Neutral Citation Number: [2018] EWFC 54

Case No: ZC16D00278

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before :

MR JUSTICE WILLIAMS

- -

Between :

Nasreen Akhter	**Petitioner**
- and -	
Mohammed Shabaz Khan	**Respondent**
- and -	
The Attorney General	**1st Interested Party**

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Valentine Le Grice QC and Max Lewis (instructed by **Direct Access**) for the **Petitioner**
Paula Rhone-Adrien (instructed by **Messrs Seth Lovis & Co Solicitors**) for the **1st Respondent**
Deepak Nagpal (instructed by the Government Legal Department) for the 1st Interested Party

Hearing dates: 5th - 6th February and 12th - 13th July 2018

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Judgment Approved

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Williams :

Introduction

1. The petitioner Nasreen Akhter issued a petition for divorce from the respondent Mohammed Shabaz Khan on 4 November 2016. The husband defended the divorce on the basis that the parties had not entered a marriage valid according to English law. In her reply, the wife averred that the presumption of marriage arising out of cohabitation and reputation applied so as to validate the marriage. In the alternative, she averred that the marriage was a void marriage within section 11(a)(iii) of the Matrimonial Causes Act 1973.

2. There are thus two central questions which I have to answer:

    a. Are the parties to be treated as a validly married under English law by operation of a presumption of marriage;

    b. if not, is the marriage a void marriage, susceptible to a decree of nullity.

3. I shall refer to the petitioner in this judgment as the wife. I shall refer to the respondent as the husband. I do this because both the wife and the husband considered themselves to be married to each other and held themselves out to the world at large as husband and wife. That was because they had undertaken a religious marriage according to their faith which they themselves and the Islamic world considered made them husband and wife. The wife says (but it is denied by the husband) that they intended to undertake a civil ceremony. Whilst the parties lived in Dubai between 2005 and 2011 they were considered by the authorities there to be validly married. Although the husband now adopts the position that they were not married, and has apparently instructed his counsel to refer to the ceremony that the parties undertook in 1998 as a blessing, I consider that for the purposes of this judgment and notwithstanding that the issues that I have to determine go to their legal status in English law that I should refer to them as husband and wife.

4. Although the case before me is of most immediate concern to the applicant and the respondent and no doubt their children and extended families it does give rise to some questions which are of public interest also. The fact that some of the issues which are present in this case have been the subject of 'The Independent Review into the application of Sharia Law in England and Wales' which was commissioned by Theresa May when she was the Home Secretary illustrates the potential wider public interests of itself.

5. What this case is not about though is whether an Islamic marriage ceremony (a Nikah) should be treated as creating a valid marriage in English law. In fact, the main issue as it has emerged is almost diametrically the opposite of that question; namely whether a Nikah marriage ceremony creates an invalid or void marriage in English law. To the

average non-lawyer in 2018, it may appear an easy question to answer. Surely a marriage which is not a valid marriage is a void marriage and thus can be annulled? Regrettably it is not that simple.

6. The complication arises in part from the fact that in a series of cases since about 2001, judges have interpreted the provisions of the Marriage Act 1949 and the Matrimonial Causes Act 1973 such that as the law currently stands a marriage can not only be valid and void but also what has become termed a non-marriage.

7. If the marriage is valid (either because it has been shown or is presumed to have been conducted in the UK and complied with the necessary laws here or it had been shown or is presumed to have been conducted abroad and complied with the necessary laws there) the husband and wife gain all the benefits that come with the legal status of husband and wife. These may range from tax benefits, entitlement to pensions, inheritance advantages, forensic advantages in evidential terms in court through to the more prosaic of family discounts on tickets. If contrary to the parties' hopes and, the marriage fails, they may separate and if necessary apply to court for judicial separation or divorce and for financial orders to deal with housing and maintenance and splitting of other assets. In the alternative if the parties have failed to comply with the necessary laws, the marriage may be annulled as being void or voidable. Whilst the marriage subsists they may have the same benefits as a married couple and if the court annuls the marriage the parties will be able to divide their assets or deal with maintenance.

8. However, in a 'non-marriage' case there is no such remedy available. Whatever the circumstances of the non-marriage the consequences are the same. Of course, no one would suggest that actors acting out a marriage for a film should under any circumstances be considered married. Likewise two individuals making promises to each other in secret. Again a couple who have lived together and had children but who have never as between themselves or held themselves out as married would rightly be treated as cohabitees without any of the remedies available to those who have married. But at the other end of the spectrum are cases where the application of the term 'non-marriage' seems inapt and indeed pejorative. The parties may have undergone a public marriage ceremony conducted by an official, witnessed by others, in which they confirmed there was no impediment to them marrying, that they consented and that they committed themselves to each other which they, their family and communities accepted led to them being married. They may have lived a married life and been accepted as married by their communities and the state. They may have had children. To all intents and purposes, they have been married. To characterise all of that as a non-marriage in law feels instinctively uncomfortable in 2018 and might rightly be regarded as insulting by many (although not all) of the participants. If it is a non-marriage which fails they may find they have no recourse to civil law and the remedies that provides. The parties cannot divorce because they do not have a marriage that is valid under English law but nor can they have the marriage annulled because they do not have a marriage that is void under English law. And so the parties – and usually of course the party who loses out is the wife – cannot ask a court to deal with issues of property, maintenance, pension sharing, variation of trusts.

9. As I have said the application of the term non-marriage to cases such as that before me feels instinctively inappropriate. For most purposes the relationship will have been accepted as a marriage by the parties, the community, and very probably various emanations of the state (schools, hospitals, possibly benefits or tax authorities). That it

has come to be called a non-marriage in a sense illustrates the conundrum in this case. The use of any other word to describe the marriage for instance invalid, unlawful, non-compliant, void tends to lead to the conclusion that it was not valid and so might be thought capable of annulment.

10. So the main issue in this case is whether this marriage – which lasted for 18 years (longer than the average 'marriage') and which produced 4 children and where all accepted them as husband and wife in fact is to be treated in English law as not a marriage at all? Not even one which can be declared void for failing to comply with the formalities of marriage? I am identifying this as the main issue because as will become clear in the course of this judgment the question of whether the situation of the parties over the course of the period 1998 -2016 was such that a valid marriage could be presumed occupied the court far less than the nullity issue.

The Formulation of the Issues

11. Although there are some factual issues in the case they are of relatively limited ambit albeit of considerable importance. I heard oral evidence from the wife, her sister and from the husband.

12. Whilst the basic two questions which the court is required to answer can be simply stated, hidden within them are a multitude of legal issues. The case was initially listed for three days on the 5 February 2018. For that hearing Mr Le Grice QC had filed a 13 page skeleton and Ms Rhone-Adrien a 7 page skeleton and they had compiled a bundle of 38 authorities running to some 615 pages. It became clear in the course of that hearing that the issues raised were of wider public interest, in particular whether the application of the Human Rights Act 1998 required the court to adopt a different interpretation of section 11 of the Matrimonial Causes Act 1973 or to apply it differently. As a result, I invited the Attorney General to intervene to make submissions on those issues. The Attorney General accepted the invitation to intervene and instructed Mr Nagpal whose written submissions ran to some 36 pages. Mr Le Grice QC's further submissions ran only to a further three pages and Ms Paula Rhone-Adrien's to 13 but these led to a further 17 page supplemental submission on behalf of the Attorney General. A further 33 authorities totalling some 956 pages were provided for the resumed hearing which was listed for two days on the 12th and 13th of July 2018. Having heard submissions from all the parties I adjourned my decision to consider my judgment.

13. Inevitably given the very lengthy written submissions, oral submissions and the authorities I cannot rehearse in this judgment all of the erudite, wide-ranging submissions that were made to me. I hope the parties will forgive me for what inevitably is a brief summary of the arguments that were put before me. I will explore the arguments in somewhat more detail later in this judgment but it seems to me that the essential issues identified by the parties are as follows

Validity of Marriage

14. In the wife's skeleton two possible presumptions of marriage are identified which might lead the court to presume that a valid marriage in English law took place.

a. Presuming proper formality of a ceremony followed by cohabitation.

The effect of this presumption is that if a marriage ceremony is proved the court should presume that the proper formalities (in this case the English formalities) were followed. The presumption is capable of rebuttal by strong and weighty evidence.
Although Mr Le Grice QC addressed the law relating to this limb of the presumption ultimately this was not pressed very hard on behalf of the wife as a basis for concluding a valid English marriage was established.
The husband and the Attorney General both submitted that the evidence given by both the wife and the husband clearly established that the ceremony was not one which could create a valid English marriage and that the positive evidence of the parties rebutted any presumption- if indeed any presumption arose on the facts.

b. Presuming the ceremony (and the proper formality)

i. the effect of this form of the presumption is that where parties are reputed to be husband and wife and have long cohabited that the court should presume that a ceremony took place accompanied by the proper formalities to establish a valid marriage.

ii. The wife submits that the effect of the presumption (particularly in the light of the *A-M v A-M* [2001] 2 FLR 6 decision) is to presume that a ceremony took place by proxy in Dubai whilst the parties were living as husband and wife there, that that ceremony established a valid Dubai marriage and that a valid Dubai marriage would be entitled to recognition as a valid marriage in England.

iii. The Attorney General submits in reliance on the *Al-Saedy v Musawi (presumption of marriage)* [2010] EWHC 3293, [2011] 2 FLR 287 case that the presumption can only be brought to bear if there is some evidential foundation for the possibility of another ceremony (unknown to the wife) having taken place. He submits that there is no evidential foundation (in contrast to *A-M*) on which the presumption can rest.

iv. The husband and the Attorney General both submit that again the presumption is rebutted by the evidence of the parties to the effect that:

1. They obtained a marriage certificate in relation to the English ceremony in order to demonstrate to the Dubai authorities that they were validly married in the eyes of Dubai law. Thus there was no reason why any further ceremony should have taken place in Dubai.

2. Both parties gave evidence that no ceremony took place in Dubai.

3. Neither party suggested that they had divorced in Dubai so as to create any need to replace the marriage which was viewed by the Dubai authorities as valid.

4. They distinguish the *A-M* case.

5. Upon return from Dubai the wife only enquired about an Islamic divorce which suggests she did not consider anything had occurred in Dubai to create a marriage in Dubai would be recognised in England.

