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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Neutral Citation No. [2024] EWFC 163 (B)

Case No. 1682-6112-5851-2182 (Suit)
1683-1486-7202-5664 (FR)

TI v LI

JUDGMENT

1) I am concerned with cross-applications in relation to (i) divorce proceedings purportedly brought in Pakistan which one party says are valid and should be recognised in this jurisdiction and one says are invalid and/or should not be recognised; and (ii) divorce proceedings brought in this jurisdiction where the jurisdictional basis to do so is challenged.

2) For ease I shall refer to the parties as 'W' and 'H' respectively. No disrespect is intended and this terminology does not in any way prejudge the issues I have to determine.

3) W was represented by Mr. Max Lewis instructed by Hanne & Co LLP. H was represented by Mr. Tim Bishop KC (instructed by Payne Hicks Beach after the fee earner moved from Boodle Hatfield LLP). I am grateful to both Mr. Lewis and Mr. Bishop for the quality of their written and oral advocacy and to their respective solicitors for the preparation of the case.

4) I remind myself that the burden of proof is on the party who makes a particular allegation/seeks a particular finding and the standard of proof is the balance of probabilities; no more and no less.

5) In advance of the final hearing I was provided with (and read) an e-bundle running to 684 pages and detailed position statements from both counsel.

6) I heard the final hearing over four days from 3rd – 6th June 2024 after which I reserved judgment.

7) I heard oral evidence from both parties (with W giving her evidence from behind a screen), Mr. J (W's brother), Mr. K (then serving as Personal Assistant and the Reader to the Chairman of the Arbitration Council at X Cantonment Board ("X")), Mr. B (one of H's employees), Ms. S (H's former partner), and Mr. Ian Edge (the single joint expert). I also read the witness statement of Mr. V (another employee of the X and Mr. K's then supervisor) dated 22nd August 2023 filed within W's proceedings in Pakistan (and which was subject to a hearsay notice dated 19th April 2024).

8) In this judgment I have not referred to every argument raised by the parties in their written and oral evidence or in their counsel's submissions. I have however borne all that I read and was said to me in mind.

Background

9) W is 48. She is a dual UK/Pakistani national (having been born in country A). She currently lives in London. H is 51. He is a Pakistani national and lives in Pakistan.

10) The parties met in 2011 and married in Pakistan on 22nd June 2012. Their life was a luxurious one. They began IVF treatment at E Centre in London in April 2015. Their relationship had deteriorated by 2015/16.

11) There is little other common ground between the parties as to the history of their relationship between 2015 and October 2021.

H's case

12) On H's case, the parties separated on 1st August 2015 following a huge argument and did not live together thereafter. From late 2015/early 2016 he was in a cohabiting relationship with Ms. C (and from June 2018 – December 2021 he was in a relationship with Ms. S). He pronounced a verbal *talaq* to W *"a few months"* after September 2015 and also *"on several occasions"* but following an altercation between W's brothers and Ms. C he instructed his attorney (Mr. D) to draft divorce papers. On 9th November 2016 he attended his attorney's offices and pronounced *talaq* formally in the presence of two witnesses (Mr. B and Mr. G). The Deed was then notarised. On the same date H wrote W a cheque for the sum of PKR5,000 (between £14 and £15 at current exchange rates) which was the *mehar* (or dower) that H was obliged to pay W in accordance with the Nikkah.

13) H arranged for Mr. B to deliver a copy of the Divorce Deed, and various other documents including the parties' Marriage Registration Certificate, and copies of both parties' Computerised National Identity Cards ("CNIC")) to the Chairman of the Arbitration Council of the X as required by the Muslim Family Law Ordinance 1961 s7 ("MFLO 1961"). The documents were sent under cover of a letter from Mr. D dated 9th November 2016 and were hand-delivered to the X by Mr. B on 16th November 2016. The letter gave W's address as Property Z. A second copy of the Divorce Deed and the cheque were then hand-delivered to Property Z by Mr. B on 17th November 2016 where it was received by a servant on W's behalf who said he would give the documents to her.

14) The X then processed the divorce application. On a date between 16th November 2016 and 10th January 2017 W attended the X offices and gave Mr. K her address as Property P. She also provided him with a contact mobile telephone number.

15) On 5th December 2016 - and in accordance with the MFLO 1961 - the Chairman of the X issued a notice for the parties to attend on 13th December 2016 to consider reconciliation. This notice was addressed to H alone and he attended. Three subsequent notices were sent out addressed to both parties on 10th January 2017 (to attend on 24th January 2017), 6th February 2017 (to attend on 16th February 2017), and 1st March 2017 (to attend on 10th March 2017). On all three documents W's address was given as Property P. All four notices were prepared by and signed by Mr. K on behalf of the Chairman. H attended all three appointments and W attended none of them. The attendances were all recorded in

a handwritten ledger.

16) In accordance with the MFLO 1961 the divorce automatically became effective on 15th February 2017 - 90 days after Divorce Deed was delivered to the Chairman of the X.

