Neutral Citation Number: [2023] EWCA Civ 1003

Case No: CA-2022-001330

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE NEWTON
FD21F0051

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 August 2023

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE DINGEMANS

- -

SA (by her Litigation Friend, the Official Solicitor)
(Declaration of Non-Recognition of Marriage)

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- -

Michael O'Brien KC (instructed by **Taj Solicitors**) for the **Appellant**
Jessica Lee (instructed by **Pathfinder Legal Services**) for the **First Respondent**
Katie Williams-Howes (instructed by **Duncan Lewis Solicitors**) for the **Second Respondent**
Rhys Hadden (instructed by **Bindmans LLP**) for the **Third Respondent**

Hearing date: 22 February 2023

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Approved Judgment

This judgment was handed down remotely at 12.00 noon on 30 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. This appeal concerns the jurisdiction of the court to make a declaration that a marriage is not recognised as valid in England and Wales.

2. The marriage in question took place in Bangladesh on or around 25 October 2019 and was between SA, who has always lived in and is domiciled in the UK, and NU who, it appears, has always lived in and is domiciled in Bangladesh. By his order dated 26 May 2022, Newton J ("the judge") made a declaration that the marriage "is not recognised as valid in this jurisdiction".

3. SA is significantly intellectually impaired. The judge decided that SA lacked the capacity to consent to marry and lacked the capacity to engage in sexual relations. He found that there had been a forced marriage and made a Forced Marriage Protection Order ("FMPO") in respect of SA. These aspects of his decision are not challenged.

4. SA also lacks the capacity to litigate and acts through her litigation friend, the Official Solicitor. The other relevant parties to the proceedings are SA's mother and father and the Local Authority, West Northamptonshire Council. NU is not a party to the proceedings.

5. SA's mother appeals from the judge's declaration contending, as set out in refined grounds of appeal: (a) that the court was wrong to make the declaration because the inherent jurisdiction should not be used to bypass the effect of ss. 55 and 58 of the Family Law Act 1986 ("the FLA 1986"); and (b) that the inherent jurisdiction to make a declaration of non-recognition of marriage can only be used "on exceptional public policy grounds" and this case is "unexceptional".

6. Permission to appeal was given by Peter Jackson LJ, not because he considered that the appeal from the judge's decision to make a declaration had a real prospect of success, but principally to enable this court to address Mostyn J's obiter observations in *NB v MI (Capacity to Contract Marriage)* [2021] 2 FLR 786 ("*NB v MI*") in which he cast doubt on this court's decision in *Westminster City Council v C and Others* [2009] Fam 11 ("*Westminster CC*"). A significant part of the hearing below and a considerable part of the judge's judgment was spent addressing those observations.

7. On this appeal, the mother is represented by Mr O'Brien KC; Ms Williams-Howes appears for the father; Ms Lee appears for the Local Authority; and Mr Hadden appears for SA, through the Official Solicitor. They all appeared before the judge at the hearing below.

8. The case advanced by the mother in support of the appeal relied significantly on the judgment in *NB v MI* and on what Mr O'Brien submitted were the public policy choices made by Parliament as reflected in the provisions of the FLA 1986 and in s. 12(1)(c) of the Matrimonial Causes Act 1973 ("the MCA 1973"). He submitted that it could be inferred, from the fact that these provisions had not been amended, that the relevant public policy considerations remained the same. This meant that the remedy provided by Parliament for a voidable marriage is a nullity petition.

9. I also note that victims of forced marriage are provided with lifelong anonymity by the provisions of s. 122A and Schedule 6A of the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act").

Background

10. The background, in brief, is as follows.

11. SA was born in the UK. In October 2019 she travelled to Bangladesh. As a result of information provided to, it appears, the Local Authority, the Police and the Forced Marriage Unit, the Local Authority applied for an FMPO under Part 4A of the Family Law Act 1996 ("the FLA 1996") on 24 October 2019. An FMPO was made on 25 October. At that hearing, the father informed the court that SA was in Bangladesh with her mother having left the UK on 6 October; that SA had become engaged to marry on 11 October; and that SA had married on 18 October. She had married her cousin, NU. The date of the ceremony was later said to have been 25 October.

12. In addition to the application for an FMPO, the Local Authority applied for declarations in respect of SA's capacity, including in respect of her capacity to marry, and for a declaration under the court's inherent jurisdiction that the marriage was a nullity or alternatively that the marriage should not be recognised.

13. The final hearing of these applications did not commence until early 2022. This was significantly due to the court making directions for further educational work to be undertaken with SA and for further assessments of her capacity in respect of various matters. Ultimately, the court had, in total, four reports by two jointly instructed independent experts. SA was diagnosed as having a moderate learning disability with an extremely low range of ability in all areas of cognitive and adaptive functioning.

Judgments

14. In his first judgment dated 21 February 2022, the judge dealt with the issue of SA's capacity. After hearing evidence from one of the instructed experts, social workers and the mother and father, the judge concluded that SA did not have capacity to marry or capacity to engage in sexual relations, either at the time of the marriage or at the time of the hearings.

15. The judge set out the evidence as to the extent of SA's learning disability. This included that SA "is in the extremely low range of ability"; she is "only able to hold up to five pieces of information at one time [and] would not be able to mentally manipulate fives pieces of information consistently"; she "would have difficulty problem-solving"; she cannot write or read; she is "unable to shower"; and she is "suggestible" and "has no ability to resist how she was being steered by others".

16. In his second judgment, the judge dealt with the application for an FMPO and for orders in respect of the marriage. He made an FMPO and made a declaration that SA's marriage was not entitled to recognition in England and Wales. In respect of the former, it seems clear that the order was made on the basis that SA had been forced into a marriage (as provided for by s. 63A(1)(b) of the FLA 1996.

17. As to the latter, the judge noted that it was "only appropriate to engage the inherent jurisdiction if no other statutory mechanism is available to deal with the relevant interests in play". He then considered the differences between a void and a voidable marriage and referred to the provisions of ss. 11 and 12 of the MCA 1973 and of ss. 55 and 58 of the FLA 1986. He noted that the Court of Appeal in *Westminster CC* had decided that the inherent jurisdiction "was available to make a declaration of non-recognition of marriage". The judge analysed a number of first instance decisions in which the court had considered "whether to grant a declaration of non-recognition of marriage", namely:

(a) *X City Council v MB, NB and MAB (By His Litigation Friend the Official Solicitor)* [2006] 2 FLR 968, in which Munby J (as he then was) made a declaration, in respect of a person who lacked capacity to marry, that "Any purported marriage … will not be recognised in English law";

(b) *SH v NB (Marriage: Consent)* [2010] 1 FLR 1927 in which, in respect of a forced marriage in Pakistan and when nullity proceedings were not available because of the lapse of time (under s. 13 of the MCA 1973), I decided, at [104], applying *Westminster CC*, that "the appropriate remedy is to grant a declaration that there is no marriage between the petitioner and the respondent which is entitled to recognition as a valid marriage in England and Wales";

(c) *B v I (Forced Marriage)* [2010] 1 FLR 1721 in which, in respect of a forced marriage in Bangladesh and when nullity proceedings were not available because of the lapse of time, Baron J made a declaration that the marriage was not recognised in this jurisdiction;

(d) *Re P (Forced Marriage)* [2011] 1 FLR 2060, Baron J again granted a declaration in respect of a forced marriage when nullity proceedings were not available because of the lapse of time; she applied *Westminster CC*;

(e) *XCC v AA & Ors* [2012] EWCOP 2183, Parker J, applying *Westminster CC*, made a declaration of non-recognition in respect of a marriage in Bangladesh when one party, DD, had "a very significant degree of learning disability". Parker J determined, at [30], that "a marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage (Civil Protection) Act 2007" and, at [88], "that nullity is adjunctive rather than an alternative to a declaration of non-recognition";

(f) *Sandwell MBC v RG & Ors* [2013] EWCOP 2373 in which, as the judge said, Holman J, at [28]-[29], "expressly recognised that, following the decision of *Westminster CC v KC*, the High Court has power in appropriate circumstances to make a declaration of non-recognition" although one was not in fact sought at the hearing in that case;

(g) *A Local Authority v X and a Child* [2014] 2 FLR 123, in which Holman J declined to make a declaration of non-recognition in respect of a marriage which was void because, at [33], there was "no statutory gap" and that to do so would "be bypassing and flouting the statutory prohibition in s 58(5) of the" FLA 1986;

(h) *In re RS (An Adult) (Capacity: Non-recognition of Foreign Marriage)* [2017] 4 WLR 61, in which Hayden J found that RS lacked capacity to marry; he considered, at [36], that the issue was one of recognition rather than validity of marriage. He referred to a number of factors including, at [40(ii)], "that W would be guilty of a crime under the section 30 of the Sexual Offences Act 2003 if the couple had sexual relations", which led him to conclude, at [52], that in "most cases an overseas marriage, entered into by an individual who lacks capacity to consent to either sexual relations or marriage, is likely to require the court to make a declaration of non-recognition"; and finally,

(i) *NB v MI*, which I deal with below.