Nullity of Marriage

15. The wife submits as follows:

    a. In order to be susceptible to a decree of nullity all that needs to be established as an act allegedly creative of a marriage status. Marriage will be established for instance by a ceremony in public which is expressed to be a marriage.

    b. Section 11 of the Matrimonial Causes Act 1973 on its plain language provides for nullity where certain requirements of the Marriage Act 1949 are not complied with.

    c. Recent authorities which have interpreted section 11 of the Matrimonial Causes Act 1973 as requiring the marriage ceremony to have purported to, or attempted to, comply with either Part II or Part III of the Marriage Act 1949 are flawed for a variety of reasons. In particular it is submitted that the jurisprudence of the Ecclesiastical Court prior to 1857 (for example *Pertreis v Tondear* (1790) 1 Hagg Con 136) shows that that court did not adopt such a narrow interpretation. It is submitted that none of the recent authorities took account of that body of jurisprudence. It is submitted that the courts were required to do so. Mr Nagpal notes the relevant statutory provision was section XXII of the Matrimonial Causes Act 1857 which required the High Court Family Division (as we now are) to act and give relief as may be conformable to the principles and rules on which the Ecclesiastical Courts had previously acted. Mr Le Grice QC submits that section 26 of the Senior Courts Act 1981 (which is the successor provision to one part of the 1857 Act) states that the High Court shall have all such jurisdiction in relation to matrimonial causes (including nullity) and matters as was immediately before the commencement of the Matrimonial Causes Act 1857 vested in the Ecclesiastical Court.

    d. It was not submitted that the High Court now retains or could exercise some sort of inherent jurisdiction outside the parameters of section 11 of the Matrimonial Causes Act 1973 to fill in a gap created by a statute which deals only with marriages in accordance with the rites of the Church of England or under a superintendent registrar's certificate.

    e. The term non-marriage should thus be reserved to situations which properly warrant the description such as actors acting a scene or parties playing at getting married.

    f. Supplementing her submissions as to the proper interpretation of section 11 the wife prays in aid the effect of rights under the ECHR. It is submitted that section 6 of the Human Rights Act 1998 makes it unlawful for the court to act in a way incompatible with a Convention right. It is also submitted that section 3 of the Human Rights Act 1998 requires the court so far as it is possible to do so to read and give effect to primary legislation in a way which is compatible with Convention rights.

i. It is submitted that the law of non-marriage is indirectly discriminatory in breach of Article 14. It is submitted that the current approach to the law of non-marriage means that Muslim women do not receive a fair trial because it excludes them from making a financial claim against a man with whom they had a Nikah marriage.

ii. It is submitted that the law of non-marriage is a breach of the Article 8 Right to respect for private and family life because characterising a marriage as a non-marriage and preventing it being void is offensive and stigmatises a marriage as non-existent. It is submitted that Article 8 can include the right to respect for status.

iii. It is further submitted that Article 1 of the First Protocol which protects the peaceful enjoyment of possessions is infringed because a wife's unascertained share of the matrimonial assets amounts to a right in property which a wife is precluded from claiming if her marriage is categorised as a non-marriage rather than a valid, voidable or void marriage. It is submitted that she is deprived of her possessions not due to conditions provided for by law but by being denied access to the court and a fair trial.

iv. It is further submitted that Article 16 of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979) (CEDAW) is also engaged and (I think) that the law of non-marriage is indirectly discriminatory against women because the effect of a finding of non-marriage impacts upon the ability of a wife to assert property rights. Given that in most cases property will legally be vested in the man the status of non-marriage as a discriminatory effect on women because it prevents them making a claim for financial relief.

g. In addition to the points raised by Mr Le Grice QC on behalf of the Wife, I also invited the parties to consider whether under the umbrella of Article 8 the rights of children to have their best interests considered as a primary consideration were engaged given that the decision on nullity would arguably affect them given their mother would not be able to make a financial remedy application if this was neither a valid or a void marriage. The fact that section 25(1) of the Matrimonial Causes Act 1973 imposes a duty on the court to give first consideration to the welfare while a minor of any child of the family in relation to such applications arguably engages the interests of the children in the interpretation or application of section 11 of the Matrimonial Causes Act 1973.

16. On behalf of the husband, Ms Rhone-Adrien emphasised the following points

a. She submitted that the evidence demonstrated the parties had clearly made a choice only to marry religiously and that they had been advised of the need to embark on a civil ceremony in order to obtain a legally valid marriage and chose not to undertake that ceremony of marriage.

b. The husband submits that the interpretation of section 11 of the Matrimonial Causes Act 1973 is clear and that the religious ceremony was a wholesale failure to make any attempt at compliance with the requirements of the

Marriage Act 1949. Thus the religious ceremony falls into the category of non-marriage rather than a void marriage. Ms Rhône-Adrian submits that the series of cases provide clear guidance as to the circumstances in which this court can conclude that a marriage ceremony falls within section 11 of the Matrimonial Causes Act 1973 and this is plainly well outside that guidance failing each of the previously identified factors.

c. Ms Rhône-Adrian emphasises the following in respect of the fundamental rights arguments:

   i. Article 12 does not confer or guarantee a right to divorce

   ii. It was submitted that having made that choice it would be un-just retrospectively to impose on the husband a remedy provided by law which neither party had any intention of creating at the time of the religious ceremony. It was submitted that in terms of the parties fundamental rights the husband's rights to choose the form of marriage and its consequences were as valid for Article 8 purposes as the wife's.

In consequence Miss Rhône-Adrian submits there is no need or purpose in revisiting the interpretation of void marriages.

17. The submissions on behalf of the Attorney General have ranged far and wide on the Nullity point. The essential issues identified by Mr Nagpal can I think be summarised as follows.

a. The construction of section 11(a)(iii) of the Matrimonial Causes Act 1973 clearly requires that the 'certain requirements' which were not complied with were those identified in section 25 or section 49 of the Marriage Act 1949. The linkage between the two is plain.

b. The authorities in which the point has been considered all agreed with that interpretation including Moylan J (as he then was) in the *MA v JA and the Attorney General (also known as A v A (Attorney-General Intervening)* [2012] EWHC 2219 (Fam); [2013] 2 FLR 68 case.

c. Section 26 of the Senior Courts Act 1981 does not import into the High Court any current obligation to interpret the law in the way that the Ecclesiastical Courts did prior to 1857. The relevant sections of the earlier statutes are not replicated in the Senior Courts Act 1981.

d. In any event it is submitted that the absence of reference to the *Pertreis* case in the modern authorities does not render them wrongly decided. Further Mr Nagpal identifies other cases from the High Court applying Ecclesiastical Court principles which demonstrate that that court would decline to hear or grant any relief in relation to marriages which it considered were outside the proper definition or interpretation of marriage for the purposes of that court.

e. He agrees that there is no vestigial Ecclesiastical Court or inherent High Court jurisdiction to grant degrees of nullity and he points out that the Ecclesiastical Court only dealt with Christian marriages.

f. The Attorney General submits that human rights or fundamental rights considerations do not affect either the interpretation of section 11 or its application. In particular it is submitted that

   i. Article 14 is only of relevance if it is established that and other ECHR right is engaged. It is not a freestanding right.

   ii. Article 6 confers only a procedural right of a fair hearing it cannot create a substantive right to a decree of nullity or to a consequent remedy. The wife has access to a court.

   iii. Article 12 (subject to anything the Supreme Court might say to the contrary in Owens) does not confer a right to a decree of nullity or a divorce.

   iv. Article 1 of Protocol 1 cannot potentially create any property rights unless you have a valid marriage or a void marriage. In any event the authorities are far from clear that the right to a share in the matrimonial acquest creates a true 'right' within the meaning of A1P1

   v. The wife's Article 8 argument is about status. In fact there is no difference in status between a void marriage and a non-marriage. If this situation falls within Article 8 because it is a marriage according to conscience there is no logical reason to exclude all forms of marriage however unorthodox they may be for instance as referred to in an article by Mr Le Grice QC ceremonies such as hand fasting or broom jumping. The Attorney-General submitted that in *Owens* the Court of Appeal held Article 8 was not engaged. The Supreme Court decision also has now held that Article 8 does not confer a right to divorce or the Attorney-General would submit to nullity.

   vi. The Attorney General accepts that Article 3 of the United Nations Convention of the Rights of the Child informs Article 8 ECHR but does not accept that the children's best interests are engaged at this stage. In any event even if they are the children's best interests are addressed by the remedy that is available to the wife under Schedule 1 of the Children Act. Section 11 of the Matrimonial Causes Act 1973 applies to adults without children or without minor children as well as those with children and its interpretation cannot be dictated by those cases where minor children are involved.

The History and Factual Findings.

18. I have had available to me the evidence contained within the court bundle and the supplemental documents which have been provided since.

19. I heard evidence from the wife, the husband, and from the wife's sister. I have also read the witness statements of Ramiz Ibrahim and Rehmat Ali although they were not called to give evidence. I shall give them the weight which I consider appropriate. The critical witnesses in this were of course the husband and the wife and I shall return to my assessment of their credibility and the consequences at the conclusion of my review of the evidence contained within the chronology set out below. In the course

of the chronology where I draw conclusions, they can be incorporated into my overall assessment of the evidence at the conclusion of this section.

20. In determining disputes of fact between the parties I approach it applying the civil standard; i.e. is it more probable than not that an event occurred or occurred as described by the wife or the husband. I give myself a Lucas direction.

5 Dec 1971	Nasreen Akhter born
14 Dec 1971	Mohammed Shabaz Khan born
13 Dec 1998	Parties undertake Islamic marriage ceremony at TKC Chowdhury's in Southall. The marriage certificate records that H was a car salesman resident at nine Elizabeth House, St Leonard Street, London, E3 it is signed by him. It records W as a trainee solicitor living at 10 Branca Road, Kent and is signed by her. It records the 'Wali' as Rehmat Ali retired and is signed by him. The witnesses are Mohammed Ayaz Khan and Ramiz Ibrahim. W said the Certificate was not produced at the time but only in 2006. She said it wrongly records the dowry as £500 when in fact it was books on Islamic jurisprudence that she had specifically asked for. The Imam who conducted the ceremony Dr Khalid M Khan of the Lambeth Islamic centre has provided a letter dated 10 December 2016 in which he confirms that the ceremony was not registered but that he advised W's father that the Nikah ceremony should be followed by a civil ceremony for legal recognition. W says they met twice before the marriage that the ceremony was arranged fairly swiftly because Ramadan was approaching and they wished to get married prior to Ramadan and its fasting obligations. She described how although they had only met twice the discussed the wedding on the phone on several occasions including how it would be followed by a Walima and the civil ceremony. She said they had not discussed a detailed contract prior to the marriage and that she knew very few people who had. She described what the Imam said about the obligations of marriage and the commitments of being a husband and wife and how the ceremony was amplified by a loud speaker so all could hear. She described how the Imam confirmed they were not already married and that her father was her guardian, what the mahr (dowry) was. She said that following the Nikah ceremony which had been organised by and paid for by her family that she was expecting the husband to organise the Walima and the civil ceremony. She said that is traditionally how responsibility is divided. W says that as a lawyer in training she was concerned that her rights were not protected and that she told the husband that they would be treated as cohabitees. She says that the husband said English law was not important and that Sharia Law was more important to their lives. She says that on occasions when she raised the issue it led to arguments. She says she changed her name by statutory declaration. W's case is that her father also spoke to the husband to suggest a civil ceremony was undertaken but the husband dismissed his request. W says her sister Shameem Ibrahim had had a