17) H attended the X offices on 13th March 2020 where he collected (and signed for) a copy of the Confirmation Certificate of Divorce that was dated the same day by Mr. K and which confirmed that the divorce *"has become effective"*. Again W's address was given as Property P. On the same date Mr. K telephoned W on the number she had given when she attended their offices in late 2016/early 2017 and she was asked to collect her copy of the Confirmation Certificate of Divorce. She said words to the effect that she was not interested and that she did not want to reconcile. On 22nd June 2020 the National Database and Registration Authority ("NADRA") issued a Divorce Registration Certificate which (erroneously) gave the date of failure of conciliation/date of effectiveness as 13th March 2020 as the Confirmation Certificate of Divorce did not contain the date on which the divorce became effective. Again W's address is given as Property P. On 11th August 2020 W attended the X offices and collected and signed for a copy of the Confirmation Certificate of Divorce although H accepts that it did not look like W's usual signature (he speculates she deliberately signed it other than in her usual way so she could subsequently deny having obtained a copy).

18) It is common ground (and I have seen the same) that on 1st August 2021 H sent W via WhatsApp photographs of the Confirmation Certificate of Divorce dated 13th March 2020 and the Divorce Registration Certificate dated 22nd June 2020. This was in the context of H applying for a visa to visit his mother in Europe and the immigration authorities had queried H's marital status, indicating that their records showed that the parties were still married and he wanted W to correct this. On 2nd August 2021 W asked H by WhatsApp to send her a full copy of the Divorce Registration Certificate which he did.

19) On 31st August 2021 H's attorney wrote to W via WhatsApp asking her to remove his name as her husband from her CNIC (copied to NADRA).

W's case

20) On W's case due to ongoing relationship problems (with many arguments revolving around her trying to conceive) the parties' marriage was *"volatile"* and *"from around 2016 we had what I would describe as an on and off relationship"*. She would spend time (sometimes months) at her mother's home. W's mother and W and her siblings (as heirs of W's late father who had died in 1996) sold Property Z on 1st March 2016 (and this is supported by the evidence of her brother, Mr. J) and by late 2016 she and her mother were living at Property A. I have been provided with the sale contract which includes confirmation that the vendors declared *inter alia "the peaceful complete physical vacant possession of the said property has been handed over to the Vendee … and that henceforth Vendee shall be rightful and absolute owner of the said property."* On 14th October 2016 W gave H the Property A address via WhatsApp (although she cannot recall why H had said he needed the full postal address at that time and he had been to that house several times). If anything was hand-delivered to Property Z on 17th November 2016 it was not forwarded or otherwise passed on to her. W did not move to Property P until late March/early April 2017 and then to Property U in August 2018.

21) W did not receive the three notices to attend the X to consider reconciliation that were purportedly sent to her dated 10th January 2017, 6th February 2017, and 1st March 2017.

She did not speak to the X on 13th March 2020. She did not attend the X's offices on 11th August 2020 and sign for a copy of the Confirmation Certificate of Divorce. She did receive the photographs sent by H via WhatsApp on 1st August 2021 and 2nd August 2021. W did not think these documents were valid as they are easily available in Pakistan and when H came to W's home a few days later he said that the Certificate *"was 'bullshit' and didn't matter"*. W did not receive the letter of 31st August 2021 purportedly sent via WhatsApp by H's attorney. The first she was aware that the parties were no longer married was in January 2023 (see further below). Thereafter she asked her brother (Mr. J) to attend X's offices which he did on 26th January 2023 when he took photographs of the documents on the X file.

22) Thereafter there is some agreement between the parties. H purchased a property in London ("Property M") in his sole name on 25th November 2019 for £820,000. On 8th October 2021 W came to the UK and on or around 10th October 2021 she came to Property M where H was staying having arrived in the UK that day. She left shortly afterwards after an argument. W states that this date marked the final end of the parties' relationship. On 17th November 2021 W applied for a home rights notice against the title (registered on 25th November 2021) of which H states he was unaware (although it was sent to Property M where H stayed from 19th April 2022 – 1st May 2022 and from 18th September 2022 – 12th October 2022). W then stayed with family in Sheffield, Airbnb accommodation and hotels until on 19th December 2022 when having posed as a prospective tenant she moved back into the property (and it is where she continues to live). H states that he thereafter discovered that W had registered a home rights notice and on 20th December 2022 he applied to the Land Registry for it to be cancelled. Having then posted an eviction notice on 22nd December 2022 H issued possession proceedings in the Central London County Court in January 2023.

23) On 16th January 2023 H's solicitors in the possession proceedings (Stowe Family Law) sent W's solicitors a copy of the Divorce Deed of 9th November 2016, the Marriage Registration Certificate dated 17th April 2013, the Divorce Registration Certificate of 22nd June 2020 and the Land Registry Notice of 25th November 2021. It is W's case that this is the first time that she had seen the Divorce Deed. There were then further hearings in the possession proceedings on 19th January 2023 and 29th March 2023 and one was listed on 12th July 2023 and then 3rd October 2023 but the proceedings were stayed by agreement (as recorded on my order on 27th September 2023) pending the outcome of the applications before me.

24) On 22nd February 2023 H sought rectification by X of the Divorce Registration Certificate so that it included the correct effective date of divorce being 15th February 2017. On 28th February 2023 the X issued an amended Confirmation Certificate of Divorce stating the divorce was *"effective w.e.f. 15.02.17"*. On 8th March 2023 NADRA issued an amended Divorce Registration Certificate amending the date of failure of conciliation/date of effectiveness of divorce to be 15th February 2017. Confirmation of these amendments was given in a letter from X dated 22nd March 2023. Both documents gave W's address as Property P.