18. The judge noted that there was no nullity petition and that this route remained open although "time is now very short". He summarised the parties' respective submissions including those on behalf of the mother which were based on *NB v MI* and which questioned whether the circumstances of this case were such as to require a declaration. On behalf of SA, Mr Hadden set out that SA "holds strongly articulated views"; that she "wishes to be married"; that she "wishes to see her husband … and she wants her husband here". However, he submitted to the judge that he should make a declaration in part on public policy grounds.

19. In setting out his conclusions, the judge referred to the inherent jurisdiction as a "flexible tool that enabled the court to provide justice for parties where the statute failed to do so". The judge decided not to follow *NB v MI*. He considered that the key issue was not the validity, or legal effect, of the marriage but its recognition, an issue with which, in his view, Mostyn J "did not grapple". He concluded that, as in *Westminster CC*, the court should refuse to recognise the marriage on public policy grounds:

> "I conclude that in the circumstances of cases such as this, with a factual background such as this, are ones where the court should make a declaration applying the principles and values of the Court, as, for example, did Hayden J in *Re RS*."

Submissions

20. I summarise the parties' respective submissions as follows.

21. As referred to above, the judge's determination that SA lacked the capacity to consent to marry or to engage in sexual relations were not challenged. Nor was it suggested that this was other than a forced marriage.

22. Mr O'Brien submitted that the provisions of ss. 55 and 58 of the FLA 1986 prevented the court from granting the declaration which was made in this case. Those provisions set out what declarations as to marital status can be made and were designed to contain, restrict or control the use of the inherent jurisdiction. They reflected Parliament's policy choice as well as Parliament's assessment of the public policy interests engaged in such cases. Parliament had determined, as set out in the FLA 1986, when it would be in the public interest for a declaration to be made and the court should not use the inherent jurisdiction to avoid or bypass the statutory code. There was "no mention" in the FLA 1986 of a power to make a declaration on public policy grounds.

23. In addition, the remedy which Parliament had provided in respect of voidable marriages was a nullity petition as provided by s. 12 of the MCA 1973. A forced marriage was included within the scope of s. 12(1)(c). This statutory remedy remained available at the date of the hearing before the judge below. This would also have provided procedural and safeguards for SA and NU.

24. Mr O'Brien submitted that s. 58(5)(a) of the FLA 1986 was clear and permitted of no exceptions. There was no gap in the statutory scheme which justified the use of the inherent jurisdiction as a "safety net". Further, a declaration of non-recognition is effectively the same as declaring that a marriage was void at its inception. The judge had, therefore, been wrong to make the declaration which "cut across" the statutory scheme, adopting the expression used by Lord Sumption in *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] AC 606, at [85]. Mr O'Brien also relied on Lord Sumption's observation that: "I do not accept that the inherent jurisdiction can be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court".

25. Mr O'Brien relied on the fact that the MCA 1973 and the FLA 1986 have been amended but the relevant provisions have not been. The FLA 1986 could have been amended to permit a court to make a declaration of non-recognition in respect of a marriage but it had not been. This, he submitted, supported the conclusion that Parliament's assessment of the public interest had not changed but remained as reflected in the relevant provisions of the FLA 1986. The same applied in respect of s. 12(1)(c) of the MCA 1973. The purpose is to protect a party's right to a financial remedy by preventing a declaration being used to circumvent the annulment procedure which gives rise to such rights.

26. Mr O'Brien accepted that this court is bound by the decision in *Westminster CC*. However, he submitted that, although the court *can* make declarations of non-recognition, they should only be made "in exceptional cases in the public interest, where the circumstances were unlikely to have been within the contemplation of Parliament". In the present case there were, he submitted, no exceptional or egregious features such as "severe violence or some factor which showed a high degree of suffering". His case, as referred to by the judge below was that "this was not a "forced marriage", in the sense of coercion or any other sort of behaviour". Mr O'Brien relied on the circumstances of the case as a whole, including the fact that SA wanted the marriage to continue. While the mother accepts that SA lacks capacity to marry, the mother also wants the marriage to continue in case SA's circumstances change.

27. In respect of remedy, nullity proceedings remained an option at the date of the hearing below and Mr O'Brien submitted that they should have been pursued. Alternatively, he submitted that divorce proceedings remained an option.

28. As referred to above, Mr O'Brien relied significantly on the reasoning in Mostyn J's judgment in *NB v MI*. I deal with that case below as well as with the Law Commission's 1984 Report, Declarations in Family Matters (Law Com. No. 132) ("the 1984 Report").

29. Ms Williams-Howes provided a detailed skeleton argument supporting the mother's appeal. She submitted that this case did not reach the "level of exceptionality" which would justify a declaration of non-recognition and that available statutory remedies should primarily be pursued because they are the "statutory protection afforded by

Parliament". In her oral submissions, she argued that divorce remained available as an appropriate means of bringing the marriage in this case to an end.

30. Ms Lee for the Local Authority took us to parts of the evidence which showed the very significant extent of SA's disability in all areas of cognitive and adaptive functioning. She relied on *Westminster CC* and submitted that the present case is also concerned with recognition not validity. As in that case, there are "powerful public policy grounds for refusing recognition" in the present case and the declaration made by the judge was the appropriate remedy. She submitted that physical violence or threats were not a relevant determinant for deciding whether a declaration should be made and pointed to Parliament having decided to make forced marriage a criminal offence.

31. As for the provisions of ss. 58(4) and (5) of the FLA 1986, Ms Lee submitted that they only bar the use of the inherent jurisdiction in respect of those declarations expressly referred to in the FLA 1986, including that "a marriage was at its inception void". There is no more general inhibition on the use of the inherent jurisdiction and, in particular, the court is not prevented from making the declaration which was made in this case. The purpose of the statute was not, as Mr O'Brien submitted, "to create a prohibition on the use of non-recognition of a marriage at its inception save by divorce of nullity". Ms Lee submitted that the mother's case conflated the types of declarations available under s. 55 of the FLA 1986. It was clear from the provisions of the FLA 1986 and from the Law Commission's recommendations in the 1984 Report that the prohibition related only to declarations in respect of void marriages, to which this appeal does not relate.

32. On behalf of SA, Mr Hadden supported the declaration made by the judge and opposed the appeal. He made extensive written and oral submissions. He relied on *Westminster CC* as establishing that there is jurisdiction to make such a declaration and submitted that it was plainly justified and proportionate in the circumstances of this case.

33. Mr Hadden pointed to the fact that the 1984 Report made no mention of voidable marriages at all. He also relied on, what he submitted was, the strong public policy against forced marriages as reflected, for example, in the provisions of the 2014 Act. In his submission, public policy is not frozen as submitted by Mr O'Brien but evolves.

34. Mr Hadden accepted that there is a high threshold for the making of a declaration on public policy grounds, though not one as high as suggested in *NB v MI*, but submitted that the present case was one in which the marriage was "sufficiently offensive", to adopt the expression used by Wall LJ (as he then was), at [101], in *Westminster CC*, to justify the declaration made by the judge. Indeed, as suggested by Hayden J in *Re RS*, Mr Hadden submitted that it would be rare for that threshold not to be surmounted "in nearly all circumstances when an adult who lacks capacity to marry or engage in sexual relations enters into an overseas marriage".