	civil wedding service following her Nikah ceremony. Mrs Ibrahim said the family were concerned that the husband had refused to undertake a civil ceremony. Her father Rehmat Ali confirms that he acted as the Wali and that he had expected that there would be a civil ceremony after the Nikah. He says that he spoke to the husband and said that when he was preparing for the Walima he should also arrange a civil ceremony and that the husband agreed to do this but never did. After the ceremony she and the husband returned to her mother's home with a small group of close family. Following that they went to his mother's home at Elizabeth house and spend their first night as a married couple there. H says W was and still is extremely religious and felt it was unnecessary to register the marriage. He described the importance of the Nikah ceremony to him. It meant that he was married before God and under Islamic law. His position was that the question of a civil ceremony had never been raised by either of them or anybody else. I find this hard to believe given how many members of their respective families, including his brother, have undergone civil ceremonies. Whilst I could understand them discussing the issue and deciding not to have a ceremony I cannot accept his evidence that neither he or the wife or anybody else ever raise the question of a civil ceremony. He said that had it been raised then that he would have agreed to it. He described how the vows that they gave were almost the same as a civil marriage. He says that she never at any time requested that a civil ceremony be conducted, that she well knew the Nikah ceremony had not resulted in a marriage valid in English law and that she has deliberately set out to deceive the court. (Self-evidently this is a serious allegation in respect of a qualified lawyer) H does say that they did not have a Walima because there is no requirement under Sharia Law for that to take place. He says that the Wali (Guardian) was not the wife's father but was her sister's ex-husband although he accepts that the wife's father was present. He has provided a statement from his former brother-in-law (although he did not give evidence) in which he says that the wife was adamant she did not want a civil ceremony despite the encouragement of her sister. H says that W could have made the holding of a civil ceremony a condition of the marriage but did not.
	Following the ceremony the wife explained how they had gone around the husband's family visiting for dinner so that she could be introduced as his wife. She also described how her mother-in-law took her shopping to buy the gold that would be associated with the Walima and civil ceremony.
16 Dec 1998	W says that she spoke to H a about the civil ceremony because there had been no progress on the Walima and the civil ceremony. In her evidence she described how usually the wedding was '*a whole host of parties that centre around the marriage'* incorporating the Nikah, the Walima and the civil ceremony and that the '*whole marriages incomplete without the civil ceremony as well'*. The husband accepted that she had mentioned the Walima and that he had said he didn't have the finances to hold a party at that time. He said it had been mentioned again when they were in Dubai but he had said all '*it's a bit late now we got three kids.*'

	I'm satisfied that if the wife was mentioning the Walima this far down the line it is more likely than not that she was also mentioning the civil ceremony.
Mid-Dec 1998	Parties have very brief honeymoon in Swansea during which marriage is consummated.
29 Sep 1999	Mohammed born in Goodmayes Hospital. W says that around the time of the birth she spoke to the husband about carrying out the civil ceremony of marriage. She says that there was an argument and that the husband accused her of having changed and become materialistic. The husband accepted that he had said to her that she had become materialistic but he said it was not in connection with the civil registration.
2000	She alleges that H smashed a chair and threatened never to register the marriage after an argument
12 July 2001	Aqsa (known as Amarah) born in Birmingham. W says that at around the time of registering the birth that she made enquiries at the Birmingham registry office because she was in communication with them about changing the name which had been registered. She says she made several calls to the office and spoke to the husband but again he became angry and threw an egg shell in her face. W says she decided to leave whilst H was away on a business trip and that she returned to her mother's home but when the husband arrived she reluctantly returned with the respondent. In his letter of June 23, 2011 H refers to having left the Sheikh in 2001. In his evidence he said that the mother had always been more of a strict Muslim then he and that he had not taken an oath of allegiance to the Birmingham Sheikh.
29 Apr 2005	Zayd born
2005	The parties moved to Dubai. The UAE authorities declined to issue a spousal Visa until they are satisfied the parties had a valid marriage. The wife accepted in her evidence that there was no ceremony or blessing that took place in Dubai that the reason for asking for a copy of the marriage certificate was to demonstrate to the Dubai authorities that they were married for the purposes of Dubai law. Although the wife clearly believed herself to be married to 'Shabaz' when pressed she accepted that notwithstanding the process that they had had to go through to prove their married status in Dubai at this had not converted their marriage into a marriage valid in English law. She said that having lived as husband-and-wife are so many years and been treated as husband and wife are so many years that the distinction between law religion and emotion became blurred. In a sense I suspect she kidded herself allowed herself to ignore the fact that she had not undertaken a civil ceremony.
October 2006	A copy of the marriage certificate is obtained from Dr Khan. A statutory declaration was completed by Mustapha Ahmet before Deborah Marsden a solicitor on 2 October 2006 and was Apostilled by Ms Marsden on the same day. The certificate bears a stamp of the embassy of the United Arab Emirates dated 3 October 2006.
2009	Financial crash in Dubai. H experiences financial difficulties.
17 Jan 2010	Saad born at the American hospital in UAE.

2010	W returns to work at 'Just Wills'.
23 Jun 2011	W writes to H recording events in relation to the husbands proposed polygamous marriage and her decision to return to live in the UK. In the letter she says that she is still willing to continue with the marriage but that her 'Iman' (her spiritual faith) is not strong enough to live in a polygamous marriage. She closes the letter by saying '*if any of the above is not true please send an email back to me to correct me.'* H wrote back to W later that day. His opening comment was '*it is not true'* although the subsequent content suggests that this relates to some of the detail of dates rather than the principal issue. In the letter he says, '*whatever has happened I chose not to pursue this matter of second marriage at the moment'*. In the letter he makes various complaints about the wife's behaviour and says, '*you have always complained I have never been a good husband or a good father.'* He says that he will find her and the children a suitable home and provide her with a car and money whilst he carries on working to earn sufficient to buy her a house. The husband's case in his evidence was that it was completely untrue that he had ever expressed a wish to take a second wife (see paragraph 22 of his statement of 16 May 2017. He says that had he wanted to but he does not believe it would have been an issue for Nasreen. He links the ending of their relationship in Dubai to financial stresses rather than the second wife issue. His evidence on this was entirely unconvincing. At one point he seemed to be taking refuge in points about dates, at another he suggested that it was just a joke. The language used in the emails was far more consistent with him having made a serious reference to the possibility than to it being a joke. The wife's demeanour and account in relation to the question of a second marriage was clear and compelling. She was visibly distressed and spoke with real feeling about how she was British and was not interested in polygamy. She said that it was this issue which made the connection in her mind about the underlying reason for the husband's reluctance to undertake a civil ceremony. Again the mother's evidence had the quality of recalling a lived experience and I have no doubt that the husband had explored the possibility of taking a second wife and that this had created a huge amount of upset on top of the difficulties created by the financial crash. The wife's evidence of how the husband put her under pressure saying that Islam permitted polygamy and that she was a bad Muslim and was rejecting the word of God shows a degree of emotional manipulation which is most unattractive. That the wife should end up effectively apologising for being a poor Muslim because she could not accept him taking a second wife shows how much she wanted to avoid confrontation and how she was prepared to allow the husband considerable liberty. It also confirms that his has the more traditional approach to Islam and the wife's has a more modern and less fundamental approach.
26 Jun 2011	W says that she and the children returned from Dubai. W says that following this, H remained in Dubai but travelled to England every 4 to 6 weeks and that they continued with the marriage.

	She says that when the husband returned permanently to England, she raised the issue of a civil ceremony again. H agreed in evidence that he had spent time at the home with W and the children although in his statement he maintains they were not in a ongoing relationship or marriage at the time.
	W lives at 36 Norwood Drive, North Harrow, a property owned by her sister.
2011/12	Upon her return to England, M contacts one or more mosques and sharia councils to enquire about Islamic divorce proceedings. She was advised that they should try to reconcile and that they were going to contact the husband. She says that she did not pursue the matter further because the parties had reconciled. In evidence it was put to her that she had completed all the papers for a religious divorce which she denied. After the completion of the evidence the wife produced a letter which confirmed she had made enquiries but had never completed any paperwork. H says he received some paperwork from the Sharia Council but he never completed it.
June 2012	W says she spoke to H about the civil ceremony. H denies it was ever mentioned. The wife's evidence about the issue of a civil ceremony appeared to me to be spontaneous and drawn from lived experience. Her reference to observations the husband would make it was raised appeared to me to be real.
Jan 2014	H returns from Dubai and rents a one-bedroom flat until August 2014 when he moves full-time in 236 Norwood Drive with the W and children.
15 Jul 2014	W qualifies as a solicitor
Sep 2014	Estate agents provide property particulars to 'Mr and Mrs Khan'. On 22 of September a viewing for 216 Uxbridge Road was confirmed to W
Nov 2014	W drafts Islamic will for H. W says that H refused to sign it as they were having difficulties in their marriage. Having regard to the level of detail in the draft well it seems more likely than not that H did voluntarily provide that information to W for the purposes of drafting a will. He subsequently changed his mind. H says this was done without his knowledge or involvement. Again his evidence on this was that she had fabricated this based on documents she found when he left the home. That is therefore a suggestion that in 2016 the wife forged a document purporting to originate from 2014. The wife says that records at the firm she was working in would prove that it was done in 2014. I'm quite satisfied that the will arose in the context of a marriage still limping on and that it was drafted with the husband's input. Two thirds of his estate were left to W and the children. The will refers at paragraph 5 a '*to my wife Nazarene Akhtar born on 5 December 1971 of 216 Uxbridge Road Harrow Middlesex HA3 6SW (whom I have married in sharia law only).* The will identifies various debts including to his sister-in-law H says it could not have been drafted then as he did not then own 216 Uxbridge Road. Given the completion date of that purchase it seems

	highly likely that 216 Uxbridge Road was his anticipated address and so it is probable it would have been included in the draft will.
16 Dec 2014	Letter evidencing gift of £26,000 from Shamim Ibrahim to H in relation to purchase of 216 Uxbridge Road W says this was a loan made by her sister in order to help the family to purchase a new family home. H says this was a gift and that they insisted he took the money. He asserts that this was part of a preconceived plan to make a claim over the property. Although not central to the issues before me, his evidence on this was hard to follow. He was unable to give any explanation as to why his sister-in-law (particularly when he says the marriage had been over for three years) was gifting him such a very substantial sum of money. He also denied that the wife had been involved in the purchase at all. This was not consistent with the emails that the wife subsequently produced referred to above. His evidence that the wife and her sister were forcing him to do things does not seem consistent with his general nature which is a man of determination and force. I do not accept his account of the circumstances of the proposed purchase of 216 Uxbridge Road. In his evidence the husband essentially developed a conspiracy theory in which the wife and her sister plotted against the husband from 2014 all the way through to 2016 in order to take advantage of him. I do not accept that this was the case. I'm quite satisfied that this in the period from 2012 to 2016 the wife was still trying to make the marriage work as was he albeit it was on a steadily declining trajectory. The provision of the money only makes sense in the context of the marriage being ongoing and the home being purchased for the family. The fact that it was purchased in H's name alone rather than in joint names suggests that the husband adopted a more traditional approach than W. It also suggests that W did not either wish or feel able to press her case for joint ownership very hard.
22 Jan 2015	H registered as sole owner of 216 Uxbridge Road Harrow. Price paid recorded as £485,000. W says she spoke to H to undertake a civil ceremony and identified the financial benefits in relation to inheritance tax. She says H again rebuked her. She says that through 2015 the relationship was up and down. They did not wish to separate and they discussed having marriage counselling but there was a serious lack of trust. W suggested again getting married and sharing their finances. She says H was not keen on this. H maintains that they had effectively been separated from 2011 and so there was never any question of them discussing a civil marriage ceremony, joint bank accounts property purchases inheritance tax or anything of the kind.
3 Apr 2016	W alleges H assaulted her.
4 Apr 2016	W alleges H pushed her up against her sister's car. Curiously although H maintains that the marriage will/relationship was effectively over in his mind in 2011 he says in relation to this incident that '*despite the fact that Nazarene alleged I was a significant risk to her safety and well-being, she voluntarily returned home with me that night'*.