25) W issued her application for a divorce order on 3rd May 2023. Her jurisdictional grounds were (i) habitual residence for one year; (ii) domicile and habitual residence for six months; or (iii) sole domicile. W referred to H having produced the two Divorce Registration Certificates (albeit described as *"divorce deeds"*) and that she had an expert

report which concludes that the divorce was not effective as she was not notified of the divorce and the rules of service were not complied with.

26) Thereafter W filed a Form A on 4th May 2023 (issued on 11th May 2023). The divorce application was then personally served on H in Pakistan on 27th May 2023. The application was referred to His Honour Judge Hess who designated the same as 'complex' and allocated it to me on 2nd June 2023. The Form C carries the same date. H filed an Acknowledgment of Service on 16th June 2023 and an Answer on 10th July 2023 in which it was said (i) there was a valid divorce in Pakistan which should be recognised; and (ii) the English court did not have jurisdiction in relation to the divorce.

27) On 12th July 2023 W filed a civil suit of jactitation in Pakistan challenging the validity of divorce documents. It was agreed on 27th September 2023 (and recorded as a recital to my order of that date) that given proceedings in Pakistan would likely take a significant period of time to conclude, it was proportionate to litigate the case in this jurisdiction.

28) On 24th July 2023 H applied to stay the financial remedy proceedings and sought a case management hearing in the suit. On 1st August 2023 I made an order on paper. On 27th September 2023 H applied *inter alia* for recognition of the Pakistan divorce in accordance with FLA 1986 ss46 and 51. On 27th September 2023 (the date of the First Appointment) I gave substantive directions including (i) staying the financial remedy proceedings; and (ii) giving permission to instruct Mr. Ian Edge as a single joint expert to report on the validity of the Pakistani divorce under Pakistani law. I gave further directions in relation to the suit on 19th December 2023 and heard the pre-trial review on 5th April 2024.

<u>Open Proposals</u>

29) On 20th March 2024 H made open proposals that on the basis that W will agree to (i) accept the validity and recognition of the Pakistani divorce in England and Wales; (ii) withdraw her application for a divorce in England and Wales; (iii) withdraw her application in Pakistan in respect of the Pakistani divorce; (iv) make no further claims against H or his property in this jurisdiction or worldwide; and (v) vacate Property M within six weeks of the date of the letter, H would agree not to seek his costs.

30) On 28th May 2024 W made open proposals for (i) H to pay W a lump sum of £750,000 within 14 days (to fund a property of £600,000 + costs and £120,000 in capitalised SPPs (£2,500 pm for four years)); (ii) W to withdraw her applications for divorce and financial remedy in England and Wales; (iii) W to withdraw her application in Pakistan in respect of the Pakistani divorce; (iv) W to make no further financial claims against H in any jurisdiction; (v) W to vacate Property M within 14 days of receiving the lump sum; and (vi) each party to bear their own costs.

<u>Applicable Law</u>

31) The relevant provisions relating to recognition of the validity of overseas divorces are found in FLA 1986 ss46 and 51.

32) Section 46 provides so far as is material:

Grounds for recognition

(1) The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognised if—

> (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained …

33) Section 51 provides so far as is material:

> Refusal of recognition
>
> (3) … recognition by virtue of section 45 of this Act of the validity of an overseas divorce, annulment or legal separation may be refused if—
>
> (a) in the case of a divorce, annulment or legal separation obtained by means of proceedings, it was obtained—
>
> (i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or
>
> (ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given.
>
> …
>
> (c) … recognition of the divorce, annulment or legal separation would be manifestly contrary to public policy.

34) I shall consider each of these sections in turn.

35) As for 'grounds for recognition' under s46 it was accepted by Mr. Lewis on W's behalf that the process in Pakistan involved *"proceedings"*. This must be right as the *talaq* was not a simple pronouncement as the relevant law requires it to be recorded (see the MFLO 1961 below) even though no judicial decision was required (see by analogy *El Fadl v El Fadl* [2000] 1 FLR 175 per Hughes J which involved Lebanese law). It is also accepted that, at the very least, H was a Pakistani national as at the date those proceedings commenced (FLA 1986 ss46(1)(b) and 51(4)).

36) In *Kellman v Kellman* [2000] 1 FLR 785 at p797 Paul Coleridge QC (sitting as a Deputy High Court Judge) stated that the wording of s46(1)(a) is significant because:

> The use by the legislature of the word 'effective' is, in my judgment, quite deliberate. It does not require that the divorce is 'valid' merely that it is 'effective'. To my mind the expression 'effective' connotes a less rigorous standard than valid. In this particular instance 'effective' can mean a decree though invalid *per se* in the granting State is none the less treated as valid and so 'effective' by virtue of, for example, some supervening legal decision or legal or equitable principle, ie estoppel.

37) I agree with Mr. Lewis that *"effective"* in this context must at the very least entail compliance with the terms of the relevant legislation which is the MFLO 1961. In translation, the relevant parts of s7 state as follows:

> 7 Talaq
>
> (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.
> (2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save as provided in sub-section (5) *talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the chairman.