Legal Framework

35. I propose to start by referring (a) to forced marriages; and (b) to the public interest in whether a marriage is entitled to recognition, so as to provide some broader context for consideration of the issues which arise in this appeal.

Forced Marriages

36. Public concern about forced marriages and the public interest in preventing forced marriages are clearly reflected in the legislation directed to this specific issue. First, the courts in England and Wales were given the power to make an FMPO by the Forced Marriage (Civil Protection) Act 2007. This inserted a new Part 4A into the FLA 1996. Section 63A(4) provides:

> "For the purposes of this Part a person ("A") is forced into a marriage if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent."

37. Secondly, s. 121 of the 2014 Act made a forced marriage a criminal offence with a maximum sentence on conviction on indictment of imprisonment for a term not exceeding 7 years. The offence is committed in the following circumstances:

> "(1) A person commits an offence under the law of England and Wales if he or she—
>
> (a) uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage, and
>
> (b) believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.
>
> (2) In relation to a victim who lacks capacity to consent to marriage, the offence under subsection (1) is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form coercion)."

Section 121(2) is relevant to the present case because it provides that, in respect of "a victim who lacks capacity to consent to marriage", the relevant conduct is extended to include *any* conduct with the relevant purpose. It was also made a criminal offence to breach an FMPO.

38. The issue of forced marriages has been considered in a number of authorities. I propose to refer to two, both decisions by Munby J (as he then was). In *Re K; A Local Authority v N and Others* [2007] 1 FLR 399, he said:

> "[85] I do not wish there to be any misunderstanding. I agree, emphatically and without reservation, with everything Singer J said in *Re SK (An Adult) (Forced Marriage: Appropriate Relief) [2004]* EWHC 3202 (Fam), [2006] 1 WLR 81 sub nom *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2005] 2 FLR 230 (*Re SK*). Forced marriage is a gross abuse of human rights. It is a form of domestic violence that dehumanises people by denying them their right to choose how to live their

> lives. It is an appalling practice. As I said in *Singh v Entry Clearance Office, New Delhi* [2004] EWCA Civ 1075, [2005] 1 FLR 308, [2004] INLR 515, at para [68]:
>
> > 'forced marriages, whatever the social or cultural imperatives that may be said to justify what remains a distressingly widespread practice, are rightly considered to be as much beyond the pale as such barbarous practices as female genital mutilation and so-called "honour killings".'
>
> No social or cultural imperative can extenuate and no pretended recourse to religious belief can possibly justify forced marriage."

Munby J reiterated these observations in *NS v MI* [2007] 1 FLR 444 in which he said, at [3], that forced marriages "are utterly unacceptable".

Public Interest

39. In addition to the State's strong opposition to forced marriages, it is also clear that whether a ceremony has effected a legally recognised marriage is itself a matter of public interest. It is important both for the parties but also for the State. This is not about remedies but whether the parties have or have not contracted a marriage which will be recognised in England and Wales.

40. One element of this was referred to in *Akhter v Khan (Attorney General and others intervening)* [2021] Fam 277 and *Shahzad v Mazher* [2021] 2 FLR 707. Quoting from the former, at [28]:

> "… marriage creates an important status, a status "of very great consequence", per Lord Merrivale P in *Kelly (orse Hyams) v Kelly* (1932) 49 TLR 99, 101. Its importance as a matter of law derives from the significant legal rights and obligations it creates. It engages both the private interests of the parties to the marriage and the interests of the state. It is clearly in the private interests of the parties that they can prove that they are legally married and that they are, therefore, entitled to the rights consequent on their being married. It is also in the interests of the state that the creation of the status is both clearly defined and protected."

We were also referred to the Law Commission's December 2015 Scoping Paper, Getting Married, which stated, at para 1.2, "a wedding is a legal transition in which the state has a considerable interest".

41. Another element is referred to in Dicey, Morris and Collins, The Conflict of Laws, 16th Edition, in Chapter 5. Rule 5 provides:

> "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right,

> power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law."

Marriages are addressed specifically, at [5-011]:

> "Public policy may require that a capacity existing under a foreign law should be disregarded in England: but the circumstances would have to be extreme before such a course becomes justifiable. Thus, the courts recognise the validity of marriages within the prohibited degrees of English law (provided they are valid under the applicable foreign law), but they might refuse to recognise a marriage between persons so closely related that sexual intercourse between them was incestuous by English criminal law, or a marriage with a child below the age of puberty64 or a marriage with a man suffering from autism and severe impairment of intellectual functioning."

This paragraph refers to a number of authorities including *Cheni (orse Rodriguez) v Cheni* [1965] P 85 and *Westminster CC*.

42. Dicey also comments, at [5-015], that "the acceptability of a foreign law must be judged by contemporary standards". This is based on *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, in which Lord Nicholls said, at [28]:

> "The acceptability of a provision of foreign law must be judged by contemporary standards. Lord Wilberforce, in a different context, noted that conceptions of public policy should move with the times: see *Blathwayt v Baron Cawley* [1976] AC 397, 426."

The context of that case was very different from the present case but the principle that public policy must "move with the times" is clearly of general application.

Legislation

43. The MCA 1973 sets out when a marriage is void in s.11 and when it will be voidable in s.12:

> "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 eighteen; 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;
>
> (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."

Section 12(1) sets out the grounds on which a marriage will be voidable. They include:

> "(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise".

44. Section 13 sets out a number of "Bars to relief where marriage is voidable". These include:

> "(2) … the court shall not make a nullity of marriage order by virtue of section 12 above on the grounds mentioned in paragraph (c) … of that section unless—
>
> (a) it is satisfied that proceedings were instituted within the period of three years from the date of the marriage, or
>
> (b) leave for the institution of proceedings after the expiration of that period has been granted under subsection (4) below.
>
> …
>
> (4) In the case of proceedings for the making of a nullity of marriage order by virtue of section 12 above on the grounds mentioned in paragraph (c) … of that section, a judge of the court may, on an application made to him, grant leave for the institution of proceedings after the expiration of the period of three years from the date of the marriage if—
>
> (a) he is satisfied that the applicant has at some time during that period suffered from mental disorder within the meaning of the Mental Health Act 1983, and
>
> (b) he considers that in all the circumstances of the case it would be just to grant leave for the institution of proceedings."

The circumstances in which time can be extended under s. 13(4) are limited because of the terms of subparagraph (a).

45. Section 14 addresses "Marriages governed by foreign law or celebrated abroad under English law". It provides:

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

46. Section 16 deals with the "Effect of annulment in case of voidable marriage". It provides:

> "(1) A nullity of marriage order granted in respect of a voidable marriage shall operate to annul the marriage only as respects any time after the order has been made final, and the marriage shall, notwithstanding the order, be treated as if it had existed up to that time …"

It is of particular relevance for the present case that a decree in respect of a voidable marriage *only* annuls a marriage from the date of the final decree. It does not affect the initial validity of the marriage and is, therefore, very different from a decree in respect of a void marriage.

47. The above provisions replaced, with amendments, provisions in the Nullity of Marriage Act 1971. This Act had been preceded by the Law Commission's 1970 Report on Nullity of Marriage (Law Com. No. 33) ("the 1970 Report"). The 1970 Report started by noting, at [6], that, at that time, among the grounds on which a marriage was void was: "(e) lack of consent (whether through duress, mistake or unsoundness of mind)"; and, at [7], that among the grounds which made a marriage voidable, by s. 9 of the Matrimonial Causes Act 1965, was: "(c) unsoundness of mind, mental disorder or epilepsy of either party at the time of the marriage".

48. The 1970 Report went on to consider the question of whether absence of consent should make a marriage void or voidable. Its ultimate recommendation was:

> "15. We, therefore, recommend that absence of consent whether due to duress, mistake or unsoundness of mind at the time of marriage should render a marriage voidable and not void."