26 Jun 2016	W applies for non-molestation order.
16 Aug 2016	Child in Need Plan
25 Aug 2016	H, W and children moved to the farmhouse, Pinner (a rented property).
29 Aug 2016	W alleges H assaulted her.
31 Aug 2016	Completion of purchase of 11 Allington close in W's name. Purchase price was £210,000. The charge was dated 31 August but neither the purchase or the charge were registered until ninth of January 2017 W says this was purchased using a cash deposit from her sister and is rented out.
20 Sep 2016	W applies for non-molestation order.
30 Sep 2016	A mediator confirms the parties have attended a Miam
7 Oct 2016	Notice of home rights under the family Law act 1996 registered over 216 Uxbridge Road by W. Her address then recorded as the farmhouse, Pinner Hill farm
21 Oct 2016	W applies for child arrangements and prohibited steps orders at Barnet County Court.
4 Nov 2016	W files behaviour petition. W files form a seeking various forms of financial relief including a property adjustment order in respect of 216 Uxbridge Road.
9 Nov 2016	H applies for parental responsibility and shared care.
22 Nov 2016	H applies to strike out divorce petition
7 Dec 2016	H files answer stating *the parties have not entered into a legally binding marriage in England and Wales and therefore would be considered as cohabitees'* In his detailed answer he asserts that the only divorce proceedings which would be applicable would be by way of S*haria law* and he asserts that the W is aware that the parties are not legally married and wishes to pursue the application in the hope to make a financial claim under the Matrimonial Causes Act 1973. H prayed that the application for divorce should be struck out.
9 Dec 2016	DJ Dias. Child arrangements order and continuation of family Law act orders (on the basis of no findings)
14 Dec 2016	DJ Mulkis Hearing reapplication for freezing injunction and H's application to strike out petition and defend W's applications. Directions were given for the filing of evidence in relation to the application to strike out the divorce petition and it was listed for a one-day hearing before a circuit judge from the first available date after 27 January 2017
9 Jan 2017	W registered as owner of 11 Allington Close, Greenford
29 Mar 2017	Recorder Campbell; The application to strike out the divorce petition and the petitioner's application for a freezing injunction were transferred to be heard in the High Court. W was directed to file and serve a reply to the answer with a cross prayer for nullity and H was to file and serve a rejoinder. Further directions were given for the filing of evidence and for the hearing of W's application for a legal services payment order.
	W's reply.

	- W accepts the marriage did not comply with the formalities of the marriage acts, - she avers that given they had always acted as husband-and-wife that they should be treated as a matter of English law as married by operation of the presumption of marriage and/or estoppel.
26 Apr 2017	Child arrangements order
24 Jun 2017	W applies for Family Law Act orders without notice.
7 Jul 2017	H applies to remove restriction against his property.
16 Jul 2017	DJ Hudd: LSPO made
21 Jul 2017	DDJ Mendel. Return date of Family Law Act application.
8 Aug 2017	H application to set aside LSPO listed for hearing on 6 of October 2017
26 Aug 2017	H intends to move into 216 Uxbridge Road.
16 Oct 2016	DJ Hudd: H's application to set aside LSPO is dismissed. H is ordered to pay MPS H's application to discharge restriction on 216 Axbridge Road listed for mention at conclusion of final hearing. H to pay W's costs
25 Oct 2017	Ex parte non-molestation order of June 2017 discharged after contested hearing. The order records that the incident of 24 June 2017 did not occur in the manner described by the applicant and that she had not satisfied the court that the respondent is threatening her on the balance of probabilities. W was ordered to pay H's costs.
14-16 Nov 2017	Final hearing listed. Vacated. No Judge available

21. Seeing the parties give oral evidence was of considerable assistance to me in understanding what had happened in the past. The written statements, whilst they covered some of the territory, did not bring to life the personalities of the husband and wife in the way that their oral evidence did. Nor did the written statements cover some of the important details relating to the parties' marriage and subsequent events. Although demeanour in the witness box can only form a part of the evaluation of a witness, it supplementing the evaluation is of the consistency of their account internally and with other evidence (contemporaneous or otherwise) and other matters relevant to credibility, in this case their oral evidence (their demeanour, how they answered questions, what it revealed about the dynamic between the two of them and their personalities) has been an important component in my evaluation of the evidence.

22. The Wife is intelligent, measured careful. She was spontaneous in many respects – recalling in considerable detail the pre-wedding preparations, the night before, the ceremony itself and her dowry. She is more diligent and anxious to be accurate. She has a greater regard for the importance of frankness and honesty – her approach is detailed and methodical. She is the sort who likes things to be by the book. Hence her detailed will drafting, her love of the law and her request for Islamic jurisprudence books as a dowry. The husband's case that she has made up the discussions over the civil ceremony at the time of the wedding, and that she has made up every subsequent reference to it do not seem consistent with the general nature nor with her general demeanour in giving evidence. In general her evidence appeared more consistent with

known fact and contemporary documents and appeared more connected to lived experiences than fabricated.

23. This desire for order I conclude would have extended to wanting a civil marriage and Walima. Although a traditional Muslim and naïve in some respects she was not fundamentalist. I think she was quite meek. The husband in contrast would be dominant. Although intelligent and University educated there is still a strong streak of traditionalism in the wife's attitude to roles in marriage.

24. I am satisfied that she asked for a civil registration on various occasions. I doubt she would press her case particularly hard given her nature and his but I am satisfied it was discussed both shortly after the Nikah ceremony and for instance in 2001 when they changed their daughter's name. Later it may have just been in passing. His evidence about the Walima being discussed several years after the marriage supports her account that these shortcomings were still live in her mind and as he brushed off the Walima with 'it's too late now; so I conclude he would have done with the civil registration.

25. Husband is more casual in his approach generally, although capable of being very careful not to say manipulative and evasive when faced with questions or material, he can clearly identify as being hostile to his interest. Bluff, genial, a bit of a charmer. Capable of being dishonest when sees it is adverse to his interests to tell the truth and is untroubled by this. He was obviously dishonest in relation to the second marriage issue. I need to give myself a Lucas direction in respect of his evidence. I accept that the fact that he lied about the second wife issue does not mean that he is lying about everything else or even anything else. However his general approach to matters of formalities, or the need for accuracy was far less evident than the wife's. He was casual in relation to the accuracy of documents, in particular the Nikah certificate which he took responsibility for obtaining. It was submitted to the Dubai authorities even though he knew that it was inaccurate.

26. He does not like to commit – preferring more general answers than specifics. I think he prefers to keep his options open, wanting freedom of action to do as he thinks fit at the time rather than tying himself down. I thought his general personality suggested that he was motivated by looking for an edge or an advantage for him. What was in it for him? He is clearly a risk taker. Unless he sees a clear advantage to him he does not like to make commitments. For instance, although I think he was more religious than the wife, he did not give his allegiance to the Sheikh whereas she did. I don't think this illustrates she being more devout than he but rather she is more easily persuaded whereas he is reluctant to commit. Thus I can well understand that he may have not wanted a civil ceremony because there was nothing in it for him; he having secured his bride by the Nikah ceremony alone and having acquired all the advantages of a wife I conclude that seeing no advantage to him of going through with a civil ceremony that he fobbed the wife off taking advantage of her rather meek and undemanding nature and the disadvantage that she was at having moved to live with him become his wife spiritually and physically, I doubt that at that stage the husband had an eye to possible second marriage in future or even that he was specifically seeking to protect himself financially. Although he is highly money motivated (collected £1.8m debts to get business back on feet) and I think quite self-centred I think it most probable that he simply could see no advantage for him in fulfilling the expectation that a civil ceremony would be undertaken. He is strong-willed and

determined – I do not think things just slip with him – decisions are taken for a purpose and in this case it was ultimately his decision.

27. Unfortunately, from the wife's point of view she being of a trusting and compliant nature had allowed matters to go too far to then be able to insist that a civil ceremony was undertaken. I accept that it had been her genuine expectation that the Nikah ceremony would have been followed in a very short space of time by a Walima and by a civil ceremony arranged by the husband. I accept her evidence that she viewed the Nikah as only a part (albeit a significant part) of a broader process which she expected would include the civil ceremony as a less important but integral component of the whole. I accept her evidence that she and the husband had discussed the expectation that there would be a Walima and a civil ceremony in the weeks leading up to the wedding. I also accept that her father spoke to the husband about it as of course did the Imam. I cannot accept the husband's evidence that the issue simply never arose between him and the wife. I therefore conclude that he either intended prior to the Nikah ceremony to organise the Walima and the civil ceremony but subsequently saw no advantage to him in seeing them through or that he led the wife to believe that he would undertake them but never truly intended to go through with it.

28. Either way at the point when the Nikah ceremony was undertaken it was the parties' intention and the expectation of the close family that it was the first stage in a process that would have included the civil ceremony and the Walima. I'm also satisfied that the question of the civil ceremony was returned to at various stages over the 18 years that passed subsequently in particular when M's birth was registered and concluding when the wife was drafting the husband's will at the time they were contemplating the purchase of 216 Uxbridge Road.

29. Thus in every sense save for the issue of legal validity this was a marriage and a long one at that. It commenced with an agreement between the parties that they wished to marry each other and an understanding between them that they would undertake a Nikah, a civil ceremony and a Walima. Both parties were lawfully able to marry each other. Both gave their consent (I leave aside the question of whether the wife's consent was obtained by misrepresentation of the husband's intentions in relation to the Walima and civil ceremony). The ceremony was undertaken in front of the important members of their family and community. It was witnessed. It was conducted by an official in the religion which bound their consciences. Because of the husband's actions the process which both had intended was not completed by the Walima and the civil ceremony. The wife committed herself emotionally religiously and physically to the marriage within a matter of days. This was followed by 18 years during which they considered themselves husband and wife. Every other person in their family and community considered them to be husband and wife. State authorities such as hospitals and schools (and I presume tax and benefits authorities), in England probably treated them as husband and wife. The state authorities of the United Arab Emirates treated them as husband-and-wife. The marriage produced four children. The trust was shattered by the husband's proposal to take a second wife and thereafter the marriage limped to a conclusion in 2016.

The Legal Framework And Discussion

30. With that history in mind I turn now to the legal framework and the issues that have been raised by the parties.

Presumptions of marriage

31. The presumption of marriage has a long history. The cases I have been referred to range from *Piers v Piers* (1849) 11 House of Lords cases (Clarks) 9 ER 1118 through to *Hyatleh v Mofdy* [2017] EWCA Civ 70. The article 'The Presumptions In Favour of Marriage' by Prof Probert Cambridge Law Journal 77 (2) provides a fascinating analysis of the presumptions.