(4) Within thirty days of the receipt of notice under sub-section (1), the chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effect until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

38) I have had the benefit of an SJE report from Mr. Ian Edge dated 6th March 2024 (prepared pursuant to a joint letter of instruction dated 10th January 2024) and thereafter replies dated 26th March 2024 to W's written questions dated 19th March 2024. He also gave oral evidence before me. In summary his opinion was:

a) a *talaq* (a unilateral pronouncement of divorce by the Muslim husband of his wife) may be oral or written, and is generally witnessed by two male Muslim witnesses. There is no need for the *talaq* to be made in the presence of the wife and her consent is unnecessary. If the wife is not present at the pronouncement, it must be communicated to her;

b) pronouncing three *talaqs* at one time immediately produces an irrevocable divorce. It is for that reason that a so-called triple *talaq* is considered morally the most reprehensible form of Islamic divorce;

c) MFLO 1961 adds further layers to the religious process;

d) although it is a criminal office to fail to comply with those provisions, the legislation is silent on whether any failure to comply renders the underlying divorce invalid. This was left to the courts;

e) case law since the commencement of MFLO 1961 has repeatedly held that whereas the requirement of notice by the husband of the *talaq* to the Chairman/Nazim of the appropriate Union Council under s7(1) is mandatory and without which the *talaq* is not valid (*Ali Nawaz Gardezi v Muhammad Yusuf* PLD [1963] SC 51), supplying a copy of the notice to the wife under s7(1) and/or the setting up of the Arbitration Council under s7(4) are both merely directory provisions and are not mandatory conditions as to the validity of the *talaq* although the failure of the former may affect the issue of whether the wife is entitled to maintenance beyond the normal period. However, failure to give immediate notice of *talaq* to the wife will not affect the subsequent validity of it. Similarly, if the Chairman fails to set up an Arbitration Council this also will not affect the validity of an otherwise valid pronouncement of *talaq*;

f) a *talaq* will be automatically effective 90 days from the date of giving of notice to the local Union Council (failing any reconciliation between the parties during this period) whether a copy of the notice has been sent to the wife or not. The 90-day period turns all divorces by *talaq* (even a triple *talaq*) into revocable divorces; and

g) even where the wife has notice or knows of the *talaq* there is nothing she can do to stop it taking effect unless she can persuade the husband to revoke it.

39) I accept this expert evidence which was not materially challenged.

40) The basic principle is therefore that although the MFLO 1961 serves to give a regulatory framework to issues of marital status, the Pakistani state cannot refuse recognition of a *talaq* because to do so would place civil law above religious law, which would be unacceptable. Compliance with the religious aspects but not the civil aspects is therefore required in order for the divorce to be valid. Mr. Edge records that in a case before the Federal Sharia Court called *Allah Rakha v Federation of Pakistan* PLD 2000 FSC 1, there has been a legal challenge to the MFLO 1961 precisely because it adds additional requirements beyond those found in *Sharia* law, but because that issue is so politically contentious the case remains suspended, and therefore of no legal effect or validity, pending a further appeal to the Shariat Appellate Bench of the Supreme Court which is yet to be heard.

41) It is fair to acknowledge that the legal position of *talaq* remains a controversial and complex one in Pakistani law and hence there is some case law from various parts of the Pakistani legal system (much of which was referred to by W in her written questions to Mr. Edge pursuant to FPR 2010 r25.10) that is inconsistent as to which aspects of MFLO 1961 s7 may be said to be mandatory and which are regulatory and hence whether non-compliance therewith affected the validity of the divorce. However Mr. Edge was clear that at present for the most part the courts in Pakistan hold that whereas notice of a *talaq* to the local Union Council is a mandatory requirement (as the 90-day period runs from this date), notice to the wife is merely regulatory. He was also clear in his conclusion that the Pakistani courts would not regard failure to send a copy of the notice of *talaq* to the wife as resulting in its non-validity as long as all the other factors for its validity were present. In his oral evidence Mr. Edge stated that the two NADRA documents would be *"almost unassailable evidence"* for a court in Pakistan.

42) As for 'refusal of recognition' under s51 both parties drew my attention to *Duhur-Johnson v Duhur-Johnson (Attorney-General Intervening)* [2005] 2 FLR 1042 per Jeremy Richardson QC (sitting as a Deputy High Court Judge) who at [44] reduced the relevant principles to six propositions:

(1) The power contained in s 51(3) as a whole provides for wide judicial discretion. The provisions need not be exercised if the interests of the respondent spouse (as opposed to the petitioning spouse) are met by other means (an example of this is *El Fadl v El Fadl*). It seems to me that it is important to emphasise that those interests must be safeguarded. I would anticipate that this approach would only be adopted where the respondent spouse has no option under the overseas divorce law but to submit to the divorce. The important point to note is that the judicial discretion is wide and the applicability of the section will vary depending on the many and varied circumstances of each case.
(2) When considering s51(3)(a)(i) a judge must ask whether reasonable steps have been taken by the petitioning spouse to notify the respondent spouse of the divorce proceedings in advance of them taking place.
(3) In answering that question the judge must look at all the circumstances of the case and the 'nature of the proceedings' in the overseas jurisdiction.
(4) Whether reasonable steps to notify the other party have been taken is to be judged by English standards, having regard to the nature of the overseas proceedings.

(5) Whether reasonable steps have been taken is a question of fact in each case (it must also be remembered that there are cases where reasonable steps have been taken but they were unsuccessful or, in rare cases, where it is entirely reasonable for no steps to have been taken).