The analysis which led to this recommendation was as follows:

> "13. The overwhelming view of those whom we consulted on our Working Paper No. 20 and who sent us comments on it was that lack of consent through duress or mistake should render the marriage voidable, and not void, and we agree with this view. This will, incidentally, have the desirable consequence of wholly

> absorbing "ratification" within "approbation"; as already pointed out in this context "ratification" appears to mean much the same but the use of a separate expression, though understandable so long as absence of consent was regarded as making a marriage void (as distinct from voidable), is a potential source of confusion.
>
> 14. In Working Paper No. 20 we said that, while the question whether lack of consent due to insanity at the time of marriage should render the marriage void or voidable was a difficult one, we thought on balance that when the lack of consent was due to this cause the marriage should continue to be void. Our reason for this view was that a ceremony, where one of the parties is in this mental state and does not understand what he is doing, is meaningless. However, on further consideration and taking into account the views expressed by those whom we consulted, we have come to the conclusion that this type of unsoundness of mind, like other types of mental disorder or lack of consent, should render the marriage voidable and not void. Our reasons may be summed up as follows:
>
> (a) Marriages are voidable under the Matrimonial Causes Act 1965, section 9, on the ground of unsoundness of mind or mental disorder and the distinction between unsoundness of mind which makes a marriage voidable and unsoundness of mind which makes a marriage void is a source of confusion. It may be difficult for a court to draw the line between unsoundness of mind depriving a person of mental capacity to understand the nature of marriage and unsoundness of mind falling within section 9; the position under the present law, which makes the marriage void if it falls into the first category and voidable if it falls into the second category, seems artificial.
>
> …
>
> (d) There are marriages of insane persons which benefit such persons. If, for instance, a woman marries a man of unsound mind and is willing to look after him and her care and presence are beneficial to the man, we can find no good reason why the marriage should be null and void or why third parties should be allowed to interfere with it by having it declared to be a nullity."

This example under (d) shows, putting it mildly, how far awareness and attitudes have changed since 1970. However, the whole analysis (including in paragraphs I have omitted) demonstrates how the matters being considered by the Law Commission were a very long way from the issues raised by forced marriages and in particular, forced marriages involving a person who lacks capacity to marry.

49. I would also note that, as stated by Lord Greene MR in *De Reneville v De Reneville* [1948] P 110, at p. 110: "So far as English law is concerned there is a clear distinction between void and voidable marriages". As he explained, at p. 111:

> "… a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction."

50. One of the purposes of the FLA 1986 was, as set out in the Introductory Text, "to amend the law relating to the powers of courts to make declarations relating to the status of a person". These provisions are contained in Part III. The relevant sections for the purposes of this appeal are as follows:

> "55 Declarations as to marital status.
>
> Subject to the following provisions of this section, any person may apply to the High Court or the family court for one or more of the following declarations in relation to a marriage specified in the application, that is to say—
>
> (a) a declaration that the marriage was at its inception a valid marriage;
>
> (b) a declaration that the marriage subsisted on a date specified in the application;
>
> (c) a declaration that the marriage did not subsist on a date so specified;
>
> (d) a declaration that the validity of a divorce, annulment or legal separation obtained in any country outside England and Wales in respect of the marriage is entitled to recognition in England and Wales;
>
> (e) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in England and Wales."
>
> (2) A court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, either of the parties to the marriage to which the application relates-
>
> (a) is domiciled in England and Wales on the date of the application, or
>
> (b) has been habitually resident in England and Wales throughout the period of one year ending with that date, or
>
> (c) died before that date and either—
>
> (i) was at death domiciled in England and Wales, or

> (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.
>
> (3) Where an application under subsection (1) above is made to a court by any person other than a party to the marriage to which the application relates, the court shall refuse to hear the application if it considers that the applicant does not have a sufficient interest in the determination of that application.

It can be seen that a declaration can be made under this provision that a divorce obtained in a country outside England and Wales is not entitled to recognition but there is no similar provision in respect of a marriage outside England and Wales. I have also set out the jurisdiction provisions in s. 55(2) which limit the circumstances in which an application for a declaration can be made.

51. Section 58 provides:

> "58 General provisions as to the making and effect of declarations."
>
> (1) Where on an application to a court for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.
>
> (2) Any declaration made under this Part shall be binding on Her Majesty and all other persons.
>
> (3) A court, on the dismissal of an application for a declaration under this Part, shall not have power to make any declaration for which an application has not been made.
>
> (4) No declaration which may be applied for under this Part may be made otherwise than under this Part by any court.
>
> (5) No declaration may be made by any court, whether under this Part or otherwise—
>
> (a) that a marriage was at its inception void;
>
> (b) …
>
> (6) Nothing in this section shall effect the powers of any court to make a nullity of marriage order.

52. The important provisions for the purposes of this appeal are subsections (4) and (5). Subsection (4) only applies to declarations expressly included within the FLA 1986. Subsection (5) is also specific and only prohibits the court from making a declaration that "a marriage was at its inception void". This reflected, as referred to below, the Law Commission's recommendation that the court should not have power to make a

declaration that a marriage was initially invalid otherwise than by means of a decree in nullity proceedings.

53. Before turning to the 1984 Report, I deal with *Kassim v Kassim* [1962] P. 224 which had a significant influence on aspects of that Report which are relevant in this appeal.

54. In that case Ormrod J (as he then was) had to decide whether to grant a decree of nullity or a declaration that the marriage was null and void. He explained, at p. 232, the different consequences of each:

> "The gravamen of the matter is that it is said that if I grant the husband the declaration for which he prays, the court is then functus officio and has no jurisdiction to make orders for the maintenance of the petitioner or for the custody and maintenance of the child of this union, whereas if I pronounce a decree of nullity, the court is not functus officio and has the necessary jurisdiction to deal with both forms of ancillary relief.

He then added:

> "It would be surprising and unfortunate if in these days the jurisdiction of the court and the rights and liabilities, or more accurately, the potential rights and liabilities of the parties, were to depend upon the precise form in which the effect of my judgment was formally recorded on the court record. It would be even more deplorable if so much were to hang upon mere minor verbal differences between the alternative forms of order. I must, therefore, consider first of all whether I have the supposed option."

He concluded that he did not have an option. He decided, at p. 233, that he was exercising "the jurisdiction in nullity and other matters formerly enjoyed before 1857 by the ecclesiastical courts [which] was transferred to this court by section 6 of the Matrimonial Causes Act, 1857, and is now exercised by it under section 21 of the Supreme Court of Judicature (Consolidation) Act, 1925". This meant, at p. 234, that he had "no option" but to make a decree of nullity:

> "When this court pronounces on a marriage which is ipso facto void it is merely finding and recording a particular state of fact for the convenience of the parties and the public, and the court is exercising the jurisdiction inherited from the ecclesiastical courts. In such cases the form in which the judgment is recorded is a declaration that the marriage is and always has been null and void, and it is called a decree of nullity."

Ormrod J reached the same conclusion and applied this decision in *Corbett v Corbett (Otherwise Ashley)* [1971] P 83.

The 1984 Report

55. The 1984 Report led to the enactment of the FLA 1986. The Law Commission considered, at [1.6], that its recommendations for reform were "limited in scope" and, at [1.7], "would only have a limited impact":

> "1.6 … Our proposals are *limited in scope* and their only impact on the court's inherent jurisdiction to make binding declarations would be that, so far as concerns matrimonial status, legitimacy, legitimation and adoption, the declarations available would be limited to those which will be provided by statute.
>
> 1.7 The recommendations in this Report are based very substantially on the provisional proposals made in Working Paper No.48. Those proposals were generally supported and welcomed on consultation as providing a rationalisation and simplification of the law. However, one commentator expressed the view that the power to grant declarations in family matters should neither be limited nor defined. We agree with the view that there should be no undue limitation on the court's inherent jurisdiction. *As will be apparent, our proposals would only have a limited impact on the court's inherent powers and would, in effect, confirm the approach recently adopted by the courts*. If our proposals are implemented, applications for declarations under the new statutory regime will be subject to special procedural safeguards designed to protect third parties and the public. It would be undesirable, as the courts have emphasised, to permit a litigant to petition by an alternative procedure and thus to circumvent the statutory safeguards." (emphasis added)

56. The 1984 Report then commented on the extent of its consideration of the law of nullity:

> 1.8 Although we are primarily concerned in this Report with declarations in family matters, we have not excluded consideration of some aspects of the law as to nullity of a void marriage. *A decree of nullity of a void marriage is in effect the converse of a declaration as to the initial validity of a marriage* made under section 45 of the Matrimonial Causes Act 1973 and we think that they should both be governed by the same rules in certain matters, such as procedural safeguards and application by third parties." (emphasis added)

57. After setting out, at [2.12], a number of "Defects in the present law", which included, at (a), "uncertainty as to the *type* of declarations which can be made by reason of Order 15, rule 16 under the inherent jurisdiction", it was proposed:

> "2.13 These unsatisfactory features are due in part to the outdated complexities of the statute (section 45 of the Matrimonial Causes Act 1973) and in part to uncertainty as to the true relationship between the statutory and discretionary powers to grant relief. We recommend, therefore, that a new legislative code based on consistent principles, should replace the existing hotchpotch of statutory and discretionary relief. In

> effect the new statute will determine the declaratory relief available in matters of matrimonial status, legitimacy, legitimation and adoption."

