those who know that they are flouting the law to have more rights than those who do not". In our view, this also supports the conclusion that there is a threshold which has to be crossed before it can be said that the parties have intermarried under the provisions of Part II of the 1949 Act.

Nullity

46. A void marriage is "strictly speaking a contradiction in terms": *Bromley's Family Law* 11th Ed., 2015 by Lowe and Douglas, at p. 67. This is because it has no legal effect on the status of the parties. A decree of nullity could, therefore, be said to be only declaratory because it does not make the marriage void. The grant of a decree of nullity is, however, significant because, as referred to above, it entitles the parties to apply for financial remedy orders under the 1973 Act.

47. The law relating to the nullity of marriage was first codified in the Nullity of Marriage Act 1971 ("the 1971 Act"). This followed the Law Commission's 1970 Report, *Family Law, Report on the Nullity of Marriage* (Law Com. No. 33). One of the existing

grounds on which a marriage was void, as noted at [6] of the Report, was an "invalid ceremony of marriage" as "governed by the Marriage Act 1949". The Report recommended, at [96(a)], that the "law relating to nullity should be incorporated in a comprehensive statute" and, at [96(b)], that "the substance of the law should remain unchanged". This was carried through into the structure of the legislation, as recommended in the Report, and in the proposed grounds on which a marriage would be void, initially in the 1971 Act, and now in s. 11 of the 1973 Act.

48. Section 11 of the 1973 Act provides:

> "11. Grounds on which a marriage is void
>
> A marriage celebrated after 31st July 1971, other than a marriage to which section 12A applies, shall be void on the following grounds only, that is to say—
>
> (a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where—
> (i) the parties are within the prohibited degrees of relationship;
> (ii) either party is under the age of sixteen; or
> (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);
>
> (b) that at the time of the marriage either party was already lawfully married or a civil partner;
>
> (c) . . .
>
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other."

It is clear that s. 11(a)(iii) refers to the provisions of the 1949 Act partly because it is clear from the Law Commission Report that, as referred to above, the 1971 Act (which is in the same terms as the 1973 Act) was not intended to change the law and partly because the 1949 Act is the Act which sets out when non-compliance with the required formalities will make a marriage void (including, by incorporation, under the Marriage (Registrar General's Licence) Act 1970, s. 13).

49. The 1949 Act, as referred to above, expressly states when non-compliance with the required formalities will make a marriage void: s. 25 (in respect of Anglican marriages) and s.49 (in respect of all other marriages) with additional provisions in respect of same sex couples under s. 49A. The Act also expressly provides when proof of certain matters is not required to establish that a marriage is valid: e.g. s. 24 (in respect of Anglican marriages) and s. 48 (in respect of all other marriages). We would also

mention that when the effect of non-compliance with some provisions, such as the presence of two witnesses (ss. 22, 44 and 46B), is not expressly addressed in the Act, the approach taken by the courts (see paragraph 31 above and 50 below) has been that non-compliance does not affect the validity of the marriage.

50. Mr Hale submitted that the 1949 Act does not preclude the court from finding a marriage void in circumstances other than those set out in that Act. We do not agree with this submission at least in respect of the circumstances of this case and certainly in respect of the court's power to grant a decree of nullity. As appears to have been agreed below, s. 11 of the 1973 Act prescribes *when* the court will have jurisdiction to grant a decree of nullity. Williams J recorded, at [51], Mr Le Grice QC's acknowledgement that "there is no residual inherent power in the High Court to grant a decree of nullity save under statute". Further, as set out above, s. 11(a)(iii) is clearly referring to non-compliance with those formalities which the 1949 Act expressly stipulates will make a marriage void. As set out in *A v A*, at [50]-[51] (Dr Lushington in *Catterall v Sweetman* (1845) 1 Rob Eccl 304 and Lord Penzance in *Greaves v Greaves* (1872) LR 2 P & D 423), it has long been established that the statutory provisions delineate when non-compliance with one of the required formalities will make a marriage void.

51. We would also refer to s. 58(5)(a) of the Family Law Act 1986 which prohibits a court from making a declaration "that a marriage was at its inception void". In our view, the combined effect of these provisions is clear, namely that whether the court can grant a decree of nullity because a marriage is void is to be determined by the provisions of s. 11 and, through s. 11(a)(iii), by the provisions of the 1949 Act.

Non-Marriage

52. The 1949 Act sets out how a valid marriage is contracted. The 1949 Act and the 1973 Act set out when non-compliance with certain of the required formalities will make a marriage void. They do not contain any provisions setting out when a ceremony will not be within the scope of the Act at all. It has long been recognised, however, that there must be some ceremonies or acts which do not create even a void marriage and which, therefore, do not entitle a party to a decree of nullity. For example, in *Risk (otherwise Yerburgh) v Risk* [1951] P 50, Barnard J decided, at p. 53, that the court had no jurisdiction to grant a decree because, under English law, the marriage ceremony which had taken place in Egypt was "no marriage".The circumstances of that case were very different in that the basis of the decision was that the marriage was polygamous, the law in respect of which has since changed, but the issue of principle is the same. We would also refer to, *The Formation and Annulment of Marriage*, 1st Ed 1951, in which Joseph Jackson said, at p. 65, that "the question whether a marriage is void, voidable or valid presupposes the existence of an act allegedly creative of the marriage status".