32. Two forms of the presumption exist. Rayden and Jackson on Relationship Breakdown, Finances and Children, 19th edition, identifies them as follows.

    a. Presumption from cohabitation and reputation;

       Where there is no positive evidence of any marriage having taken place, where parties have cohabited for such a length of time and in such circumstances so as to have acquired the reputation of being spouses, a lawful marriage may be presumed to exist. This is particularly so when the relevant facts have taken place outside the jurisdiction.

    b. Presumption from ceremony followed by cohabitation.

       Where the court has evidence that the parties have undertaken a ceremony of marriage and have subsequently cohabited then, unless there is cogent evidence to the contrary, the existence or happening of all other things necessary for the validity of the marriage will be presumed. This extends to making presumptions about the granting of a special licence.

33. Lord Justice McFarlane commenced his analysis of the presumptions in the *Hyatleh* case from these definitions. If the presumption arises and is not rebutted its effect is that the court presumes a valid marriage existed. That would permit the marriage to be dissolved by divorce.

34. This begs the question of when a presumption may be rebutted. It appears from the *Hyatleh* judgment that the authorities may recognise a distinction in the degree of proof required to rebut the presumption, according to whether the presumption goes to the question of actual ceremony rather than formalities. In *Mahadervan v Mahadervan* [1964] P 233 the Divisional Court held

    '*where a marriage has been followed by long cohabitation and reputation the presumption… May only be rebutted upon evidence proving the contrary beyond all reasonable doubt. Put another way, every possibility that the marriage did comply with local formalities must be exclude*d.'

35. In *Chief Adjudication Officer v Bath* [2000] 1 FLR 8 the Court of Appeal said

    '*…. The common law presumed from the fact of extended cohabitation as man and wife that the parties had each agreed to cohabit on that basis, and the presumption extended to include an inference that the statutory requirements first introduced by Lord Hardwicke's Marriage Act 1753 had been duly complied with; but in each case the presumption was capable of being rebutted by clear and convincing evidence.'*

Later in the judgment Lord Justice Evans referred to the presumption being displaced by what he described as 'positive not merely clear evidence' albeit recognising how positive and how clear it needed to be would depend upon the strength of the evidence which gave rise to the presumption.

36. At paragraphs 34, 35 and 36 of *Hyatleh* Lord Justice McFarlane said

'[34] *the cases on the presumption of marriage are clear in identifying the underlying policy in favour of holding to the validity of a marriage which has been evidenced by cohabitation as a married couple for a substantial period of years.*
[35] the more recent cases have not held to the very high standard of proof (beyond reasonable doubt) identified by the divisional Court in Mahadervan *but, on any view, each identifies an enhanced degree of evidential solidity, on the balance of probability, with the establishment of clear or positive or compelling evidence, depending on the facts of each case before the presumption may be displaced. The fact that the divisional Court held to the highest standard of proof, of itself, underlines the strength of the policy in support of upholding an apparent marriage to which the presumption applies.*
[36] finally, before leaving this review of the case law, it is of note that Evans LJ in Bath *identified evidence that might support the existence of the presumption is not simply being confined to a measurement of the period of cohabitation, but as including the manner in which the parties had regarded themselves or were treated by others as man and wife.'*

37. It is a curious feature of the presumption of marriage cases that if the presumption is rebutted the net result may be that the parties move directly from the possibility of a valid marriage immediately into the category of what has come to be known as 'non-marriage' without any possibility of the marriage being a void or voidable marriage. Prof Probert's review makes clear the very different situations in which the presumption has been deployed over the 227 years it was born and the difficulty in defining a consistent approach. One detects a theme of fairness as between the parties to the litigation; whether the parties to the marriage, their children or one of the parties and a third party including the state.

38. On behalf of the wife, Mr Le Grice QC did not advance a case for the application of the presumption in relation to the 1998 Nikah ceremony. What he principally focused on was the application of the presumption based rather on a presumed ceremony having taken place in the UAE. If such a ceremony took place it must have been by proxy on behalf of the wife because she had no knowledge of any such ceremony. In *Al-Saedy v Muswai* [2010] EWHC 3293 (Fam); [2011] 2 FLR 287 Bodey J reviewed the relevant principles and various authorities at paragraphs 60 to 71. The thrust of Bodey J's reasoning was that if the parties' reputation as husband and wife derived from a particular ceremony and that ceremony were demonstrated not to be a valid marriage, then the presumption could not be relied on to establish that the parties were validly married. This is because the presumption cannot convert that which has shown to be invalid to be valid. He did, however, acknowledge that a petitioner might still exceptionally be able to rely on the presumption in support of some *other* marriage ceremony, of which she was unaware, provided *"that she is able to point to some evidential foundation for that possibility"*. As Bodey J explained, logically a petitioner must be unaware of such a ceremony, otherwise she would have given evidence of it. An example of such an evidential foundation would be where one party

has signed a form of proxy. The underlying principled reason for the requirement of an evidential foundation was articulated by Bodey J in the final sentence of paragraph 71:

> ***[71]****…Were it otherwise, it would be tantamount to elevating a presumption born of common sense into the status of a rule of substance, whereby long cohabitation plus a reputation of marriage would establish marriage, even when all the identified evidence showed that no valid or even void marriage ever took place.*

39. An example of such an evidential foundation would be where one party has signed a form of proxy. This was the case in *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6, where the presumption was successfully invoked and Hughes J (as he then was) concluded that the husband had not rebutted the presumption that he might have married the wife by proxy without her knowledge. In that case there was an evidential foundation arising out of the fact that the husband had been actively seeking to regularise the position as a matter of English law and to that end had been advised that the parties needed to divorce and re-marry abroad to create a marriage which would be recognised as valid in England. To that end the wife had signed a power of attorney which enabled her to be divorced and was accustomed to signing documents at the husband's behest without appreciating what those documents were. The evidence established if the wife signed a power of attorney, the husband could marry her in an Islamic country without her knowledge and had been seeking to pursue a foreign marriage. Mr Le Grice QC places particular emphasis on this decision (see paragraph 19 of his skeleton argument). It is submitted that it should be presumed that there was a valid marriage by proxy while they were living in the UAE or shortly before the wife joined Mr Khan. In support of this it is submitted that the fact that the husband was looking to prove marriage at that time by seeking evidence of the earlier Nikah brings the presumption into effect which itself supplies the evidence that there was a marriage unless contradicted by clear and weighty evidence that the presumption does not prove a marriage. Mr Le Grice QC's reliance on this case though has to be viewed in the context of its facts which clearly provided an evidential basis where the presumption might operate.

40. The cases all establish that if the known ceremony is shown on the evidence not to create a valid English marriage that the presumption cannot apply. The evidence of both the husband and the wife in this case establishes well beyond the balance of probabilities that the Nikah ceremony did not create a valid English marriage. It is clear, convincing and positive. For the 'ceremony followed by cohabitation' presumption to apply on the basis of an assumed rather than actual ceremony I accept that there must be some evidential foundation of at least the possibility of a ceremony having been undertaken unknown to the wife. If there were to be no requirement for any evidential foundation it would in effect create a presumption indistinguishable from 'cohabitation and reputation' presumption. I do not think the cohabitation and reputation presumption can be brought to bear where a known ceremony is demonstrated on the evidence not to have created a valid marriage. As Prof Probert makes clear in her article the presumption based on cohabitation and reputation arose from problems created by an evidential void or deficiency. It is difficult to see why as a matter of policy or justice it should be wheeled into action where the evidence is clear and complete. The evidence in this case does not in my view provide any foundation for the possibility of a further ceremony in the UAE conducted without

W's knowledge. First of all the parties obtained a copy of their Nikah certificate in order to satisfy the UAE authorities that they were entitled to live together as husband and wife. Secondly there was no reason at all for the parties to need a further ceremony given that the UAE authorities had accepted the validity of their marriage for the purposes of residence in the UAE. The wife does not suggest that the husband had expressed any desire to marry again in the UAE so as to create a valid marriage for English law purposes. Indeed her evidence is that he had declined to undertake a civil ceremony for just that purpose. Nor does the wife suggest that she had at any stage signed a power of attorney or any other document which might have enabled the husband to arrange a ceremony by proxy. Nor is there any suggestion that the parties were Islamically divorced which might have been a necessary precondition for a further marriage ceremony in UAE. Thus the direct evidence of the parties discloses no evidential foundation for a presumed second ceremony on which the presumption can operate. There is therefore no burden on the husband to adduce clear, positive or convincing evidence to rebut it.

41. I therefore conclude that the presumption of marriage does not operate on the facts of this case so as to presume a valid marriage under English law.

Marriage and Nullity

42. So if this marriage is not a valid marriage under English law and where the parties cannot be divorced, what is it? Is it a void marriage susceptible a decree of nullity? As Mr Nagpal puts it *'the ultimate question for the Court is whether the requirements of section 11(a)(iii) are satisfied or not?'*

43. The provisions relating to nullity are contained in the Marriage Act 1949 (as amended) and the Matrimonial Causes Act 1973.

Marriage Act 1949

25 Void marriages.

If any persons knowingly and wilfully intermarry according to the rites of the Church of England (otherwise than by special licence)—

(a) except in the case of a marriage in pursuance of section 26(1)(dd) of this Act, in any place other than a church or other building in which banns may be published;

(b)without banns having been duly published, a common licence having been obtained, or certificates having been duly issued under Part III of this Act by a superintendent registrar to whom due notice of marriage has been given; or

(c)on the authority of a publication of banns which is void by virtue of subsection (3) of section three or subsection (2) of section twelve of this Act, on the authority of a common licence which is void by virtue of subsection (3) of section sixteen of this Act, or on the authority of certificates of a superintendent registrar which are void by virtue of subsection (2) of section thirty-three of this Act;

(d)in the case of a marriage on the authority of certificates of a superintendent registrar, in any place other than the church building or other place specified in the notices of marriage and certificates as the place where the marriage is to be solemnized

or if they knowingly and wilfully consent to or acquiesce in the solemnization of the marriage by any person who is not in Holy Orders, the marriage shall be void

49 Void marriages.

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;

(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;
the marriage shall be void
(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 Matrimonial Causes Act 1973
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.

44. The Marriage Act 1949 also of course sets out the statutory provisions for the creation of a valid marriage in English law. Part 1 deals with ‘Restrictions on Marriage’, part two with ‘Marriage according to Rites of Church of England’ and part three with ‘Marriage under Superintendent Registrar’s certificate’.

45. One thing which is agreed between the parties is that there are some events which may superficially bear some of the features of a marriage ceremony but which are plainly not. Thus the event undertaken by actors in the wedding scenes of 'four weddings and a funeral' can properly be described as a non-marriage; likewise children playing. Beyond that though the parties very much part company. The Attorney General, drawing on Bodey J's judgment in *Hudson v Leigh* (below), describes the phrase 'non-marriage' as a convenient shorthand for describing something which is neither a valid or a void marriage. Whilst it may have developed as a convenient shorthand it is an unfortunate one if applied to facts such as those before me.