58. The 1984 Report recommended that the statutory regime should not include the power to make a declaration as to the initial invalidity of a marriage: The Explanatory Note, at p. 61, dealing with what is now s. 58(5)(a) of the FLA 1986 stated:

> "6. Paragraph (a) of this subsection gives effect to the recommendations in paragraphs 3.19 and 3.28 of the Report that the court should not be able to grant a declaration that a marriage was initially invalid, whether under this Bill or under R.S.C., Order 15, rule 16. The effect of this subsection is that an applicant who wishes to have it declared that his marriage was initially invalid will have to apply for a decree of nullity. This will prevent the parties from avoiding the ancillary powers of the court which arise in nullity, but not declaration, proceedings."

59. I set out [3.19] and [3.28] as well as [3.18]:

> "3.18 The Working Paper proposed that the only route for obtaining a declaration as to the initial invalidity of a marriage should be by a nullity decree. We also proposed that if there was no jurisdiction to entertain nullity proceedings (because neither party was domiciled in England and Wales nor had been habitually resident here for at least a year before the start of proceedings) there should be no jurisdiction to apply for a declaration that the marriage was void, merely because the marriage had been celebrated in this country. The main reason for this proposal was to prevent parties from avoiding the ancillary relief powers of the court which arise in nullity, but not declaration, proceedings. As regards the head of jurisdiction based on the celebration of the marriage here, this is not a sufficient ground for nullity proceedings and we see no reason why the jurisdictional rules for nullity should be capable of being evaded by recourse to the declaration procedure.
>
> 3.19 The provisional conclusion in the Working Paper was supported on consultation by almost all those who commented on this issue. However, one commentator suggested that the courts should have jurisdiction to decide the validity of a marriage celebrated in England. In our view, such a jurisdiction ought not, for reasons given in the previous paragraph, to be conferred by means of a declaration rather than jurisdiction to grant a nullity decree. It raises, therefore, the much broader question whether the jurisdictional rules for nullity should be amended."

After considering a number of factors, it was recommended that "the court should not be empowered to make a declaration as to the initial invalidity of a marriage, even in

those cases where, because the parties do not satisfy the jurisdictional requirements, the court cannot entertain a petition for a decree of nullity of a void marriage".

60. Paragraph 3.28 said the following:

> "(iii) Overlapping declarations
>
> 3.28 We have seen that the court will not grant a declaration as to the initial invalidity of a marriage - the appropriate relief is a nullity decree. [This was based on *Kassim* and *Corbett*] We have also seen that, if an appropriate procedure is available under section 45 of the Matrimonial Causes Act 1973, the courts already take the view that that procedure should be followed, rather than a declaration being sought under the inherent jurisdiction of the court, that is, under Order 15, rule 16.18. We think that this is the right approach and that there is, in our view, no advantage in retaining an overlapping inherent jurisdiction. *We recommend that it should not be possible to seek declaratory relief under the inherent jurisdiction of the court in those circumstances where we have recommended specific statutory provision for the granting of declarations in family matters. Furthermore, in those cases where we have specifically recommended that no declaratory relief should be available, this recommendation ought not to be evaded by seeking declarations under Order 15, rule 16. We do not wish, however, to introduce any other restrictions on the availability of declarations under the inherent jurisdiction of the court*." (emphasis added)

These recommendations reflected what had been said in the Law Commission's 1973 Working Paper No. 48, Declarations in Family Matters, ("the 1973 Working Paper"), which had commented, at [24], that:

> "a decree of nullity in respect of a void marriage is essentially a declaration of the initial invalidity of a marriage and it seems to be unnecessary for there to be two varieties of relief which have basically the same purpose".

I have included this passage because it is a further reference which makes clear that the Law Commission was dealing with *void* marriages and that its recommendations were based on its analysis that a decree of nullity in that context "is essentially a declaration of the *initial* validity of a marriage" (emphasis added).

61. Finally, I refer to the Explanatory Note, at p. 63, dealing with what became s. 58(6) of the FLA 1986, which made the same point:

> "This is a saving provision, consequential on subsection (5). Since a decree of nullity in relation to a marriage void ab initio is essentially a declaration that the marriage is void, it is necessary to make it clear that paragraph (a) of subsection (5) does not prevent the court from making a decree of nullity in respect of a void marriage."

Authorities

62. I start my review of the authorities with *Cheni v Cheni*. The case concerned a marriage in Egypt between a woman and her maternal uncle. The marriage was valid by the law of the parties' domiciles. The ultimate issue determined by Sir Jocelyn Simon P (as he then was) was whether the marriage should be declared null and void on the ground of consanguinity. After an extensive review of the authorities and after noting that the marriage did not contravene any criminal statutes, Sir Jocelyn Simon concluded, at p.99 D/E, in respect of the submission that the marriage should not be recognised as it was contrary to English public policy:

> "If domestic public policy were the test, it seems to me that the arguments on behalf of the husband, founded on such inferences as one can draw from the scope of the English criminal law, prevail. Moreover, they weigh with me when I come to apply what I believe to be the true test, namely, whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law. In deciding that question the court will seek to exercise common sense, good manners and a reasonable tolerance."

He went on to conclude, at p.99 F/G, that, having "regard to this particular marriage, which, valid by the religious law of the parties' common faith and by the municipal law of their common domicile, has stood unquestioned for 35 years … injustice would be perpetrated and conscience would be affronted if the English court were not to recognise and give effect to the law of the domicile in this case".

63. *Westminster CC* concerned a purported marriage between a man who lived in England, IC, and a woman who lived in Bangladesh, NK. The judge, Roderic Wood J [2007] EWHC 3096 (Fam) made declarations to the effect: (i) that IC lacked the capacity to marry; and (ii) that the marriage between IC in England and NK in Bangladesh, which had been conducted by telephone, was "not valid under English law". The parents appealed to the Court of Appeal contending, among other things, that the marriage was voidable, not void, and that the judge had had no power to grant the latter declaration because of the provisions of the FLA 1986. It is important to note that the ceremony had taken place on or about 26 August 2006 and judgment was given by the Court of Appeal on 19 March 2008, well within the three year time limit provided by s. 13(2)(a) of the MCA 1973.

64. The Court of Appeal allowed the parents' appeal from the declaration that the marriage was not valid under English law. This was because, in summary, under English law, the marriage was voidable and not void and the declaration was to the effect that the marriage "was at its inception void" which was prohibited by s. 58(5)(a) of the FLA 1986. As Thorpe LJ said, at [26],

> "Section 55(1) itemises the declarations as to marital status which the court may make. The first of these is "a declaration that the marriage was at its inception a valid marriage". What is significantly absent is a sub-paragraph permitting a declaration that the marriage was at its inception an invalid marriage. That omission was very deliberate as we may see from section 58(5)

> which states: "No declaration may be made by any court, whether under this Part or otherwise— (a) that a marriage was at its inception void …" The following subsection provides: "Nothing in this section shall effect the powers of any court to grant a decree of nullity of marriage." Thus the combined effect of these provisions is to ensure that the only route to a judicial conclusion that a marriage was void at its inception is a petition for nullity. An alternative route, namely an application for a declaration, was plainly proscribed."

A different declaration was, however, substituted, namely that "the marriage between IC and NK, valid according to the law of Bangladesh, is not recognised as a valid marriage in this jurisdiction". In summary, the marriage was not recognised as valid because IC did not have the capacity to marry and on public policy grounds.