(6) It is important to note that whether the respondent spouse has notice of the proceedings is not the issue. It is whether the petitioner spouse has taken reasonable steps to notify the other party. The focus of inquiry is upon the actions of the petitioning spouse, not simply a question of whether the respondent spouse knew about the proceedings.

43) Much of the argument before me focused on (4) and (6) above.

44) In *Olafisoye v Olafisoye (No. 2) (Recognition)* [2011] 2 FLR 564 per Holman J it was said at [34] there are two stages in the approach of the court: first an assessment or judgment whether such steps were taken ~~as~~ *"as should reasonably have been taken"*, and even if the court adjudges that they were not *"that merely opens the door or gateway to the second stage and an overall exercise of discretion whether or not to recognise the overseas divorce"*.

45) The discretion to refuse recognition on grounds of public policy pursuant to s51(3)(c) is a much broader ground. It is a discretion to be used sparingly (*El Fadl v El Fadl* [2000] 1 FLR 175 and *Kellman v Kellman* [2000] 1 FLR 785 (above)). However as was stated in *Golubovitch v Golubovich* [2010] 2 FLR 1614 per Thorpe LJ, if this ground is made out, then (at [69]) there is no discretionary element and *"refusal of recognition must follow"*.

Findings

46) It was made clear by Mr. Lewis on W's behalf at the outset of the case that she was not making an allegation of judicial corruption in an overseas court. He accepted, as Mr. Bishop said, that this must meet a very stringent test set down in *Maximov v NMLK* [2017] EWHC 1911 (Comm) per Sir Michael Burton (sitting as a Judge of the High Court) and be based on cogent evidence. However W was making such an allegation against Mr. K and others she described as *"lower-level officials"* at the X.

47) Having considered the parties written and oral evidence my conclusions are as follows:

a) the Divorce Deed of 9th November 2016 is a genuine document drafted, signed and witnessed on the date which it purports. W accepted in evidence that the Deed *"seems authentic"* and it was made clear by Mr. Lewis on W's behalf that its validity was not in fact in issue;

b) the Divorce Deed and other documents were hand-delivered to the X on 16th November 2016. I have seen a photograph of what appears to be the 'Divorce Case Register' where the parties' details were entered by hand as Case No. 148/2016 on a date after 10th November 2016 (the exact date is cut off). The details of Case No. 147/2016 are written above and those of Case No. 149/2016 are written below. There is no suggestion that these entries are not genuine nor contemporaneous and Mr. Lewis accepted that he had no evidence to the contrary;

c) the papers were delivered to an address at which H knew W no longer lived. I reach this conclusion from (i) consideration of the sale contract dated for Property Z dated 1st March 2016 and its declaration that vacant possession has been given to the purchasers; (ii)

there is no evidence to suggest that W's mother, W and/or her siblings continued to occupy the property after that date (I do not consider the X Notice of Demand for Cantonment Taxes for Property Z for the period from 1st October 2023 – 30th June 2024 and which gives W's mother and others as *"Title"* evidences very much not least because even H did not suggest that W's family lived in the property any more); and (iii) W's WhatsApp exchanges with H between 13th October 2016 and 5th December 2016 which were produced at my request as I wanted to see the context of W providing H with the address for Property A on 14th October 2016. On 9th November 2016 (which is the date H executed the Divorce Deed) at 8.05 am H stated *"You are coming back, see them yourself, never been sent to your old house"* (which I believe to be an inadvertent autocorrect for *"they've been"* as otherwise the message does not make sense).

Mr. Bishop cautioned me against putting too much weight on this one WhatsApp message (suggesting that it could mean that H believed W's mother and other family members still lived there). However taken together the evidence is the property was no longer occupied by W's family and H was aware of this. Quite why H chose to serve a copy of the Deed at a knowingly incorrect address I do not know given there is force in what H said in oral evidence namely that "*Why would I conceal the divorce from [W]? I am entitled to a divorce. Why would I serve her at the wrong address? If she had told me a different address I would have had her served there*". W's oral evidence was that it may have been an *"exercise of power"* by H;

d) W <u>did</u> however know about the divorce:

i) in the WhatsApp exchanges on 4th November 2016 at 3.26 am H wrote *"I am letting you go for your better to no"*, on 9th November 2016 at 6.28 am W wrote *"I don't understand this"*, at 7.30 am *"... you did this without informing me"* and at 7.45 am *"What a fool I am"*. H replied at 8.01 am stating *"It's not at all like that, when you see the papers you will understand so don't presume things"*, and then after H's message at 8.05 am (above) W stated at 8.51 am *"And these papers were drafted on 20th August."* W accepted when recalled to give evidence that the reference to 20th August tied in with the date on the seal on the Divorce Deed. It would be the most remarkable coincidence for it to be otherwise. Her explanation was that she had been told about the papers by Ms. Q, a mutual friend, who told her *"everything that happened"* and *"what was happening"* and this led W to start messaging H. W then said she knew the date referred to divorce papers *"because I had asked him for a divorce many times"*. She further said *"Of course I knew it was a divorce we are talking about"*. When Mr. Bishop asked why there had been no mention of this in W's witness statement and that she had suppressed this evidence her response was *"These are private conversations which not everyone needs to read"*. I then asked W to provide her WhatsApp exchanges with Ms. Q to both counsel which she did and I was told there was nothing of relevance. This must cast some doubt on W's explanation as to the source of her knowledge. When I asked W what the *"this"* referred to in her message at 7.30 am W said she had *"been up all night thinking about it"* and then *"[H] had a divorce deed made that he was going around giving to everyone except me."* The way in which W said this suggested strongly to me that it was true and hence I conclude W knew about the Divorce Deed;

ii) H's witness statement of 10th January 2024 describes at [47] an argument between the parties when H was in the car a few days after (he says) W received the divorce papers. Mr. B's evidence (at paragraph [15] of his witness statement of 10th January