46. The interpretation of section 11 of the Matrimonial Causes Act 1973 and the interplay between that section and section 25 or 49 of the Marriage Act 1949 has been considered several times by this court and also by the Court of Appeal albeit in the latter case in a different context. Those authorities are:

    a. *R v Bham* [1966] 1 QB 159CA– see 168B-169D

    b. *Geries v Yagoub* [1997] 1 FLR 854 HHJ Aglionby – see (internal pages) 857E-858G

    c. *A-M v A-M* [2001] 2 FLR 6 Hughes J – see paragraphs 55-58

    d. *Gandhi v Patel* [2002] 1 FLR 603 Park J- see paragraphs 31-48

    e. *Burns v Burns* [2008] 1 FLR 813

    f. *Hudson v Leigh* [2009] EWHC 1306 (Fam); [2009] 2 FLR 1129 Bodey J - see paragraphs 53-73; 77-79

    g. *MA v JA and the Attorney General* [2012] EWHC 2219 (Fam); [2013] Fam 51 Moylan J – see paragraphs 67-101

    h. *Dukali v Lamrani (Attorney General Intervening)* [2012] EWHC 1748 (Fam); [2012] 2 FLR 1099 Holman J – see paragraphs 25-38

    i. *Sharbatly v Shagroon* [2012] EWCA Civ 1507 CA – see paragraphs 7; 24; 28; 32-33; 39-40

    j. *El-Gamal v Al-Maktoum* [2011] EWHC 3763 (Fam); [2012] 2 FLR 387 Bodey J– see paragraphs 13-24

    k. *Asaad v Kurter* [2013] EWHC 3852 (Fam); [2014] 2 FLR 833 Moylan J – see paragraphs76-78; -94-95; 99.

47. Mr Le Grice QC relies on the description of marriage summarised at page 85 of the second edition of Jackson's The Formation and Annulment of Marriage where it is said

    '*the question of whether a marriage is void, avoidable or valid presupposes the existence of an act allegedly creative of a marriage status. In concubinage and the like, no act of the requisite nature exists. In those places where a marriage requires a declaration before a registrar or priest, a private and secret declaration of consent does not create any kind of marriage, not even a void one…'*

48. This description derives from 18th and 19th century authority, including from the Ecclesiastical Courts which Mr Le Grice QC says requires an analysis of section 26 of the Senior Courts Act 1981, its predecessors and the jurisprudence of the Ecclesiastical Court. His essential point is that those cases illustrate a less rigid approach to the grant of decrees of nullity and the Ecclesiastical Court did not recognise a category of 'non-marriage'. Mr Le Grice QC referred to *Kassim v Kassim* [1962] P 224 and *Corbett v Corbett (otherwise Ashley)* [1971] P 110 as examples of Ormrod J drawing on the Ecclesiastical Court jurisdiction and confirming the absence of any concept of non-marriage. In *Corbett* submissions were made that a purported marriage between two individuals of the same sex was not a marriage at all and thus not susceptible to a decree of nullity. Ormrod J rejected that submission and at 109G said

"...the Ecclesiastical Court did in fact grant declaratory sentences in cases of "meretricious marriages: Elliott v Gurr *(1812) 2 Phillim 16. There is, in my judgment, no discretion to withhold a decree in the exercise of this jurisdiction"*
I have been unable to establish from the judgment what statutory jurisdiction existed in relation to nullity at that point in time. I infer from the report that the situation was not covered by the relevant statute at the time. Section 11(c) of the Matrimonial Causes Act 1973 (which Parliament enacted notwithstanding the Law commission's recommendation that marriage between two people of the same sex should be excluded from the nullity provisions) was not in force at the time. That supports the contention that the court at that point in time retained a power to grant a decree of nullity outside the statutory scheme then in place. However given that the statutory scheme is now different I'm not sure that it assists me in determining how section 11 of the Matrimonial Causes Act 1973 should now be interpreted.

49. In any event as Mr Nagpal notes Mr Jackson distinguished between (i) a void marriage; (ii) a non-existent marriage; and (iii) mere cohabitation.

> *"A marriage void, for example, for affinity, will be held not to have been "solemnised", but a void marriage is still a marriage in the sense that it has to be distinguished from the non-existent marriage or mere cohabitation of man and woman".*

50. Section 26 of the Senior Courts Act 1981 provides

the High Court shall, in accordance with section 19 (two), have all such jurisdiction in relation to matrimonial causes and matters as was immediately before the commencement of the matrimonial causes act 1857 vested in or exercise ball by any Ecclesiastical Court or person in England or Wales in respect of-
(a) Divorce a mensa et thoro (renamed judicial separation by that act)

(b) nullity of divorce ... and

(c) any matrimonial cause or matter except marriage licenses.

51. On behalf of the wife Mr Le Grice QC argues that in interpreting section 11 of the Matrimonial Causes Act 1973 the court must proceed and act and give relief on principles and rules which are as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts acted prior to 1857. It is on that basis that he argues that cases such as *Pertreis v Tondear* (1790) 1 Hagg Con 136 should be considered by this court

(and should have been considered by the courts previously) in interpreting the true meaning and application of section 11. Mr Nagpal points out that section XXII of the Matrimonial Causes Act 1857 expressly required the court to act in that way. He notes that its successor, the Supreme Court of judicature (Consolidation) Act 1925 also contained in section 32 a requirement that the matrimonial jurisdiction be exercised as nearly as may be in the same manner as by the Ecclesiastical Court. However he points out that there is no equivalent in the Senior Courts Act 1981. Although I have not been taken to any Law commission, green or white paper or Hansard report on the circumstances in which the requirement came to be removed from the Senior Courts Act 1981 I think it reasonable to conclude that the omission of express reference was deliberate. That is hardly a surprise given the intervention of 134 years in which it might reasonably be thought that the principles and rules of the Ecclesiastical Courts had become embedded in the High Court family division in so far as they remained relevant. I therefore do not consider that there is any statutory requirement to act in conformity with the approach of the Ecclesiastical Court prior to 1857. In any event given the changes to the statutory framework in relation to nullity it would be difficult to directly transpose to the 21st century the approach that the court took in 1790 in applying Lord Hardwicke's 1753 Clandestine Marriages Act. The attorney general points out it seems clear that the Ecclesiastical Court regarded themselves as applying the universal law of Christian marriage; *Garthwaite v Garthwaite* [1964] P 356. Cases such as *Hyde v Hyde and Woodmansee* [1866] 1 LR P&D 130 and *Risk v Risk (otherwise Yerburgh)* [1951] P 51 illustrate the court when it was under an express obligation to act in conformity with the practice of the Ecclesiastical Court refusing relief when the marriage was outside the Christian tradition. It could be argued in the 21st century it would be potentially discriminatory in the exercise of a general inherent jurisdiction to refuse relief simply because of the form of religion or because of a component feature of that religion. Mr Le Grice QC however accepted that there is no residual inherent power in the High Court to grant a decree of nullity save under statute. Thus it may not be open to the court to update the court's approach using some sort of 'filling in' aspect of the inherent jurisdiction; *A v Liverpool City Council* [1982] AC 363; *Re X and Y* [2016] EWHC 2271 (Fam) at [31]–[50].

52. It is 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 the 11 cases identified above spanning a period of some 50 years. The term 'non-marriage' seems to appear first more recently in the case of Gandhi -v- Patel (above).

53. In *MA v JA and the Attorney General* [2012] EWHC 2219 (Fam); [2013] Fam 51 Moylan J (as he then was) conducted a comprehensive review of the law in relation to presumptions of marriage, void and invalid marriages. Within that evaluation he considered all of the cases identified above and by the parties in their skeleton arguments save for Al Gamal, his own case of *Asaad v Kurter* [2014] 2 FLR 833 and the very recent authority of *AB v HT and others* [2018] EWCOP 2. I do not intend to reiterate all that he set out from paragraphs 67 through 281 of that judgment but will restrict myself to what I consider to be the key aspects.

    a. In *A-M v A-M* [2001] 2 FLR 6 Hughes J (as he then was) referred to 'alternative marriage rites consciously and deliberately conducted altogether outside the Marriage Acts and never intended or believed to create any recognisable marriage. Unless a marriage purports to be of the kind contemplated by the Marriage Acts, it is not, I hold a marriage for the

purposes of section 11 of the Matrimonial Causes Act 1973. No doubt it is possible to envisage cases where the question whether a particular ceremony or other event does or does not purport to be a marriage of the kind contemplated by the marriage act is a fine one.

b. At paragraph 74 he quotes Cretney and Probert's Family Law, 7th edition, "whilst it is sensible for non-compliance to be a matter of degree, it would be indefensible for a Sikh or Muslim marriage to be struck down in circumstances in which a Christian marriage would be upheld."

c. At paragraph 78 he quotes Bodey J in the *Hudson* case that it would be "unrealistic and illogical to conclude that there is no such a concept as a ceremony or event which, whilst having marriage - like characteristics, fails in law to effect a marriage" and he decided that the positive intention of all three key participants not to perform or effect a marriage, takes this case outside the intended scope of section 12(c) of the Matrimonial Causes Act "

d. At paragraph 79 he identified that Bodey J had considered whether it was possible or sensible to seek to define or set out a test for a non-marriage. He decided that it was not.

[77]. I am unconvinced that there is or can be any satisfactory definition and to cover this sort of situation for convenience described in shorthand as a non-marriage or a non-existent marriage.
[79] in the result, it is not in my view, either necessary or prudent to attempt in the abstract a definition or test of the circumstances in which a given event having marital characteristics should be held not to be a marriage. Questionable ceremonies should I think be addressed on a case-by-case basis taking account of the various factors and features mentioned above including particularly, but not exhaustively: (a) whether the ceremony or event set out or purported to be a lawful marriage; (b) whether it bore all or enough of the hallmarks of marriage; (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) the reasonable perceptions, understandings and beliefs of those in attendance. In most if not all reasonably foreseeable situations, a review of these and similar considerations should enable a decision to be satisfactorily reached.

e. In *El-Gamal v Al-Maktoum* [2011] EWHC 3763 (Fam); [2012] 2 FLR 387 Bodey J considered an Islamic ceremony conducted by an Imam in a flat in London. He said

"*it is not the law, in my judgment, where no or minimal steps are taken to comply with the marriage acts and so the marriage does not set out or purport to be a marriage under those acts, that it nevertheless suffices if the participants hopefully intended, or believed, that the ceremony would create one.*
In that case is the ceremony had been conducted by an Imam in front of two witnesses and the parties intended that it should be valid. Bodey J said
"*there was a wholesale failure to comply with the formal requirements of English law."*

f. At paragraph 85 Moylan J said

"I agree with Bodey J in Hudson v Lee *that it is neither possible nor sensible to seek to set out a definitive test for determining whether a ceremony results in a non-marriage or results in a marriage potentially valid within the 1949 Act. He sets out some of the factors relevant to the issue including whether the ceremony bore all enough of the hallmarks of marriage. What are the hallmarks of marriage or, to quote again from R v Bham when is a ceremony in a form known to and recognised by our law is capable of producing, when they're performed, a valid marriage*?"

g. At paragraph 87 he said, "...there is a public interest in marriages which have been contracted in England resulting in the obligations and rights consequent on marriage (including a void marriage) being imposed on and afforded to the parties to such marriages"

h. He referred to Ormrod J's judgment in *Collett* in which he said, "...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"

i. At paragraph 92 he notes that "...there is also no clear route to identifying which requirements are essential for a ceremony to be within the scope of the 1949 Act. Indeed the 1949 Act only stipulates those failures which will not affect the validity of the marriage and those failures which will result in a marriage being void." [These two classes do not cover the whole ground]

j. A non-marriage is by definition a marriage which is the product of a ceremony which is wholly outside the scope of the 1949 Act. This brings me back to the question of 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.

k. He goes on to consider whether the formal exchange of voluntary consents to take one another for husband and wife could be enough but concludes that this would be too wide. He notes that the parties can adopt such form and ceremony as they see fit. He seems to have identified that the essentials included the intention to contract a marriage and a ceremony which makes plain the necessity for the absence of lawful impediment in the taking of one another to be the lawful wedded wife or husband. He noted that the greater the departure from the 1949 act the more powerful the argument ceremony is one wholly outside its provisions.

l. At paragraph 96 he concluded that the proper approach was that it should be determined by reference to the 1949 Act applied in a manner consistent with the principles summarised by Ormrod J in *Collett* and taking into account the factors referred to by Bodey J in *Hudson v Leigh.*

54. It is a central part of the husband and the Attorney General's submissions that section 11 exclusively sets out the basis on which decrees of nullity can be granted. This is certainly so in relation to marriages which have taken place in England. Section 14 of the Matrimonial Causes Act 1973 relaxes that in relation to marriages governed by foreign law or celebrated abroad under English law. Given my conclusions in relation to the possible application of the presumption of marriage in relation to the UAE and

that it is not alleged that any actual marriage ceremony took place governed by foreign law or celebrated abroad under English law, I need consider section 14 no further.