65. In the course of his judgment, Thorpe LJ first rejected the challenge to the judge's conclusion that IC did not have the capacity to marry. He then, at [31], expressly approved the judge's "introduction of the public policy considerations":

> "[31] I would be equally supportive of the judge's introduction of the public policy considerations. Not every marriage valid according to the law of some friendly foreign state is entitled to recognition in this jurisdiction. In *Cheni (orse Rodriguez) v Cheni* [1965] P 85 Simon P refused to withhold recognition on the ground of public policy. However he clearly defined the possibility of such an outcome when he said, at p 99 [which I have quoted above] …
>
> [32] In the present case it is common ground that IC lacks the capacity to marry in English law. Even having regard to the relaxations that have permitted marriage to be celebrated in a variety of places and by a variety of celebrants, it is simply inconceivable that IC could be lawfully married in this jurisdiction. There is much expert evidence to suggest that the marriage which his parents have arranged for him is potentially highly injurious. He has not the capacity to understand the introduction of NK into his life and that introduction would be likely to destroy his equilibrium or destabilise his emotional state. Physical intimacy is an ordinary consequence of the celebration of a marriage. Were IC's parents to permit or encourage sexual intercourse between IC and NK, NK would be guilty of the crime of rape under the provisions of the Sexual Offences Act 2003. Physical intimacy that stops short of penetrative sex would constitute the crime of indecent assault under that statute. IC's parents, perhaps understandably, cannot accept the court's statutory and inherent powers to protect IC. Their engineering of the telephonic marriage is potentially if not actually abusive of IC. It is the duty of the court to protect IC from that potential abuse. The refusal of recognition of the marriage is an essential foundation of that protection. Miss Ball has suggested that the public policy exception is not easily

> illustrated in the authorities. In my judgment the refusal of recognition in this case is justified even if not precedented. Accordingly I would grant permission to appeal on ground one and allow the appeal only to the extent of varying the language of the order of 21 December. In place of the existing declaration (h) I would propose a declaration that the marriage between IC and NK, valid according to the law of Bangladesh, is not recognised as a valid marriage in this jurisdiction."

66. In his judgment, Wall LJ said:

> "[47] In my judgment, this is a case about recognition of the marriage, not about its validity. In my judgment, the fundamental questions raised by the appeal are: (1) whether or not the English court has jurisdiction to refuse to recognise the marriage in fact celebrated between IC and NK; and (2) if so, whether it should exercise that jurisdiction."

His "very clear conclusions", at [48], were that court had jurisdiction and should exercise that jurisdiction by granting a declaration. He acknowledged the force of the submissions based on, what is now, s. 12(1)(c) (and was then s. 12(c)) of the MCA 1973 but rejected that these meant that the court had no power to deny the marriage recognition.

> "[59] … In my judgment, this marriage cannot be afforded recognition either on its own or in the context of the development of English private international law in relation to marriage. There are also powerful public policy grounds for refusing recognition.
>
> [60] I acknowledge, of course, as I have to, that, as a matter of English domestic law, section 12(c) of the 1973 Act renders the marriage between IC and JK voidable rather than void. It does not, however, in my judgment follow that the English courts are bound to recognise the marriage as a valid marriage. To put the matter another way, the status conferred by sections 12 and 16 of the 1973 Act on the marriage is in no sense inconsistent with the High Court's capacity to refuse it recognition. There are, I think, a number of good reasons for so concluding. I propose to set them out under different headings."

Before I set out a summary of those reasons, I would emphasise Wall LJ's observation that the fact that, under the MCA 1973, a marriage is "voidable rather than void" does not mean that the English courts "are bound to recognise the marriage as a valid marriage".

67. Wall LJ then set out at some length his reasons for this conclusion. I do not propose to repeat them in this judgment. They included that capacity to marry is governed by each party's ante-nuptial domicile. Accordingly, at [63], because "IC does not have the capacity to marry under the law of his acknowledged ante-nuptial domicile … a marriage contracted by him … is, accordingly, not entitled to recognition".

68. He repeated, at [93], what he had said, at [47]: "the effect of sections 12(c) and 16 of the 1973 Act in English domestic law is, in my judgment, quite separate from the question whether or not the marriage in this case is entitled to recognition". He then quoted from *Cheni* at p. 99 before saying:

> "[101] In my judgment, quite different considerations apply to the marriage with which we are concerned. In particular, the absence of any capacity on IC's part, either to consent to the marriage itself or to sexual intercourse, in my judgment, strikes at its root. If, therefore, in the popular phrase, push comes to shove, I would, applying Simon P's words to the facts of the instant case hold that the marriage in the instant appeal is sufficiently offensive to the conscience of the English court that it should refuse to recognise it, and should refuse to give effect to the law of Bangladesh and Sharia law. In so doing, I take the view that the court would be exercising "common sense, good manners and a reasonable tolerance", and would properly be applying the law of England."

His ultimate conclusions were:

> "[102] I am therefore firmly of the view that IC's marriage to NK is not entitled to recognition in English law. I respectfully agree, however, with Thorpe LJ's observations on the inapplicability of Part III of the Family Law Act 1986. These proceedings were launched under the inherent jurisdiction of the High Court, not under Part III of the 1986 Act.
>
> [103] As I have already stated, this case, in my judgment, is about recognition, and I therefore agree with Thorpe LJ's conclusion that in place of the existing declaration … there should be substituted a declaration that the marriage between IC and NK, valid according to the law of Bangladesh, is not recognised as a valid marriage in this jurisdiction."

69. I have referred above to the authorities to which the judge referred. I propose only to deal additionally with, briefly, *A Local Authority v X and a Child* and, at greater length because of Mr O'Brien's reliance on it, *NB v MI*.

70. In the former case, Holman J declined a make a declaration of non-recognition. During the course of his judgment, he said:

> "[24] There is a line of authority, both at first instance and in the Court of Appeal, whereby in certain circumstances courts have made declarations that a marriage contracted abroad is not recognised here for one reason or another. Sometimes that outcome is sought in situations where the party to the marriage lacked mental capacity to contract a marriage and continues to lack mental capacity to take any steps to seek its annulment. Lack of mental capacity, however, and also duress, are not

> grounds which render a marriage void but, rather, which render it voidable under s 12(c) or (d) of the MCA 1973."

Holman J noted, at [25], that the case before him was different from that line of authority because "the marriage is altogether void"; X was aged 14 at the date of the marriage. He, in particular, distinguished the case before him from that in *B v I*, at [31]:

> "But, on the facts of that case, Baron J was never faced with the situation where the court might have been able to make a decree of nullity on the ground that the marriage was void or a declaration that the marriage was 'at its inception void'. On the facts and in the circumstances of the case with which she was faced, the marriage was never a void one but was, at most, one which was voidable in the discretion of the court on the grounds of duress, which fall under s. 12 rather than s 11 of the MCA 1973."

It is relevant to the present appeal that, at [32], Holman J identified "a fundamental distinction" between the case before him and *B v I*, namely that "this marriage is a void one". This distinction was the basis of his conclusion, at [33], that "there was no statutory gap" such that a declaration of non-recognition would "be bypassing and flouting the statutory prohibition of s. 58(5) of the Family Law Act 1986 by a mere device".

71. I now turn to *NB v MI*. I do not set out the facts of that case save to say that Mostyn J decided that NB had had capacity to consent to marry, hence his observations, in respect of the issue the subject of this appeal, were obiter.

72. In the course of his analysis of the 1984 Report, Mostyn J said, at [48], after referring to the recommendation, at [2.13], that there should be "a new legislative code" that:

> "It is absolutely clear that the Law Commission intended the new code to be the Alpha to Omega, the *ne plus ultra*, of the legal regime. The report makes clear beyond doubt that it was never intended that there would remain outside the code a residual, inherent, discretionary power to make alternative declarations where the subject matter was covered in the code."