53. The first authority to which we need refer, and the earliest authority referred to in the judgment below, which specifically addresses the 1949 Act is *R v Bham* [1966] 1 QB 159. The case concerned the criminal prosecution of an Imam under section 75(2)(a) of the 1949 Act for having conducted an Islamic ceremony of marriage in a private house in England. As noted in *A v A*, at [68], counsel for the Crown accepted that the ceremony in that case could not, wherever performed in England, have created more than a "purported marriage". In its judgment quashing the defendant's conviction, however, the Court of Criminal Appeal accepted, as correct, the submissions made on

behalf of the defendant that the 1949 Act applies only to marriages "permitted by English domestic law", at p. 168/B/C. This was because:

> "The provisions of the Act prescribe and control the manner in which such a marriage may be solemnised. It does not seem to the court that the provisions of the Act have any relevance or application to a ceremony which is not and does not purport to be a marriage of the kind allowed by English domestic law", at p. 168 C/D; and:
>
> "What, in our judgment, was contemplated by this Act and its predecessors in dealing with marriage, was the performing in England of a ceremony in a form known to and recognised by our law as capable of producing, when there performed, a valid marriage", at p. 169 B/C.

The Court agreed with and adopted, at p. 169/D, what Humphreys J had said in *R v Mohamed (Ali)* [1964] 2 QB 350n: to be within the Act, the ceremony "must be at least one which will prima facie confer the status of husband and wife on the two persons".

54. *R v Bham* does not provide a precise answer to the question of when a ceremony will be within the scope of the 1949 Act when it "does not purport to be of the kind allowed by English domestic law". This led to some discussion during the hearing of the appeal as to the meaning of the word "purport" in these circumstances. This is relevant because, as was observed in the Law Commission's report on *Solemnisation of Marriage in England and Wales* (EWLC 53) 1973, Annex para 120, after quoting from *R v Bham*:

> "Unfortunately, the Act gives little indication of what are the minimum requirements of a 'form known to and recognised by our law as capable of producing … a valid marriage'".

We return to this question below. At present we would simply note that *R v Bham* is clear authority for the proposition that there can be ceremonies of marriage which are not within the scope of the 1949 Act at all and which would not, therefore, be within the scope of s. 11(a)(iii) of the 1973 Act.

55. This principle has been applied in a number of first instance decisions since then, including: *Gereis v Yagoub* [1997] 1 FLR 854; *A-M v A-M*; *Hudson v Leigh (Note)* [2013] Fam 77 (an application for permission to appeal was dismissed by the Court of Appeal); *Al-Saedy v Musawi (Presumption of Marriage)* [2011] 2 FLR 287; *El Gamal v Al-Maktoum* [2012] 2 FLR 387; *Dukali v Lamrani (Attorney General intervening)* [2013] 2 FLR 1099; and *A v A*.

56. In addition, in *Sharbatly v Shagroon* [2013] 1 FLR 1493, the Court of Appeal approved Holman J's decision in *Dukali v Lamrani* and also referred, at [28], to Bodey J's judgment in *Hudson v Leigh* as having been "endorsed by [the Court of Appeal] when rejecting the oral permission application". Both *Dukali v Lamrani* and *Sharbatly v Shagroon* concerned applications for permission to apply for a financial remedy order after an overseas divorce under the Matrimonial and Family Proceedings Act 1984. In both cases, however, the marriages had been conducted in England; in the former by a Moroccan civil ceremony conducted at the Moroccan Consulate in London; in the latter, by an Islamic ceremony of marriage at a hotel in London.

57. Although the immediate issue in each case was whether the respective marriages were marriages within the meaning of the 1984 Act, it is clear that in both cases this was determined through the provisions of the 1949 Act and the 1973 Act. In *Dukali*, Holman J decided, at [36], that the marriage "was neither valid nor void but was non-existent. It was not valid because there was manifold non-compliance with every requirement of the Marriage Acts as to notification, use of a registered or approved venue, form, authorisation of the officiant and subsequent registration". It was also not a void marriage because, at [36], "it did not even purport to be a marriage under the provisions of the Marriage Acts"; the parties had not "purported to inter-marry under the provisions of [Part II] of the 1949 Act at all". It was therefore, at [37], a "non-marriage".

58. In *Sharbatly v Shagroon* Thorpe LJ expressly agreed with Holman J's analysis, including the following passage, quoted by Thorpe LJ at [32]:

> "[44] Despite all these points and considerations, however, I have reached the firm view, submitted not only on behalf of the husband but also by counsel on behalf of the intervening Attorney-General, that the word 'marriage' in s 12 and Part III generally of the MFPA must mean, and can only mean, a marriage which is, or under English law is recognised as, a valid or at least a void marriage. That is the natural meaning and scope of the word 'marriage' when used in this context. Far from needing to use words of limitation or exclusion to limit 'marriage' to a valid or void marriage, Parliament would have needed to use express words of inclusion if it had intended to enlarge and include within the word 'marriage' even what is characterised here as a non-marriage. That is particularly so in the case of a marriage which was actually contracted in England. If the marriage relied upon is a ceremony which took place here but which was so irregular and altogether outside the scope of the Marriage Acts as not to be a marriage at all, not even a void one, then in my view it would require clear words from Parliament before it could fall within the scope of s 12 and Part III [of the 1984 Act]."

59. As referred to above, although both these cases were dealing with applications under the 1984 Act, the decisions were clearly based, to quote again from Holman J's judgment, at [44], on whether the marriage was "under English law … recognised as a valid or at least a void marriage". As well as approving this reasoning, Thorpe LJ made clear, at [33], that the 1984 Act "cannot be divorced from the 1973 Act" and, at [34], that his decision was based on his conclusion that "fundamental" to the right to apply under the 1984 Act "is the existence of a marriage recognised as valid or void by the lex loci celebrationis" (i.e. England and Wales).