55. Mr Le Grice QC has submitted that the Court of Appeal decision in *Sharbatly* is not binding on this court because it dealt with section 12 and part III of the 1984 matrimonial and family proceedings act. In *Sharbatly* the Court of Appeal relied upon the reasoning of Holman J in *Dukali* which also dealt with the Matrimonial and Family Proceedings Act 1984. The Court of Appeal said that the 1984 Act could not be divorced from the 1973 Act. They also asserted that fundamental to the right (to apply for financial remedies) is the existence of a marriage recognised as valid or void by the *lex loci celebrationis*. Mr Justice Hedley said that it was his view that the case was not intended further to illuminate that line of cases which Mr Justice Moylan had considered in *MA v JA.*

56. Thus it seems to me that a clear and powerful line of authority emerges from the line of cases to the effect that this 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.

57. It is an essential part of the wife's case that in undertaking that evaluation and in interpreting section 11 of the Matrimonial Causes Act 1973 this court should take into account fundamental rights under the ECHR as brought into effect by the Human Rights Act 1998. Mr Le Grice QC points out that in none of the previously decided cases has any reference been made to arguments under the HRA 1998. He accepts that in *AB v HT* that Mr Justice Jonathan Baker made some reference to human rights but he submits and I agree that that case was not centrally about human rights issues and the references to them are limited.

Human Rights

58. The relevant provisions of the Human Rights Act 1998 are

Section 3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Section 6 Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section 'public authority' includes—

(a) a court or tribunal, and

59. The courts must strive for an interpretation (read and give effect) of legislation, (whether enacted before or after the Human Rights Act 1998 came into effect) that is consistent with the rights protected under the Convention: *R v A (No 2)* [2002] UKHL 25, [2001] 3 All ER 1, per Lord Steyn at [44]; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 2 All ER 557.

60. In *Re K, Re H* [2015] EWCA Civ 543 stated that

[29] I accept the submission of Ms Whipple that these principles hold good despite the passing of the HRA. The limits of the interpretative obligation imposed on the courts by section 3 of the HRA are now well established. It is sufficient to refer to two authorities. In Re S (Care Order: Implementation of Care Plan) *[2002] UKHL 10, [2002] 2 AC 291, it was held that the HRA reserved the amendment of primary legislation to Parliament. Any purported use of section 3 of the HRA producing a result which departed substantially from a fundamental feature of an Act of Parliament was likely to have crossed the boundary between interpretation and amendment.*
[30] The same approach was adopted in Ghaidan v Godin-Mendoza *[2004] UKHL 30, [2004] 2 AC 557. At para 33, Lord Nicholls said:*

> *"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."*

61. Separately the court must not act in a way which is incompatible with a Convention right.

62. Convention case law, which demands real and effective remedies, has repeatedly held that in order to secure Convention rights, there may be positive obligations upon the state to take positive steps to ensure the rights of individuals. *Marckx v Belgium* (Application 6833/74) (1979) 2 EHRR 330, [1979] ECHR 6833/74, ECtHR where at

para 31 the ECtHR emphasised that there may be positive obligations inherent in an effective 'respect' for family life under Article 8. They include an obligation on states to provide the substantive and procedural means by which the rights can be effective. The case law emphasises that the ECHR is to be interpreted in a purposive manner, consistent with the aims of the ECHR itself. Convention rights are intended to be of real value. Case law is to be interpreted in a manner that ensures that rights are 'practical and effective' not 'theoretical and illusory: *Bellet v France*, 4 December 1995, Series A no 333-B § 38; *Re W* [2016] EWCA Civ 1140.

63. The ECHR is 'a living instrument which must be interpreted in the light of present day conditions'. Case law develops in an 'evolutive' manner which means that cases are determined on their individual facts. The Convention case law aims to balance the rights of individuals with the needs of society as a whole. The ECtHR has stated the principle that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'. Although primarily addressing the rights of the individual vis-a-vis the state the Convention may have horizontal effect between individuals and the state may be under a positive obligation is to promote Convention rights on a horizontal level.

64. Some rights such as Article 8 are qualified rights and its exercise may be curtailed if in accordance with the law and necessary in a democratic society. Allied to the concept of striking a balance between the state and the individual is the question of necessity and proportionality. In *R v DPP, ex p Kebeline*, per Lord Hope of Craighead *[1999] 3 WLR 972* at 993, the House of Lords emphasised that the questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality and that difficult choices may have to be made by the executive or legislature between the rights of the individual and the needs of society and that in some circumstances the courts will recognise that there is an area of judgment within which the judiciary will defer to the legislature.

65. The Court of Appeal has emphasised in *Re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent) (Stonewall Equality Limited and another intervening)* [2017] EWCA Civ 2164; [2018] 4 WLR 60 that the court must act compatibly with Convention rights and that one of those rights is to enjoy Convention rights without discrimination. This makes clear that Article 14 is not freestanding but only applies in relation to the other rights.

66. Mr Le Grice QC says the rights engaged in this case include

Article 6 Right to a fair trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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 exercise of this right except such as is in accordance with the law and 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.

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.

Article 1, Protocol 1

(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.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.''

67. In addition to those rights I invited 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.

68. The United Nations Convention on the Rights of the Child 1990 was ratified by the UK on 16 December 1991 and it came into effect on 15 January 1992. It was entered into using the 'Royal Prerogative' to enter into a foreign treaty. It has not been incorporated by statute into domestic law and does not, as such, form part of the law of England and Wales, but decisions of the Supreme Court of the UK make clear that the rights set out in the UNCRC are binding and must be complied with in domestic decision making: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, per Baroness Hale at 23; *HH v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor Intervening)* [2012] UKSC 25, [2013] 1 AC 338, [2012] 4 All ER 539, paras 33 and 155, where the Supreme Court said that in looking at ECHR rights they had to be considered through the prism of UNCRC, Article 3.1.

69. Article 3 UNCRC 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*

70. The Supreme Court has endorsed in *Cameron Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 a statement by the Committee on the Rights of the Child that has identified Article 3.1 as one of the guiding principles of the Convention for interpreting and implementing all the rights of the child. 'General Comment No 14' adopted by the United Nations Committee on the Rights of the Child on 29 May 2013 states at para 6 that 'best interests' in this context is a 'threefold concept': (a) a substantive right, (b) a fundamental, interpretative legal principle, and (c) a rule of procedure.

71. In *ZH (Tanzania) v Secretary of State for the Home Department* at para 26, the UK Supreme Court explored and explained the distinction between decisions directly affecting the child's upbringing where welfare was the paramount consideration, and decisions which affect the child more indirectly where welfare is a primary consideration, and what 'a primary consideration' meant. Baroness Hale said:

> *''This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first.'*

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.

73. In addition, Mr Le Grice QC has also relied on 'The United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979)' which entered into force as an international treaty on 3 September 1981 and was ratified by the UK on seventh of April 1986.

> ***Article 16***
> *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
>
> *(c) The same rights and responsibilities during marriage and at its dissolution;*

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

74. Mr Le Grice QC says that in accordance with The Vienna Convention on the Law of Treaties 1969, which came into force on 27 January 1980 that the UK must implement treaties in good faith and, insofar as they may conflict with internal laws, treaties should take precedence:

''Article 26 "Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

75. In relation to Article 6 ECHR Mr Le Grice QC's central contention is that the existence of a law of non-marriage and the resulting inability to make a financial claim is indirectly discriminatory in respect both of women and in particular Muslim women; both being disproportionately affected given the likelihood that men will usually hold the majority of financial assets and Muslim women are more likely to be held to be in a non-marriage given the current state of the law.

76. Mr Nagpal says this argument is unsustainable for the simple reason that the essence of Article 6 is that it guarantees procedural rights; it cannot be used to create a substantive right where none exists in domestic law. Mr Le Grice QC says if there is no difference in status terms between a void marriage and a 'non-marriage' it is a procedural issue. He refers to what Lord Bingham stated in *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163.

***[3]……** the Strasbourg case law is emphatic that article 6(1) of the Convention applies only to civil rights which can be said on arguable grounds to be recognised under domestic law; it does not itself guarantee any particular content for civil rights in any member state: see, for example,* Z v United Kingdom (2001) 34 EHRR 97 *, 134-135, 137, paras 87, 98. Thus for purposes of article 6 one must take the domestic law as one finds it, and apply to it the autonomous Convention concept of civil rights. It is evident, thirdly, that the Strasbourg jurisprudence has distinguished between provisions of domestic law which altogether preclude the bringing of an effective claim (as in* Powell and Rayner v United Kingdom (1990) 12 EHRR 355 *and* Z v United Kingdom 34 EHRR 97 *) and provisions of domestic law which impose a procedural bar on the enforcement of a claim (as in* Stubbings v United Kingdom (1996) 23 EHRR 213 , Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249 *and* Fogarty v United Kingdom (2001) 34 EHRR 302 *). The European Court of Human Rights has however recognised the difficulty of tracing the dividing line between procedural and substantive limitations of a given entitlement under domestic law, acknowledging that it may be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy: see* Fayed v United Kingdom (1994) 18 EHRR 393 *, 430, para 67. An accurate analysis of a claimant's substantive rights in domestic law is none the less the first essential step towards deciding whether he has, for purposes of the autonomous meaning given to the expression by the Convention, a "civil right" such as will engage the guarantee in article 6."*

77. Ultimately, I agree with the position of the Attorney General although not without some reservation. The origins of the discrimination (if it exists) lies in the territory of status. This is dealt with in Article 12 of the ECHR which affords individuals a right to marry in accordance with national law. It is not asserted that there is discrimination in relation to the right to marry and it is accepted that the right to marry does not carry with it a right to divorce still less a right to nullity or a right not to be characterised as being in a non-marriage. The ability to mount a financial remedy claim ultimately derives from this categorisation. The substantive law of financial remedy is therefore accessible without discrimination but is dependent upon status. It seems to me therefore that Mr Le Grice QC's argument is in reality an argument that Article 12 has a discriminatory effect but given that Article 12 does not confer a right to divorce or nullity if it is discriminatory it is not the content of a substantive right. Given there is no direct or indirect discrimination against a Muslim woman in bringing a financial remedy claim if she has obtained a decree of nullity, I conclude that there is no breach of the wife's Article 6 and Article 14 rights in this regard.