2024) is that he overheard this argument being in the car with H (*"I was also aware that [H] had, at some point in late 2016, informed [W] over the phone that the divorce papers had been delivered to the property because I was present in the car at the time [H] and [W] were on the phone discussing this"*). I have no reason not to accept Mr. B's evidence in relation to this and I do so;

iii) W attended the X's office and advised them of her change of address and her phone number sometime between the papers having been delivered to the X and when the notice of 10th January 2017 was prepared. This must have been after 7th December 2016 (as her exit and reentry passport stamps show she was out of the country from 19th October 2016 – 7th December 2016 when she was in Hong Kong with her terminally ill brother who sadly died in December 2016). Mr. K's evidence to this effect was clear and Mr. Lewis rightly described him as *"impressive"*. I see no reason for him to lie (whether prevailed upon to do so or otherwise); he is independent and a professional;

iv) *someone* gave the X a different address for W as otherwise there would be no basis for the address to have been changed from Property Z to Property P. W was clear in cross-examination that she did not tell H that she had had moved to Property P until after she had done so, namely after March/April 2017. She confirmed this three times. When asked why the X had therefore known (for the first time) to address the notice of 10th January 2017 to Property P as H did not know of that address at that time W said simply that she didn't know and *"had nothing to say"*. Given W's evidence and as it was not suggested that anyone else had so informed the X I cannot conclude other that it was W who gave the X her change of address; and

v) in my view the change of address also undermines W's case (in her witness statements if not necessarily her oral evidence) that the notices were *ex post facto* falsified documents given that if they were I cannot see why there would have been the need to change the address;

e) H attended the X on 13th November 2016, 24th January 2017, 16th February 2017, and 10th March 2017 - I have seen a photograph of a handwritten record (in Mr. K's hand) of H's attendances on these dates. Again, there is no suggestion that these entries are not genuine nor contemporaneous and again Mr. Lewis accepted that he had no evidence to the contrary;

f) W spoke with the X on 13th March 2020. W's case to the contrary was (i) the handwritten entry in the record was written by a low level member of staff knowing it to be untrue and who did so as they were corruptible (and corrupt); and (ii) even if the call did take place it is not known what was said. However, I have no reason to reject Mr. K's evidence that the entry was written by him and there is simply no evidence upon which I could conclude that the call did not take place nor that what was written was inaccurate. Although this record is not dated it comes below the entry of 10th March 2017;

g) the Chairman thereafter gave instructions to Mr. K to issue the Certificate confirming the divorce. This is on the same handwritten record I refer to above. It is again undated but it comes below W's confirmation and is signed by (it is said and I have no reason not to accept this) the Chairman. Mr. Lewis again accepted that he had no evidence to the contrary; and

h) H attended the X on 13th March 2020 and was given one of three copies of the Confirmation Certificate of Divorce and he signed the 'file copy' to say he had received the same. Mr. Lewis again accepted that he had no evidence to doubt the truth of this.

48) I am fortified in my conclusions for the following reasons:

a) I have referred above to the WhatsApp messages between 13th October 2016 and 15th December 2016 provided at my request. On 21st October 2016 at 5.43 pm W wrote *"Do the paperwork"* and *"Then go with your concubine to Italy"*. H replied at 5.45 pm *"Ok, now that I have your consent."* On 26th October 2016 at 12.12 am W wrote *"… do not say it until its final"* and then at 12.13 am *"That's all I have to say"*. On 4th November 2016 at 3.26 am H wrote *"I am letting you go for your better to no"* which he then corrected to *"Tomorrow."* W replied *"I know."* This suggests W knew about the divorce paperwork and/or was inviting H to execute the same and that H was then doing so;

b) although these WhatsApp messages convey something different to aspects of H's evidence (it can hardly be said, as Mr. Bishop did in his position statement, that the parties were only in touch with each other *"sporadically"* after the *talaq* given that these messages alone run to 20 typed pages) – as the messages are frequent, at times intimate/sexual, and sometimes sent in the early hours of the morning – I accept that neither these nor other later WhatsApp messages include any references to what might be described as 'matrimonial matters'. This is consistent with there having been a change in the parties' relationship from that time in 2016 and one of which <u>both</u> parties were aware. Further, and consistent with this, there is a run of 12 messages sent by W on 3rd November 2016 between 2.43 am and 2.59 am in all of which she refers to the parties' relationship in the past tense;

c) W accepted that H made no financial provision for her after his date for the parties' separation;

d) a run of WhatsApp messages from 30th July 2021 – 3rd August 2021 were produced when I sought the context of H's WhatsApp messages of 1st August 2021 and 2nd August 2021 where photographs of the divorce documents were provided to W. It is clear from these messages that W knew that H wanted her to correct her ID certificate and she sought to delay the same by claiming everything was closed because it was a Friday;

e) I accept the evidence of Ms. S, H's girlfriend between June 2018 and December 2021, in which she *inter alia* said that (i) she never saw or met W; (ii) on the one occasion when they spoke on the telephone in June 2018 W described herself as H's *"ex-wife"*; (iii) she (and not W) helped H find an apartment to purchase from late 2018; and (iv) after its purchase in November 2019 she (and not W) helped with its furnishing. Ms. S exhibited to her witness statement a run of WhatsApp messages between herself and Ms. VX, the agent who showed both her and H Property M on 9th July 2019. In her oral evidence W said she did not know who Ms. VX was. Given she was from the estate agents marketing the property this does not suggest active involvement with its purchase.