60. It would not, therefore, appear to be open to us to decide, as submitted in particular by Mr Horton, that the concept of non-marriage should be confined to situations where there was "clearly no intention for any form of marital relationship to be created".

61. Even if this was open to us, however, it seems to us that to accept this submission would be to open up a path which would create very considerable difficulties, similar to those which the regulatory system first introduced in 1753 has been designed to prevent.

62. The present case concerns a religious ceremony and Mr Horton's submission would seem to require that all religious ceremonies, wherever and however performed, should be brought within the scope of the 1949 Act. That would clearly not be an acceptable dividing line especially as a marriage solemnized in approved premises can take any form (other than a religious service) the parties choose. It would then, equally, be questioned why any such ceremony wherever performed should not also be included within the scope of the 1949 Act. It would clearly not be acceptable to exclude such ceremonies and to give them a different legal effect to a religious ceremony for that reason alone. The current legal position has been neatly summarised in *The Scoping Paper*, at [2.71], namely that: "Faced with the prospect of effectively deregulating marriage … the courts developed the concept of the 'non-marriage'".

63. We would, therefore, have concluded that, to prevent the regulatory system being fundamentally undermined and in a manner which would be contrary to the need for certainty in the interests of the parties and in the public interest, we would have decided that there are some ceremonies of marriage which do not create even void marriages. In summary, in some cases the extent of non-compliance with the formal requirements stipulated under the 1949 Act means that the manner in which the marriage has been "solemnized" (to use the word from the 1949 Act, including s. 29), is such that the parties have not intermarried *under* the provisions of Part II or, when relevant, *according* to the rites of the Church of England.

64. As referred to above, however, we agree with observations that have been made about the unsatisfactory nature of the expression "non-marriage". We consider that the focus should be on the ceremony and would propose that they should be called a "non-qualifying ceremony" to signify that they are outside the scope of both the 1949 and the 1973 Acts.

Issue (i):

65. We conclude on issue (i) that, it is clear, for the reasons given above, that there can be ceremonies which do not create a marriage, or even a void marriage, within the scope of the 1949 and the 1973 Acts and which do not, therefore, entitle the parties to a decree of nullity.

66. We referred, in paragraph 54 above, to there being some discussion during the hearing of the appeal as to the meaning of the word "purport". Having considered whether we should seek further to define when a marriage will "purport to be a marriage" within the scope of the 1949 Act, we have decided not to do so. This is for a number of reasons. First, the Law Commission is conducting a comprehensive review of the law governing how and where couples can marry, which would seem likely to include consideration of this issue. Secondly, we doubt whether it is possible or, indeed, sensible, to seek to delineate when the cumulative effect of the failure to comply with the required formalities will result in a non-qualifying ceremony and when it will result in a void marriage. Rather, we would suggest that the focus of the parties who want to marry and of those officiating at a ceremony of marriage, should be on complying with the required formalities so that they can be confident that they have contracted a valid marriage. Thirdly, although there may be ceremonies, such as in *A v A*, when the cumulative effect of compliance with the required formalities is to create a valid or, alternatively, a void marriage, we would not want to encourage parties who want to

marry to rely on such partially compliant ceremonies because the outcome will, inevitably, be uncertain.

Human Rights

67. The judge, having held, at [56], that the court must consider "on the specific facts of this case whether [what] the parties did can properly be evaluated as an attempt to comply with the formalities required in English law to create a valid marriage", accepted the submission of Mr Le Grice that, in interpreting s. 11 of the 1973 Act, the court should take into account fundamental rights under the ECHR.

68. The position in relation to the ECHR is not easy to distil. This is because (i) certain of the Interveners seek to rely on Articles of the ECHR which were not relied on by the Petitioner at first instance; and (ii) some Interveners now seek to assert that the judge was wrong in his conclusions in relation to, for example, A1P1 in circumstances where there is no Respondent's Notice (nor could there have been as, of those now appearing in this appeal, only the Interveners seek to uphold the judge's judgment). In those circumstances, the court permitted submissions to be made in relation to all the human rights arguments now raised.

69. The judge, in concluding that this was a void marriage, relied upon the following key aspects of the ECHR in support of his determination that there should be a flexible approach to the interpretation of s. 11 of the 1973 Act. We will deal with these issues in the following order:

    i) Article 12 ECHR: the judge held, at [93(c)], that "a horizontal effect together with general principles of fairness or equitable principles support the proposition that if the parties had agreed to or it was their joint understanding that they would engage in a process which would ultimately lead to a legally valid marriage means that should be taken into account in determining whether [what] took place falls within or without the parameters of section 11";

    ii) The judge held, at [93(a)], that where the parties intended to effect a legal marriage, Article 8 supports an approach to interpretation "and application which [results in] the finding of a decree of a void marriage rather than a wholly invalid marriage";

    iii) The court should, where appropriate, consider the best interests of the children, at [93(b)].

    A1P1

70. As it has been reargued on this appeal, we will first briefly deal with A1P1 before moving on to the three matters set out above. A1P1 provides:

> "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

71. At first instance, Mr Le Grice argued that, as a wife, the Petitioner would have acquired a share in the matrimonial property, which potential, he submitted, was a right to property within A1P1. He argued that the court, in categorising her religious marriage as a non-marriage, prevented the Petitioner from securing her interest in this property because her lack of status as a "wife" denied her the right to instigate financial remedy proceedings.