78. In relation to Article 8 Mr Le Grice QC argues that the right to respect for private and family life incorporates a right to respect for their status as a married couple. He submits that describing their relationship as a non-marriage is an infringement of their right to respect for private and family life which is not dependent upon their marriage status: *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471. He also submits that categorising their relationship as a non-marriage and thus excluding them from the ambit of nullity also amounts to a breach of article 8. He refers to the decision of the South African Constitutional Court in *Daniels v Campbell No and others* (2004) CCT 40/031 where Sachs J commenting on the definition of surviving spouse of a Nikah marriage said

"*such exclusion as was effected in the past did not flow from the courts giving the word "spouse" its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than to the dictates of the English language.'*

79. The Attorney General responds by arguing that in terms of status there is no difference between a void marriage and a non-marriage. As a matter of law the parties are not and never were married. He also argues that the wife has not demonstrated that the state has not complied with a positive obligation to ensure respect for family life or that there has been interference with the right to respect for family life. He refers to the decision of the European Court of human rights in *Serife Yigit v Turkey* (3976/05); (2011) 53 EHRR 25 (in circumstances where the applicant's Islamic ceremony was not recognised as valid in Turkey) where the grand chamber said:

[100] *It should be reiterated in this regard that the essential object of art.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. 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. This applies also in the present case.*

> ***[101]*** *As to the applicant, she chose, together with her partner, to live in a religious marriage and found a family. She and ÖK 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 art.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 art.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, that art.8 does not require the state to establish a special regime for a particular category of unmarried couples. 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 art.8.*

80. Save in one respect I agree with the Attorney General submissions. It does not seem to me that there is a distinction in Article 8 terms between those who cohabit choosing not to marry and those who knowingly undertake a religious only ceremony and opt not to undertake the additional formalities necessary to affect a valid legal marriage. 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 the finding of a decree of a void marriage rather than a wholly invalid marriage. I agree with the sentiments of Sachs J.

81. Furthermore in terms of the obligation upon the court as a public authority it seems to me that it would be more appropriate to apply a term to the situation which is not as negative or potentially insulting as non-marriage is. As the expression has originated from the courts that is an act of a public authority which it seems to me either does, or risks, infringing the Article 8 rights of couples to respect for their private and family life. Those who have religiously married and have lived for many years, raised families and been treated by the family community and state authorities as married should not have the term non-marriage applied to them. In the course of this hearing the expressions valid marriage, void marriage, voidable marriage have been used to describe the legal statuses provided for in the Marriage Act 1949 and the Matrimonial Causes Act 1973. Whilst there may be a risk of confusion between void voidable and invalid it seems to me preferable to use the expression invalid marriage to describe a situation which is none of the other three. In my view the expression non-marriage should be reserved only to those situations such as acting or children playing where there has never been any intention to genuinely create a marriage.

82. The Supreme Court has said that Article 8 ECHR should be viewed through the prism of Article 3 UNCRC. Thus the best interests of children as a primary consideration are a component of Article 8. The determination of whether this is a void or an invalid marriage is an action concerning the children. I therefore consider that in the interpretation of section 11 or in its application the court should where it is appropriate be able to take into account the best interests of children. Whether this is seen as an aspect of the substantive right or an interpretive principle it seems to me does not matter as long as the court is able to take it into consideration. Given that it is

a primary consideration their interests can of course be outweighed by other considerations including policy considerations. In a case where both parties had knowingly and voluntarily contracted a religious only marriage it might well be that respecting their autonomy and historic decision-making would outweigh the interests of the children.

83. Article 12 has not been expressly relied upon by Mr Le Grice QC as he accepts that the domestic law can properly impose formalities as to marriage. In this the attorney general agrees. Article 12 primarily addresses the rights of individuals to marry without appearance from the state. This however it seems to me there may be circumstances where Article 12 also has relevance in terms of its horizontal effect. 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. Although usually deployed in the context of property rights, the equitable maxim that equity treats as done that which ought to be done and that equity focuses on intent not form (see Snell's Equity 33rd edition 5-015) seems to me capable of informing how the court might approach the interpretation of section 11 or its application. Whilst the equitable maxim cannot it seems be used to create something which is only capable of legal creation by fulfilling statutory conditions (i.e. a legal interest in land cannot be created unless section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 are met) it can create equitable rights. In this case it could not create a valid marriage but seems to me this approach supports the conclusion that in determining whether on the facts of this case whether what happened created a void marriage I can treat the joint intention of the parties to undertake a civil ceremony which was not then seen through by the husband's as supporting the conclusion that this was a void marriage

84. Mr Le Grice QC submits that the non-marriage authorities infringe the wife's Article 1 Protocol 1 right to peaceful enjoyment of her possessions. He submits that over the course of the marriage the wife has acquired a share in the matrimonial acquest. He submits that this is a right to property and that the categorisation of her marriage as a non-marriage prevents her from securing her right to this property because it denies her a financial remedy application. It allows her only her possessions in her name. Mr Le Grice QC founds this on a number of financial remedy authorities including

    a. *Moore v Moore* [2007] 2 FLR 358
    b. *White v White* [2001] 1 AC 596
    c. *Cowan v Cowan* [2001] 2 FLR 192
    d. *Charman v Charman (no 4)* [2007] 1 FLR 1246.

85. He argues that if this were a marriage having endured for some 18 years the birth of four children and the accumulation of capital there is no doubt that the wife would have a sharing claim with equal division being the starting point. The same would apply if she obtained a decree of nullity. I assume for the purposes of this that that assertion is correct. From a point of logic it seems curious that a spouse can acquire a share in matrimonial property when in void marriage situations there has never been a valid marriage to generate rights arising out of marriage. That suggests that it is not the existence of a valid marriage that is the source of the rights but is based on the partnership of two individuals living together as husband-and-wife.

86. The Attorney General submits that effectively the wife is putting the cart before the horse. He submits that even if a wife's claim to a share does amount to property rights for the purposes of A1 P1 that the gateway to those property rights is a determination that she is entitled to either a decree of divorce or a decree of nullity.

87. The Attorney General also takes issue with the assertion that unascertained rights in the matrimonial acquest can even engage the A1 P1 rights. The issue has been considered (albeit the attorney general submits not definitively) by the Court of Appeal in *Ram v Ram* [2004] EWCA Civ 1452; [2005] 2 FLR 63 and *Gray v Work* [2017] EWCA Civ 260; [2018] Fam. 35 and that neither case conclusively supports the proposition contended for by Mr Le Grice QC. The attorney general submits that the starting point in relation to property rights is separation of property and that marriage does not alter property rights. *Miller v Miller; McFarlane v McFarlane* [2006] 2 UKHL 618; [2006] 2 AC 618 at paragraph 123 by the Supreme Court in *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42; [2011] 1 AC 534 at paragraphs 107, 164, 184.

88. I prefer the Attorney General's arguments on this point. Cohabitees, however long they have lived together and however many children they have do not acquire any rights of property merely by cohabiting. They may do so independently on the principles applicable to implied, constructive or resulting trusts. Those would give true rights in property. 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 A1 P1 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 A1 P1 rights.

89. I don't consider that Article 16 of CEDAW adds anything to Article 14 ECHR. At its simplest level the law in relation to invalid marriages applies equally to men and women and I do not consider that anything in Article 16 further assists in interpreting section 11 over and above the arguments I have outlined above.

Conclusions on the Law and its application to this case.

90. Does the State's interest in certainty of marriage which thus points to a narrow interpretation of section 11 of the Matrimonial Causes Act 1973 and more restricted application to each case outweigh the State's interest in marriage as an institution which confers various benefits on the participants and the interests of individuals and children in at least identifying such situations as void marriages? Whilst I appreciate Mr Nagpal's point on behalf of the Attorney General that a void marriage indicates it

was void from its inception (i.e. was never a marriage at all) and thus is indistinguishable from a non-marriage in terms of legal status there is plainly a difference in ordinary perception but also in the remedies which flow from the different status.

91. It seems to me that the net effect of my conclusions on the fundamental rights arguments points in favour of an interpretation of section 11 which allows more flexibility. I do not consider that this extension is inconsistent with the wording of the section itself or carries the existing interpretation much further.

92. The starting point in relation to the interpretation and application of section 11 of the Matrimonial Causes Act 1973 must therefore be the net result of the series of cases considered by Moylan J (as he then was) in *MA v JA* (above).

    a. Unless a marriage purports to be of the kind contemplated by the marriage acts 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 (see for instance *K v K* [2016] EWHC 3380, [2017] 2 FLR 1055).

    c. The court should take account of the various factors and features mentioned above including particularly, but not exhaustively: (a) whether the ceremony or event set out or purported to be a lawful marriage; (b) whether it bore all or enough of the hallmarks of marriage; (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;

93. However I think that approach must also be supplemented as a result of my conclusions in relation to some of the human rights arguments outlined above. That requires consideration of

    a. Article 8 supports an approach to interpretation and application which the finding of a decree of a void marriage rather than a wholly invalid marriage. This seems to me to be consistent in any event with the historic approach of the courts as shown in the presumptions but also has clearly emerges from the authorities over the centuries which supports a finding of marriage

    b. 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,

    c. 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 means that should be taken into account in determining whether took place falls within or without the parameters of section 11

    d. The competing Article 8 rights of the parties can be considered which in the case of one party may be in favour of the marriage being held to be invalid and in respect of the other being held to be void

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

    a. Unless a marriage purports to be of the kind contemplated by the Marriage Act 1949 it will not be within section 11. 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. When considering the question of a marriage the court should be able to take a holistic view of a process rather than a single ceremony

    b. The court should take account of the various factors and features mentioned above including particularly, but not exhaustively: (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; (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 (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

95. Applying that approach to the facts as I have determined them leads to the following conclusions.

    a. It was understood by both the husband and wife that they were embarking on a process which was intended to include a civil ceremony in which the marriage would be registered,

    b. The wife's understanding and the husband's expressed position was that this civil ceremony was to follow shortly after the Nikah ceremony

    c. The failure to complete the marriage process was entirely down to the husband's refusal after the Nikah ceremony had been undertaken to take action to complete the marriage process by arranging the civil ceremony.

    d. The wife thereafter frequently sought to complete the marriage process by seeking to persuade the husband to undergo a civil ceremony.

    e. The nature of the ceremony which was in fact undertaken 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

    f. thereafter the parties lived as a married couple for all purposes

    g. the couple were treated as validly married in the UAE.

96. On the basis of my slightly more flexible interpretation of section 11 of the Matrimonial Causes Act 1973 informed by fundamental rights arguments and taking

into account the factors outlined above I therefore conclude 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.

97. It is therefore a void marriage and the wife is entitled to a decree of nullity.