Although W asserted in her first statement of 10th January 2024 at para [39] that *"In 2019 we finally found a two-bedroom flat in PJ …"* this is contradicted by the contemporary evidence and there is also no evidence that (as W asserts at para [41]) she *"helped furnish and decorate the house."* There is also nothing to support the assertion (as made by W at [48]) that Property M was purchased *"with the intention of it being the family*

home in London." Further there is not one WhatsApp message between the parties that I have seen prior to the purchase in which the purchase is discussed or any in relation to its subsequent furnishing by W on H's behalf (the first message referring to the property was on 30th December 2019). There is also no evidence to support the assertion at para [14] of W's statement in the possession proceedings dated 17th January 2023 that *"[t]he money I had received from my inheritance was given to [H] by me for purchase of the apartment* ..." and this is in fact contradicted by para [39] of W's first statement date 10th January 2024 where she states that *"it was purchased outright without a mortgage in [H's] sole name as [H] was the financially stronger party and it was expected that he would pay for everything whilst we were together."*

I also do not consider that (as W asserted) H had given her keys to Property M. When asked she gave no details as to when and where he had done so. If he had she could have come to the property after its purchase in late 2019 (Covid-19 restrictions permitting) when he was not there. However she only did so on 10th October 2021 when she knew he was there. Further, although W has adduced a letter which sets out the electoral register for the property sent in advance of the local elections on 5th May 2022 I accept from the emails from the NT Borough exhibited to H's second statement dated 21st February 2024 that they are not able to stop someone registering on the electoral register if they appear to qualify and are only able to remove them if not.

f) I bear in mind that W volunteered at the outset of her oral evidence that she had been deliberately erroneous in her witness statement of 10th January 2024 (which had been verified by a Statement of Truth) where she had said at para [42] that *"after about 4 or 5 days of living together we argued ... [H] threw me out of the flat."* I note that this is similar wording to that used at para [4] of W's civil suit in Pakistan dated 12th July 2023 where she states *"Approximately five or six days after [W] arrived in UK in October 2021, she and [H] had an argument"*. W gave no explanation of justification of this in her oral evidence when asked. Further at para [16] of her witness statement in the possession proceedings dated 17th January 2023 W referred to the parties *"both living in the apartment together"*. On any view this is not true.

In considering this aspect of W's evidence (but also no doubt more generally) Mr. Lewis asked that I give myself the so-called 'Lucas' direction (named after *R v Lucas* [1981] QB 720) which can be over-simplified to be that just because a person may have lied about one thing it does not automatically follow that they are lying about everything. I deliberately say 'over-simplified' because I am conscious that in *Re A, B, and C (Children)* [2022] 1 FLR 329 Macur LJ described the judge's self-direction (at [58]) as having been *"formulaic"* and *"incomplete"*, that (at [54]) such a formulation *"leaves open the question: how and when is a witness's lack of credibility to be factored into the equation of determining an issue of fact?"* and thereafter cited from the Crown Court Compendium of December 2020. I have given myself the entire self-direction as given in criminal proceedings and have read the relevant extracts from the Crown Court Compendium in full; and

g) during the hearing H provided me with his UK visitor visa application for which he applied on 18th October 2019 (which had been disclosed by his solicitors on 13th March 2024) in which he gave his relationship status as *"Divorced or civil partnership dissolved"*. The application form for this visa (valid from 24th October 2019 – 24th October 2029) was sought by W's solicitors on 19th February 2024 as it was exhibited to H's witness statement of 10th January 2024. Their letter stated that W *"understands that [H] named*

[W] as his spouse for this application" and hence a copy of the application was sought *"to clarify his declared marital status at the date of the application."* The source of W's understanding is not given but it is incorrect;

h) there are instances where there are clear contradictions in W's evidence – for example at Ground X of W's civil suit in Pakistan dated 12th July 2023 it is said that *"On July 14 2019, [H] signed a consent form from the embryo storage center agreeing to extend the storage of the embryos"* whereas on 31st January 2024 it was said by W's solicitors on her behalf (for the first time) that H *"instructed [W] to sign the consent forms on his behalf"* and *"There is therefore no need for a handwriting expert as [W] does not contest that she signed the form on [H's] behalf …"*. There is a factual dispute as to whether the form was signed by W with H's permission (W saying it was and H saying it was not). My focus here is not on the dispute (which I do not need to resolve) but the clear inconsistencies in W's evidence.

49) There are several other evidential issues upon which Mr. Bishop invited me to make findings that (he said) were relevant to credibility. Mr. Lewis invited me not to do so saying *"Less is more. There is no need for fine granular detail. It is a binary yes or no."* I understand the reasons why Mr. Lewis said this and given there are no further findings I need to make in order fairly to determine this case I shall not do so.