72. Mr Nagpal submitted that this is to put the "cart before the horse". We agree; even if a wife's claim to a share of what would otherwise be matrimonial assets amounts to "property rights" (and this is far from clear: *Ram v Ram* [2004] EWCA Civ 1452; [2005] 2 FLR 63 and *Gray v Work* [2017] EWCA Civ 260; [2018] Fam 35) the gateway to those property rights is the right to a decree of either divorce or nullity.

73. The judge said:

> "88…The unascertained right to a share of the matrimonial property seems to me dependent upon establishing that there is either a valid or a void marriage and thus there is no potential property right infringed until that is established. I therefore do not consider that the A1P1 argument assists either in respect of an assertion that a determination of non-marriage infringes rights or that the court should interpret section 11 so as to act compatibly with A1P1 rights."

We agree with this analysis and, accordingly, A1P1 cannot be used as a basis for, or to bolster other, human rights arguments.

Article 12

74. Although the judge rejected the A1P1 argument on the basis that the Petitioner does not have the status necessary to engage the Protocol, he nevertheless went on to hold that the Petitioner should be entitled to make an application for financial remedy. The question must therefore arise as to whether Article 12, as an alternative to A1PI, provides her with the necessary status to make an application under the 1973 Act.

75. Article 12 provides:

> "Article 12 - right to marry
>
> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

76. At first instance neither the Attorney General nor the Petitioner sought to rely on Article 12. Both accepted that domestic law can properly impose formalities on marriage and that there is no Article 12 obligation on the state to recognise a religious marriage: see for example: *X v Federal Republic of Germany* (No 6167/73) (1975) 1 DR 64 and *Hamer and United Kingdom* (7114/75) (1982) 4 EHRR 139 [60]-[61].

77. The judge accepted, at [83], that, from a "vertical perspective", there was no basis on which to conclude that a failure to regard the Petitioner's Nikah as a void marriage could amount to a breach of Article 12. The judge still regarded Article 12, however,

as relevant and, by a somewhat unconventional route, concluded that this was a void marriage, in part by reason of what he called Article 12's "horizontal effect".

78. In our judgment, before examining the correctness of the judge's 'horizontal route', we must first consider whether on the facts of this case Article 12 is engaged at all.

79. In *Johnston and Others v Ireland* [1986] ECHR 17, (1986) 9 EHRR 203 *(Johnston)* the ECtHR said:

> "52 the Court agrees with the Commission that *the ordinary meaning of the words 'right to marry' is clear, in the sense that they cover the formation of marital relationships but not their dissolution.* Furthermore, these words are found in a context that includes an express reference to "national laws"; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12 (art. 12). *(our emphasis)*
>
> Moreover, the foregoing interpretation of Article 12 (art. 12) is consistent with its object and purpose as revealed by the travaux préparatoires. … In the Court's view, the travaux préparatoires disclose no intention to include in Article 12 (art. 12) any guarantee of a right to have the ties of marriage dissolved by divorce.
>
> 53. The applicants set considerable store on the social developments that have occurred since the Convention was drafted, notably an alleged substantial increase in marriage breakdown.
>
> It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions (see, amongst several authorities, the above-mentioned *Marckx* judgment, Series A no. 31, p. 26, § 58). However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate."

80. This reasoning was applied by the Court of Appeal in *Owens v Owens* [2017] EWCA Civ 182, [2018] 1 FLR 1002, at [76]–[81] where the Court of Appeal, having considered *Johnston*, held that a submission that there is no Convention right to be divorced nor, if domestic law permits divorce, a right to a "favourable outcome" was "irrefutable" - a proposition not thereafter challenged in the Supreme Court [2018] UKSC 41, at [29]. This is not to say that there might not be circumstances in which Article 12 *could* be engaged if the domestic divorce provisions, for example, created "insurmountable legal impediments on the possibility to remarry after divorce": *Babiarz v Poland* [2017] ECHR 13, [2017] 2 FLR 613, at [50] (see paragraph 104 below).

81. This court is bound by *Owens*, and the circumstances referred to in *Babiarz* are very far removed from this case, which is not about any impediment to the right to marry but only about whether the Petitioner is entitled to a decree of nullity. It being "irrefutable" that there is no absolute right to be divorced under Article 12, the question is whether Article 12 applies to nullity. In our judgment it does not. Logic alone would dictate this to be the case but, in any event, casting back to the ECtHR's words in *Johnston*, if Article 12 cannot cover "the dissolution of a marriage", it cannot cover a situation where a marriage is declared null and void ab initio.

82. In our judgment, counsel at first instance were right in their joint view that Article 12 has no place in this case. For completeness sake, however, we address the judge's finding that Article 12 has "horizontal" effect and that:

> "83 … in this case where the husband led the wife to believe that they would undertake a civil ceremony as part of the process of marrying and has thus left her in the situation where she does not have a marriage which is valid under English law the husband himself has infringed her right to marry. Once she had embarked on the process going through the Nikah ceremony and consummating the marriage, notwithstanding Ms Rhone-Adrien's assertion that she could have left the marriage at any stage, the reality for this wife and I suppose many others in her situation is that this was not a realistic option for her. Thus if this marriage is not a valid marriage according to English law nor a void marriage she is left without the remedies which arise from divorce or nullity. It seems to me this must be a relevant consideration in the evaluation of whether on these facts this should be treated as a void marriage."