Mostyn J then quoted from [3.28] in the 1984 Report, which I have set out above. After quoting other parts of the 1984 Report, including [3.18] he said:

> "[51] The Law Commission then set out, with full reasons, those declarations which would not be available. So far as marriages were concerned the prohibition was confined to a declaration as to the initial invalidity of a marriage. At para 3.18 the report stated:
>
> > 'Our recommendation is, therefore, that the court should not be empowered to make a declaration as to the initial invalidity of a marriage, even in those cases where, because the parties do not satisfy the jurisdictional

> > requirements, the court cannot entertain a petition for a decree of nullity of a void marriage.'
>
> As will be seen, this prohibition was duly enacted. I shall refer to it as 'the statutory prohibition'.
>
> [52] It can therefore be seen that the Law Commission was emphatically clear that even if, for one reason or another, there was no jurisdiction to entertain a nullity petition, there could not be recourse to an application for a declaration under the inherent jurisdiction to fill the gap.
>
> [53] It is clear that when the Law Commission spoke of 'a petition for a degree of nullity of a void marriage' it was not merely speaking of marriages void ab initio within s 11 of the Matrimonial Causes Act 1973 but was also including voidable marriages within s 12. This is demonstrated by the reasoning in the report at para 3.18 that the statutory prohibition should exist principally in order to prevent the evasion of ancillary relief powers that a decree of nullity would give rise to."

The latter conclusion was repeated, at [58], when Mostyn J said that s. 58(5)(a) "encompasses" both a void and a voidable marriage.

73. In support of these conclusions, Mostyn J referred, in a footnote, to [24]-[27] of the 1973 Working Paper. Those paragraphs explained why it was not being suggested that the law, as determined in *Kassim v Kassim*, should be changed in respect of void marriages. In that decision, as set out above, Ormrod J decided that, where a marriage was void, the court had no power to make a declaration but must pronounce a decree of nullity. The Law Commission was not recommending that financial remedies should be available on the making of a declaration and did not want to enable a party to use this as an alternative and thereby avoid being ordered to make financial provision in respect of a marriage.

74. Mostyn J went on to question this court's decision in *Westminster CC* because, at [66], he "struggle[d] to understand how [the declaration] is not a circumvention of the statutory prohibition" in s. 58(5)(a) of the FLA 1986. He noted, at [67], the Court of Appeal's "reliance on" *Cheni v Cheni*. He next quoted, what are now, Rule 5 and [5-011] from Dicey, Morris & Collins (which I have set out above). He then, at [70], said that he did not "dispute the existence of the public policy power to refuse to recognise unconscionable foreign legal constructs, notwithstanding the statutory prohibition" but suggested that there were reasons "for very narrowly construing the criterion of exceptionality in this class of case".

75. After critiquing a number of cases, Mostyn J returned to this topic, at [90], when he again suggested that "in a case where the statutory prohibition applies, the exercise of this power, if not in fact blocked by the prohibition (see above), must be very highly exceptional". I just mention that the reference, "see above", was to a potential argument identified by him (but not addressed), at [70], namely that the fact that there was no "public policy exception to the statutory prohibition on making a declaration that a marriage was invalid at its inception", when there was in respect of declarations under

the FLA 1986 by s. 58(1), could support an argument "that the reach of statutory prohibition in fact extends to block additionally the exercise of the public policy power".

76. Returning to the issue of "the criterion of exceptionality", among the reasons given by Mostyn J for this conclusion was, at [91], the fact that:

> "By s. 2 of the Nullity of Marriage Act 1971 Parliament re-categorised marriages which were invalid due to defective consent from void ab initio to merely voidable. By s 5 of that Act (now s 16 Matrimonial Causes Act 1973) a decree of nullity granted on the ground that a marriage is voidable shall operate to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time. It is impossible to conceive that Parliament would have passed s 5 if all marriages voidable on the ground of lack of consent in consequence of unsoundness of mind were in fact so offensive that they should not be recognised on the ground of public policy. To my mind, this is a very weighty point in deciding whether the criterion of exceptionality is met."

77. This approach led Mostyn J to decide, at [93], that if his decision on the issue of capacity was wrong, he would not have granted a declaration both because he considered it would be "a blatant bypassing and flouting of the statutory prohibition" and because "the facts of this case do not satisfy the stringent criterion of exceptionality".

Determination

78. I start by reiterating that, as accepted by Mr O'Brien, the marriage in this case was a forced marriage. I also repeat that public policy in respect of forced marriages is clear and, as set out above, is reflected in the civil law provisions giving the courts power to make an FMPO and in the criminal law provisions which make, in broad terms, forcing someone to marry a criminal offence with a maximum sentence of 7 years' imprisonment. In particular, the offence is capable of being committed in respect of "a victim who lacks capacity to consent to marry … by *any* conduct carried out for the purpose of causing the victim to enter into a marriage" (emphasis added).

79. I would next note that we are bound by this court's decision in *Westminster CC* which expressly decided that the court has power to make a declaration of non-recognition in respect of a voidable marriage. The present case is indistinguishable from that case. As in that case, the marriage in this case is voidable because one party lacked the capacity to consent to marry. The issue, therefore, is whether the judge was right to exercise that power by making a declaration. However, before addressing that issue, I propose to make a number of other observations about the statutory framework, in particular because of Mostyn J's observations in *NB v MI*.

80. *Westminster CC* has been followed in a number of subsequent first instances decisions, as referred to above, and was not questioned until *NB v MI*. Is there anything which calls into question the decision in *Westminster CC* or which supports the conclusion in *NB v MI*, at [53], that "when the Law Commission spoke of 'a petition for a decree of

nullity of a void marriage' it was … including voidable marriages within s. 12" and, at [58], that "s. 58(5)(a) encompasses … a voidable marriage"?

81. It is obviously significant that neither s. 55 nor s. 58 of the FLA 1986 deal expressly with voidable marriages. In addition, as referred to above, s. 55 expressly provides for a declaration as to the non-recognition of a foreign divorce, annulment or judicial separation, by s. 55(1)(e), but does not provide for a declaration that a foreign marriage is not recognised. This would, in my view, be a surprising omission if the FLA 1986 had the effect advanced by Mr O'Brien, namely it prohibited the court from making a declaration in respect of the non-recognition of a marriage contracted abroad. Accordingly, I do not consider that such a declaration is prohibited by s. 58(4).

82. Section 58(5)(a) provides that a declaration cannot be made "that a marriage was at its inception void". Under the provisions of the MCA 1973, a voidable marriage is not one which "was at its inception void". By s. 16, a voidable marriage is only annulled as from the date of the final decree. Accordingly, on a plain reading of s. 58(5)(a) it does not apply to a voidable marriage.

83. Is there anything in the 1984 Report which supports a different conclusion? It is first relevant to note the extent of the proposed reforms. The Law Commission considered, at [1.6], that its proposals were "limited in scope and, at [1.7], that they "would only have a *limited impact* on the court's inherent powers" (emphasis added). It was also emphasised, at [3.28], that, apart from those declarations specifically included, there was *no* proposal "to introduce any other restrictions on the availability of declarations under the inherent jurisdiction of the court".

84. It is also notable, as referred to during the hearing, that the 1984 Report makes no substantive reference at all to voidable marriages. This would also, in my view, be a surprising omission if the FLA 1986 had been intended to have the effect in respect of such marriages as submitted by Mr O'Brien. In fact, as can be seen from the passages quoted above, the 1984 Report dealt only with void marriages. This can be seen, for example, from [1.8]:

> "Although we are primarily concerned in this Report with declarations in family matters, *we have not excluded consideration of some aspects of the law as to nullity of a void marriage. A decree of nullity of a void marriage is in effect the converse of a declaration as to the initial validity of a marriage* made under section 45 of the Matrimonial Causes Act 1973 and we think that they should both be governed by the same rules in certain matters, such as procedural safeguards and application by third parties." (emphasis added)

This focus explains why the *only* declaration which is proscribed by s. 58(5)(a) is a declaration "that a marriage was at its inception void". As referred to further below, this was not an oversight or wording which by implication was also intended to apply to voidable marriages but reflected the fact that the 1984 Report only addressed void marriages with the wording of ss. 58(5)(a) being based on the view, as expressed in both the Working Paper and the 1984 Report, at p. 63, that "a decree of nullity in relation to a marriage void *ab initio* is essentially a declaration that the marriage is void".