83. In his conclusion, at [93c], the judge said that Article 12 "together with general principles of fairness or equitable principles support the proposition" that a failure to fulfil the agreement or "joint understanding that they would engage in a process which would ultimately lead to a legally valid marriage" should be "taken into account in determining whether [what] took place falls within or without the parameters of section 11".

84. Mr Nagpal submitted that ss. 3 and 6 of the Human Rights Act 1998 impose obligations on public authorities, including courts, but not on individuals. Whilst those obligations can in certain cases, Mr Nagpal submitted, require the state through the courts to regulate relations between private individuals, in the present case, at no time did the Petitioner possess any type of private law right against the Respondent requiring him to marry her lawfully or have any claim against him for refusing to do so.

85. In any event, Mr Nagpal argued, a finding that the parties never married (which is what a void marriage is) would not logically remedy a determination that the right to marry was infringed.

86. We would agree with both these propositions.

87. Mr Nagpal further submitted that the judge's decision amounted to a finding that the Respondent "behaved badly" in failing to carry out what had been the joint intention of the parties many years ago, namely that there should be a civil ceremony resulting in

the parties' marriage, valid according to Islam, also becoming a legal marriage under the 1949 Act.

88. No one can be forced to marry; indeed to force someone to marry is a criminal offence. Further, a person can change their mind and break their promise to do so right up to the last minute before the proposed marriage ceremony (or, even, during the ceremony). From a legal perspective, it does not matter how badly that refusal may reflect on the person who changes their mind, or indeed how deeply hurtful it is to their intended spouse. That this is the case is reflected in the fact that agreements to marry do not give rise to legal rights, and that no action lies for their breach: see s. 1 of the Law Reform (Miscellaneous Provisions) Act 1970 ("the 1970 Act") which abolished "breach of promise" actions:

> "Engagements to marry not enforceable at law.
>
> (1) An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights and no action shall lie in England and Wales for breach of such an agreement, whatever the law applicable to the agreement."

89. In our judgment therefore Article 12, like A1P1, is not engaged and even if it were, there would be no breach on the facts of this case.

Article 8

90. Article 8 provides:

> "Article 8 Right to respect for private and family life
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence
>
> 2 There shall be no interference by a public authority with the law and it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

91. In *Serife Yigit v Turkey* (3976/05) (2011) 53 EHRR 25 *(Serife Yigit)* the ECtHR considered the human rights implications of a refusal to give a widow's pension to a woman who had married her partner in a religious ceremony but without a recognised civil ceremony. There was a challenge on the basis of Article 14 taken with A1PI, but the second limb to the argument put before the court was based on an alleged violation of Article 8 on the basis that a failure to recognise their religious marriage amounted to an infringement of the surviving partner's right to respect for private and family life.

92. The court found that Article 8 was applicable, the applicant having entered a religious marriage, had six children and having lived together for 26 years until her partner's death. The question was, therefore, whether the state, in conferring a status on civil

marriage as distinct from religious marriage, resulted in an interference with the applicant's family life within the meaning of Article 8. The ECtHR held:

> "100. It should be reiterated in this regard that the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A). Furthermore, in the sphere of the State's planned economic, fiscal or social policy, on which opinions within a democratic society may reasonably differ widely, that margin is necessarily wider (see, *mutatis mutandis*, *James and Others*, cited above, § 46). This applies also in the present case (see paragraph 82 above).
>
> 101. As to the applicant, she chose, together with her partner, to live in a religious marriage and found a family. She and Ö.K. were able to live peacefully as a family, free from any interference with their family life by the domestic authorities. Thus, the fact that they opted for the religious form of marriage and did not contract a civil marriage did not entail any penalties – either administrative or criminal – such as to prevent the applicant from leading an effective family life for the purposes of Article 8. The Court therefore finds no appearance of interference by the State with the applicant's family life.
>
> 102. Accordingly, the Court is of the view that Article 8 cannot be interpreted as imposing an obligation on the State to recognise religious marriage. In that regard it is important to point out, as the Chamber did (see paragraph 29 of its judgment), that Article 8 does not require the State to establish a special regime for a particular category of unmarried couples (see *Johnston and Others*, cited above, § 68). For that reason the fact that the applicant does not have the status of heir, in accordance with the provisions of the Civil Code governing inheritance and with the domestic social security legislation, does not imply that there has been a breach of her rights under Article 8."

93. Whilst under Turkish law no religious marriages were recognised by the state, in our judgment the principle that Article 8 cannot be interpreted as imposing an obligation on the state to recognise a religious marriage applies equally to this jurisdiction where certain forms of religious marriage are recognised by the state.

94. In *Serife,* the ECtHR said:

> *"*Furthermore, the rules laying down the substantive and formal conditions governing civil marriage are clear and accessible and the

> arrangements for contracting a civil marriage are straightforward and do not place an excessive burden on the persons concerned", at [86].

95. Under the 1949 Act the routes into marriage (see paragraphs 12 and 13 above) are, in our view, accessible in that they provide a number of different ways in which a valid marriage can be contracted which "do not place an excessive burden on the persons concerned". We reiterate that these routes include parties incorporating a religious ceremony of their choosing, including a Nikah.

96. In our judgment the judge rightly accepted the Attorney General's submission, made in line with *Serife Yigit*, that there is no distinction in Article 8 terms between those who cohabit, choosing not to marry, and those who "knowingly undertake" only a particular form of ceremony (in this case religious) and "opt not to undertake the additional formalities necessary to effect a valid legal marriage", as found by the judge, at [80]. The judge however then went on to distinguish *Serife Yigit* saying:

> "80 … However I do consider that in respect of those who sought to effect or intended to effect a legal marriage that article 8 supports an approach to interpretation and application which [results in] the finding of a decree of a void marriage rather than a wholly invalid marriage".

97. Regardless of any merit in this approach, as a matter of agreed fact, at no time did the parties in the present case seek to effect a legal marriage and, at all times, not only the Petitioner but also the Imam and the Respondent were aware that for there to be a legal marriage it was necessary for there to be a civil ceremony. We would not agree, for the reasons outlined in this judgment, if "intended to effect a legal marriage" was a reference by the judge to the parties' expressed intention at the date of their Nikah also to go through a civil ceremony in due course, that any such intention would suffice to undermine the approach in *Serife Yigit* and change the legal effect of what they in fact undertook. Other than in the context of consent, mere intention cannot change the legal effect of a ceremony of marriage.

98. Accordingly, we do not agree with the judge's view, at [93(a)], that Article 8 supports an approach to interpretation which results in "the finding of a decree of a void marriage rather than a wholly invalid marriage" or that such an approach is consistent with "the historic approach of the courts as shown by the presumptions but also [as] clearly emerges from the authorities over the centuries which supports a finding of marriage".

99. The judge said:

> "Article 12 ECHR on a horizontal effect basis together with general principles of fairness or equitable principles support the proposition that if the parties had agreed to or it was their joint understanding that they would engage in a process which would ultimately lead to a legally valid marriage that should be taken into account in determining whether took place falls within or without the parameters of section 11."

100. We do not agree that this reflects the proper approach to the interpretation of section 11. The judge found that the point at which the Nikah took place was the start of a

continuum which would ultimately include the civil ceremony. As a consequence of looking, as the judge put it, at the matter from a "holistic view", he found, at [95]-[96], the failure to have a civil ceremony amounted, not to a deliberate failure to attempt to comply with any of the necessary formalities required under the 1949 Act resulting in a non-marriage, but only a failure to comply with certain formalities under s. 11(a)(iii), allowing the court to hold that the marriage was void.

101. It was this global approach to the human rights issues which led the judge to say:

> "94. Incorporating those considerations into the starting point leads me to conclude that the approach should be somewhat more flexible to reflect the Article 8 rights of the parties and the children".

102. With respect to the judge, who was clearly seeking a route which he understandably believed would lead to a fair outcome for the Petitioner, that is to say the ability to make an application for financial remedies for herself, we do not consider that his approach can withstand analysis. The judge's view, that Article 8 supports an interpretation and application in favour of a void rather than invalid marriage, depended upon the couple having "sought to effect" or having "intended" to effect a legal marriage. The difficulty with the judge's approach is that, as referred to above, at no time did the parties in fact seek to effect a legal marriage. As there is no question of the couple having ever sought to effect a legal marriage, the judge has, instead, relied upon the continuum argument, namely the parties' agreement at the date of the Nikah that they would have a civil ceremony at some future date with the intention to effect a legal marriage. The judge's analysis in this respect would also, again, fall foul of s. 1 of the 1970 Act.

103. In addition, the question of whether a marriage is void must, in our view, depend on the facts as they were at the date of the alleged marriage. A marriage either is or is not void and either is or is not within the scope of the 1949 Act at the date of its alleged solemnization. The determination of whether a marriage is void or not cannot, in our view, be wholly (or in part) dependent on future events, such as the intention to undertake another ceremony or whether there are children. We return to this below but, putting it more broadly, it cannot be the case that the legal effect of a ceremony of marriage can depend on whether the parties have children either at the date of the ceremony or subsequently. There is no basis, under Article 8 or by virtue of the impact of Article 3 of the United Nations Convention on the Rights of the Child 1990 ("UNCRC"), by which the legal effect of the same ceremony could be converted including from a non-marriage to a void marriage.

104. There is, in our judgment, a further difficulty with the judge's analysis. The judge could not have had in mind the following passages in the judgment of Sir James Munby P, in *Owens* which passages were endorsed in the Supreme Court, at [29]:

> "[77] Mr Dyer's argument in answer to Mr Marshall's argument was simple, clear and, in my judgment, irrefutable. There is, he submitted, no Convention right to be divorced nor, if domestic law permits divorce, is there any Convention right to a favourable outcome in such proceedings. He referred to two authorities.

[78] In the first, *Johnston v Ireland* (1986) 9 EHRR 203, at paras 52-53, the Strasbourg court said this in relation to Article 12 [quoted in our paragraph 80 above]:

[…]

[79] In relation to Article 8, the Court said this, para 57:

> 'It is true that, on this question, Article 8, with its reference to the somewhat vague notion of 'respect' for family life, might appear to lend itself more readily to an evolutive interpretation than does Article 12. *Nevertheless, the Convention must be read as a whole and the Court does not consider that a right to divorce, which it has found to be excluded from Article 12, can, with consistency, be derived from Article 8, a provision of more general purpose and scope*. The Court is not oblivious to the plight of the first and second applicants. However, it is of the opinion that, although the protection of private or family life may sometimes necessitate means whereby spouses can be relieved from the duty to live together, the engagements undertaken by Ireland under Article 8 cannot be regarded as extending to an obligation on its part to introduce measures permitting the divorce and the re-marriage which the applicants seek.'