85. Turning to *NB v MI*, in so far as Mostyn J's conclusions, at [51]-[53], state the effect of s. 58(4), namely that, "No declaration which may be applied for under this Part may be made otherwise than under this Part by any court"; and s. 58(5)(a), namely that, "No declaration may be made by any court … (a) that a marriage was at its inception void", they are plainly uncontentious. However, with all due respect, there is nothing in the FLA 1986 or the 1984 Report which supports his broader conclusion that s. 58(5)(a) encompasses a voidable marriage or that the Law Commission was "including voidable marriages".

86. I acknowledge that the main reason behind the prohibition on the court making a declaration that a marriage is void, as set out in [3.18] of the 1984 Report, namely "to prevent parties from avoiding the ancillary relief powers of the court which arise in nullity", *could* be an objective which could also apply to voidable marriages. However, the simple fact is that it was not; it was only applied in respect of void marriages. The fact that this objective could apply to voidable marriages does not, in my view, address the plain wording of s. 58(5)(a) or the absence of any reference to voidable marriages in the 1984 Report. I would make the same comment as I have made above, namely it seems unlikely that, if the Law Commission had been intending to include voidable marriages, it would not have made at least some express reference to this.

87. Importantly, another reason given for confining the remedy in respect of a void marriage to a decree of nullity, in both the Working Paper, at [24], and the 1984 Report, at p. 63, was, to quote the latter again, that "a decree of nullity in relation to a marriage void *ab initio* is essentially a declaration that the marriage is void". This clearly could not be applied to voidable marriages and supports the conclusion, as referred to above, that the omission of any reference to voidable marriages was not an oversight and that, contrary to the view expressed in *NB v MI* at [58], the wording of s. 58(5)(a) cannot be read as applying, by implication, to voidable marriages.

88. Further, the conclusion in *NB v MI*, expressed at [58], that the "reference to a marriage void at inception in s. 58(5)(a) encompasses … a void marriage under s 11 of the Matrimonial Causes Act 1973 and a voidable marriage under s 12", overlooks the effect of s. 16. By that provision, a voidable marriage is not one which is void at its inception.

89. As referred to above, in support of his conclusions, Mostyn J referred to [24]-[27] of the 1973 Working Paper. However, as with the 1984 Report, the Working Paper only substantively addressed void marriages, namely those which were "initially" invalid and did not deal with voidable marriages at all. In addition, [24]-[27] in the Working Paper appear under the heading, "Declaration that a marriage was initially void". Similarly, [3.18] in the 1984 Report is under the heading, "Declaration as to the initial invalidity of a marriage". The critical words are "initially" and "initial" which contradict the suggestion that voidable marriages were being included.

90. Mr O'Brien submitted that a declaration that a marriage is not entitled to recognition is equivalent to a declaration that a marriage was void at its inception. In my view, this is not correct. There is a substantive distinction between declaring that a voidable marriage is not entitled to recognition and declaring that a marriage is void at its inception. The latter was proscribed by the 1986 Act because a decree of nullity in respect of a void marriage is essentially a declaration of its initial invalidity. The same reasoning does not apply in respect of voidable marriages which, as a matter of English law, are not initially void.

91. As stated by Wall LJ in *Westminter CC*, at [47], "this is a case about recognition of the marriage, not about its validity". As he also said, at [60], "as a matter of English domestic law, section 12(c) of the 1973 Act renders the marriage … voidable rather than void". I repeat, and would emphasise, what he then said:

> "It does not, however, in my judgment follow that the English courts are bound to recognise the marriage as a valid marriage. To put the matter another way, the status conferred by sections 12 and 16 of the 1973 Act on the marriage is in no sense inconsistent with the High Court's capacity to refuse it recognition."

92. I have repeated this passage because, in my view, it would be surprising if the effect of the MCA 1973 and FLA 1986 was that the court was "bound to recognise" a marriage as a valid marriage in particular in respect of a forced marriage. As referred to above, both the private interests of the parties to the marriage and the interests of the state are engaged when considering whether a ceremony has effected a legally recognised marriage. Further, this outcome would deprive the court of being able even to determine whether recognition of the marriage was contrary to the public interest. In this respect it is also relevant, although not as submitted by Mr O'Brien, that the FLA 1986 does *not* address the court's power to make a declaration on public policy grounds (s. 58(1) only deals with the power to refuse to make a declaration within the FLA 1986 on public policy grounds) and, in particular, does *not* seek to prevent or limit the court's power to refuse to recognise a marriage on public policy grounds.

93. I would also add two additional observations, The first is that, as referred to above, the Law Commission considered its recommendations as being limited in scope. This militates against extending the scope of the provisions of the FLA 1986 by implication, as Mostyn J did in respect of voidable marriages. I have no doubt that if the Law Commission had intended further to restrict the court's power to grant declaratory relief it would have said so expressly.

94. The second is that there is nothing which suggests that, when writing the 1984 Report, the Law Commission had in mind forced marriages. As referred to above, public policy must "move with the times" and, in the absence of the FLA 1986 expressly prohibiting the power not to recognise a foreign voidable marriage, public policy would support the court having such a power.

95. Accordingly, I reject the first ground of appeal because, for the reasons given above, I do not consider that the declaration which the judge made bypassed the effect of the FLA 1986. Indeed, as Dingemans LJ commented during the hearing, the declaration which the judge made in this case was entirely consistent with the scheme of the 1986 Act.

96. The final issue I need to address is whether the judge was right to make a declaration in the circumstances of this case or whether, as Mr O'Brien submits, the facts of the case are not so egregious as to justify a declaration.

97. The invocation of public policy clearly has a high threshold. This is reflected in the passages I have set out above from Dicey, Morris & Collins and in what was said in *Westminster CC*. Rule 5 states that recognition must be "inconsistent with the

fundamental public policy of English law". In *Westminster CC*, Wall LJ, at [101], applied the test from *Cheni v Cheni* of whether "the marriage … is sufficiently offensive to the conscience of the English court that it should refuse to recognise it". I do not think it helpful to add further adjectives or a different formulation to describe the nature of the test and would disagree with the approach proposed in *NB v MI*, such as, at [70], of "very narrowly construing the criterion of exceptionality in this class of case". There is no justification for applying any sort of enhanced test of public policy. There are examples in legislation, including s. 58(1) of the FLA 1986, when Parliament has made the test, "*manifestly* … contrary to public policy" (emphasis added) but there is no such provision which applies in the circumstances of this case.

98. In my view it would be surprising if public policy did not apply to prevent the recognition of a forced marriage in the circumstances of this case. Indeed, what Wall LJ said in *Westminster CC*, at [101], is equally applicable to all such cases, namely that "the absence of any capacity on IC's part, either to consent to the marriage itself or to sexual intercourse, in my judgment, strikes at its root". As referred to above, Hayden J made a similar observation in *Re RS*.

99. Turning to the facts of this case, I reject Mr O'Brien's submission that "severe violence or some other factor which showed a high degree of suffering" is required before a declaration is justified. A marriage has to be "sufficiently offensive" to be contrary to public policy and it does not require severe violence or a high degree of suffering for it to cross this threshold. I also do not accept the submission that the facts in *Westminter CC* are of a different nature to the facts in this case. In particular, I do not agree that a telephone marriage is more offensive than taking SA to Bangladesh to marry. Indeed, it could be said that involving SA more directly in a ceremony of marriage in this way is more offensive.

100. It is clear that, when making his decision, the judge took all the relevant factors into account, including the fact that SA wanted the marriage to continue. On the facts of this case, the judge was clearly entitled to decide that the circumstances of the marriage were sufficiently offensive to justify making the declaration. It was a forced marriage in respect of a person who has a significant learning disability and is in the extremely low range of ability in all areas of cognitive and adaptive functioning; who lacked capacity to consent to marry or to engage in sexual relations; and who is suggestible and has no ability to resist how she was being steered by others. Indeed, in my view, he was right to make a declaration.

101. Accordingly, I also reject the second ground of appeal.

102. In conclusion, as set out above: (i) the FLA 1986 does not prohibit the court from making a declaration of non-recognition in respect of a foreign marriage which is voidable under English law; and (ii) the judge was entitled to make such a declaration in this case. Accordingly, in my view, the appeal must be dismissed.

Lord Justice Dingemans:

103. I agree.

Lady Justice King:

104. I also agree.