[80] In the second case, the very recent judgment in *Babiarz v Poland (Application no. 1955/10)*, 10 January 2017, paras 47, 49-50, 56, the Strasbourg court, referring to *Johnston v Ireland*, said:

> '47 … In the area of framing their divorce laws and implementing them in concrete cases, the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention and to reconcile the competing personal interests at stake.
>
> […]
>
> 49 *The Court has already held that neither Article 12 nor 8 of the Convention can be interpreted as conferring on individuals a right to divorce. Moreover, the travaux préparatoires of the Convention indicate clearly that it was an intention of the Contracting Parties to expressly exclude such right from the scope of the Convention*. Nevertheless, the Court has reiterated on many occasions that the Convention is a living instrument to be interpreted in the light of present-day conditions. It has also held that, if national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons the right to remarry.
>
> 50 Thus, the Court has not ruled out that the unreasonable length of judicial divorce proceedings could raise an issue under Article 12. The Court did not rule out that a similar conclusion could be

> reached in cases where, despite an irretrievable breakdown of marital life, domestic law regarded the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party. However, that type of situation does not obtain in the present case, which concerns neither a complaint about the excessive length of divorce proceedings nor insurmountable legal impediments on the possibility to remarry after divorce." *(our emphasis)*

105. If failure to grant a divorce is excluded from the scope of the ECHR, including Article 8, it follows in our judgment that a failure to grant a right to a decree of nullity must also be excluded. Mr Hale sought to distinguish *Owens* by reference to *Hamalainen v Finland* [2015] 1 FCR 379, 37 BHRC 55, at [83], on the basis that the issue of status in this case falls four square within the ambit of Article 8 since what is at stake is an "essential change in the applicant's legal situation". In our judgment so equally does a decree of divorce.

106. In our judgment therefore:

i) Whilst the Petitioner's Article 8 right to respect to family life is undoubtedly engaged, the failure of the state to recognise the Nikah as a legal marriage is not in breach of those rights;

ii) The right or otherwise to the grant of a decree of nullity does not in itself engage Article 8.

The fact that at the time of the Nikah ceremony both parties knew that in order to contract a legal marriage they had to go through a civil ceremony, and intended to do so, does not undermine either of those conclusions or permit reliance on Article 8 as a means to allow a flexible interpretation of s. 11 of the 1973 Act.

<u>The best interests of the children</u>

107. The judge's other approach to Article 8 was introduced by him through his invitation to the parties to:

> "… consider to what extent the rights of the minor children might be engaged given that a consequence of the decision I reach will have a knock-on effect on the children through the availability or not to the wife of a financial remedy where the first consideration would be the welfare of the children."

108. The route the judge had in mind was Article 3 of the UNCRC which provides:

> "Article 3
>
> 1 In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

109. The UNCRC was ratified by the UK on 16 December 1991 and came into effect on 15 January 1992. Although the Convention has not been incorporated into domestic law, it is now well established that those rights must be taken into account in our domestic setting and, in particular, that consideration of ECHR rights must be viewed through the prism of Article 3: see: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, per Baroness Hale at [23];

> "This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law."

110. *HH v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor Intervening)* [2012] UKSC 25, [2013] 1 AC 338, [2012] 4 All ER 539, was a case concerned with the rights of two children whose parents were the subject of extradition proceedings. Lord Kerr said:

> "155. Article 3.1 of the UN Convention on the Rights of the Child dated 20 November 1989 provides that "in all actions concerning children ... the best interests of the child shall be a primary consideration". …The word "concerning" in article 3.1, like the phrase "relating to" in article 24.2, encompasses actions with indirect, as well as direct, effect upon children: the *ZH (Tanzania)* case, para 26 (Lady Hale). The rights of children under article 8 must be examined through the prism of article 3.1: see paras 21 to 23 of the same case."

The question then is whether, upon a proper interpretation of Article 3, the present application is an "action concerning children" whether by way of the direct or indirect effect upon him or her.

111. The judge decided that it was, saying:

> "72. It seems to me that the decision that I reach in this case is properly described as an action concerning children both because a direct consequence will be the availability or non-availability of a financial remedy of quite a different character to that which is available under the Children Act 1989. I also consider that it is an action concerning the children because it involves a determination of whether the relationship of their mother and father is to be described and categorised as a non-marriage or a void marriage. A marriage which is ended by a decree of nullity for non-compliance with the formalities of legal marriage is in my view a matter which concerns the children."

This finding fed into the judge's conclusion that:

> "93b. The court should where it is appropriate be able to take into account the best interests of children as a primary consideration and weight with other article 8 rights of the parties."

With respect to the judge, we disagree. In our view the decision before the court cannot properly be described as an action concerning children and we cannot see how it can be

said that the best interests of a child can turn what was neither a void nor valid marriage, into a void or valid marriage. In our judgment, the action in question relates solely to the status of the adult applicant.

112. The judge in reaching his conclusion to the contrary relied, at [72], on two matters.

113. The first was that the action involves a "determination as to whether the relationship of their mother and father is to be described and categorised as a non-marriage or a void marriage". This, all parties agree, is a reference to the suggestion that there may potentially be reputational issues attached to those children whose parents' relationship is held to be a non-marriage.

114. This has to be considered against the backdrop of s. 1 of the Legitimacy Act 1976 which provides for the status of the children of void marriages:

> "1 Legitimacy of children of certain void marriages
>
> (1)The child of a void marriage, whenever born, shall, subject to subsection (2) below and Schedule 1 to this Act, be treated as the legitimate child of his parents if at the time of the insemination resulting in the birth or, where there was no such insemination, the child's conception (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid."

115. In the present case, neither party "reasonably believed" that the Nikah was a valid marriage for the purposes of the law of England and Wales. It follows, therefore, that even if this was a void marriage, the children would be illegitimate (or, put in the more attractive and contemporary terminology used in Scotland, the children would be the "natural" children of their parents). The status of the parents' relationship therefore makes no difference to the legal status of the children of these parties.

116. Moreover, section 1(1) of the Family Law Reform Act 1987 ("the FLRA 1987") provides:

> "(1) In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time."

It follows that as of 4 April 1988 when the FLRA 1987 came into force, there is legal equality for all children whether or not their parents have ever been married to each other.

117. The second matter on which the judge relied, at [72], was that every child who is subject to the court's jurisdiction in England and Wales has a claim for provision for themselves, either as part of a claim within the 1973 Act or under Schedule 1 to the Children Act 1989. The judge referred to the two different routes as being "of a quite

different character". That is inevitable given that a claim under the 1973 Act is in relation to the freestanding claim made in the capacity of wife as well as in the capacity of mother, whereas a claim under Children Act 1989 is an application made on behalf of a child alone; each route however provides for all the same essential elements necessary in order properly to provide for that child.

118. It follows in our judgment that whilst there is inevitably a tangential impact upon a child dependent upon the status of his or her parents' relationship, an application brought before the court made in order to establish the status of that relationship cannot properly be regarded as an "action concerning children".

119. In our judgment, therefore, the interests of children can play no part in a determination as to whether a ceremony is a non-qualifying ceremony or is a void marriage.

Article 14: Discrimination.

120. Mr Horton on behalf of the Southall Black Sisters did not seek to rely on the UNCRC, or Article 6 ECHR or Article 12. He sought to rely only on Article 8 and A1P1 in conjunction with Article 14. Whilst the judge set out the terms of Article 14, at [66], the focus of his judgment was upon the matters set out above and there is little consideration or analysis of Article 14 nor is it a ground of appeal. It is not therefore necessary or appropriate for the disposal of this particular appeal to consider the issue of Article 14 discrimination.

Issue (i):

121. Returning to issue (i), we conclude, for the reasons given above, that the judge's approach is not supported by either the ECHR or the UNCRC. We are also of the view that they do not support any departure from the current legal approach as also summarised above. Accordingly, we repeat, there can be ceremonies which do not create a marriage, even a void marriage, within the scope of the 1949 and the 1973 Acts and which do not, therefore, entitle the parties to a decree of nullity.

Issue (ii)

122. The next issue is whether the December 1998 ceremony was a non-qualifying ceremony (or a non-marriage) or, as Williams J decided, a void marriage within the scope of s. 11 of the 1973 Act.

123. We have reached the clear conclusion that the December 1998 ceremony did not create a void marriage because it was a non-qualifying ceremony. The parties were not marrying "under the provisions" of Part II of the 1949 Act. The ceremony itself would have been permitted under s. 44 if it had been performed in a registered building, but it was not. In addition, 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. It was not, therefore, a marriage within the scope of, in particular, the provisions of s. 26 of the 1949 Act. We would also add that the parties knew that the ceremony had no legal effect and that they would need to undertake another ceremony which complied with the requirements of the 1949 Act if they were to be validly married.

124. We also see no scope, as referred to above, for the nature and effect of a ceremony to change over time, other than in the case of a voidable marriage as expressly provided for by s. 12 of the 1973 Act. Whether a ceremony created a valid marriage or a void marriage or was of no legal effect at all must be determined at the date of the ceremony. It would make no sense for its legal effect to fluctuate depending, as was submitted by Mr Hale, on future events such as whether the parties did or did not have children. There is no support for this approach to the determination of the legal effect of a ceremony either in our domestic legislation or in the ECHR or in any case to which we were referred. Further, to adopt this approach would also fundamentally undermine the need for the parties and the state to know, as from the date of the ceremony, whether the parties are or are not validly married.

125. Contrary to the judge's decision, we also reject Mr Hale's submission that, by adopting a holistic approach, the legal effect of the December 1998 ceremony can be changed because the parties intended to marry and intended to undertake a civil ceremony which would have created a valid marriage. We repeat that, in our view, the effect of a ceremony of marriage must be determined as at the date it was performed. To use the language of the 1949 Act, the issue of whether a marriage has been validly "solemnized" depends on what has in fact happened when it was allegedly "solemnized".

126. We would agree, as Mr Hale submitted, that the formalities of marriage could be described as a "process". This does not justify, however, treating the civil ceremony which the parties intended to undertake as having in fact taking place. It did not. The effect of what happened cannot, in our view, depend on whether the parties might have agreed to undertake a further step or steps. This might result in a party being married even when they had changed their mind part way through the process. This proposed development of the law would also fundamentally undermine the manner in which the status of marriage is created and the necessary degree of certainty which underpins the required formalities. In addition, as Mr Nagpal submitted, this would be inconsistent with the express abolition of the right to sue for breach of an agreement to marry by section 1 of the 1970 Act.

127. Similarly, we reject the submission that the parties' intentions can change what would otherwise be a non-qualifying ceremony into one which is within the scope of the 1949 Act. Their intentions provide no legal justification for changing the effect of the only ceremony which in fact took place.

Conclusion

128. For all the reasons set out above, the judge's order must be set aside as there was, in this case, no ceremony in respect of which a decree of nullity could be granted pursuant to the provisions of s. 11 of the 1973 Act.