50) Mr. Lewis placed reliance on the fact that W's CNIC was renewed with effect from 30th September 2020 (the previous one having expired on 20th April 2020) and continued to identify H as her husband. Although this is of course consistent with W's case I do not consider that I can give any great weight to this given that (as Mr. Bishop submitted) this could have been done accidentally (albeit I consider this unlikely), this could be W burying her head in the sand, or this could be in furtherance of a plan, by then devised by W, to deny the Pakistani divorce and seek a financial award from H. Further, although Mr. Lewis speculated that there may be significant sanctions for a knowingly incorrect application there is no evidence to this effect.

51) Mr. Lewis also sought to rely on W's expressions of surprise about the divorce in the WhatsApp exchanges at the start of August 2021. However, I am not sure they convey quite the surprise that he suggested. They start on 1st August 2021 at 8.21 pm with W stating *"Firstly, I am not a Pakistani national"* and then on 2nd August 2021 at 6.12 pm W states *"Send me the whole paper"* and *"What's written in it"* which do not convey to me the level of shock I would expect for someone hearing for the first time they were divorced. Further, I consider that W's messages are not necessarily to be trusted (at 6.44 pm on 2nd August 2021 *"You're informing me way after time"*, at 6.45 pm *"What did you do"*, at 6.46 pm *"You never informed me"*, at 6.47 pm *"Is this valid?"*, and at 6.48 pm *"You failed to notify me" "In the given time"*) given that they were sent a couple of months before W came to UK to seek (as I will go on to find) a financial award.

52) For completeness I did not find the evidence of Mr. J, W's brother, to be of meaningful assistance save for his corroboration of the date of sale of Property Z. He had little direct knowledge of any of the issues I have had to determine.

53) My overriding impression is that W feels aggrieved that H never served her personally with the Divorce Deed. When asked by Mr. Bishop why she had described the Deed (at para [20] of her witness statement filed in the possession proceedings dated 17th January 2023) as a *"unilateral, fabricated, backdated divorce document"* she said it was because

she never got it. When asked why it made no sense for H to have knowingly served documents on her at an incorrect address, and that H had wanted the divorce documents to be given to her, she replied "*He should have done so. We met 50 times. He should have given me the Divorce Deed. I would have backed off*". When recalled to give further evidence in relation to the WhatsApp messages, after saying that Ms. Q *"told me everything"* she said "*He should have said it to me. He could have given me these papers*". W also said when asked about the divorce papers *"He should have given it to me."* I have referred above to W saying, *"[H] had a divorce deed made that he was going around giving to everyone except me."* In my judgment this is at the heart of W's grievance rather than a purported lack of knowledge of the divorce.

54) During his closing submissions Mr. Lewis raised with me the issue of the parties' respective demeanour. In reaching my factual findings I have not had the need to consider the same. Had I had to do so I would have needed to consider the relevance or otherwise of the fact that H accepted he had had witness training with Bond Solon. Whether the demeanour of a witness when giving evidence is a reliable aid either to finding facts, or exercising a discretion on uncontested facts is also a complex issue on which there are differing judicial views (see for example *Cazalet v Abu-Zalaf* [2024] 1 FLR 565 per King LJ (an appeal from Mostyn J) and her observations on the judgments of Lord Leggatt (as he now is) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd and Another* [2013] EWHC 3560 (Comm) and *Blue v Ashley* [2017] EWHC 1928 (Comm) and the views then expressed in *Kogan v Martin and Others* [2019] EWCA Civ 1645 per Floyd LJ). Given I have been able to make my findings by reference to admissions, documentation and inconsistences I do not need to consider the issue of demeanour further.

Analysis

55) Mr. Lewis submitted that FLA 1986 requires the court to ask itself four questions:

a) was the divorce *"effective"* in Pakistan? – s46(1)(a);
b) what *"facts"* are implied by the official Pakistani divorce documents, and how does the level of W's *"participation"* in the proceedings govern whether they bind this court? – s48;
c) were *"reasonable"* steps taken to give notice or the ability to participate? – s51(3)(a); and
d) is there a public policy objection to recognition? – s 51(3)(c).

56) I shall address these four questions in turn.

s46(1)(a)

57) Based on Mr. Edge's expert opinion, which I accept, I find that a court in Pakistan would find the process begun by *talaq* in this case was effective notwithstanding the failure (as I find) to supply a copy of the notice to W. In his answers to W's written questions Mr. Edge states (at Reply 12) that if W was served at a property she no longer resided at and if H was aware of this *"I am sure that the Pakistani courts would probably say that the copy was not properly served."* However, Mr. Edge also states failure to send a copy to the wife will not affect the validity of the divorce. In my view a Pakistani court would therefore find these parties to be divorced.

s48

58) FLA 1986 deals with the evidential position of any express or implied facts in relation to the divorce, and differentiates between two scenarios namely (i) where both parties *"took part in the proceedings"* (s48(1)(a)), in which case any such findings are conclusive

evidence of the facts found; and (ii) in any other case, such findings are *"sufficient proof unless the contrary is shown"* (s48(1)(b)). FLA 1986 s48(3) states that *"a party to the marriage who has appeared in judicial proceedings shall be treated as having taken part in them"*.

59) In *A v L (Overseas Divorce)* [2010] 2 FLR 1418, Sir Mark Potter P stated at [70] that:

> There is no statutory guidance as to the precise meaning of the word 'appeared' in this context. However, it is plainly a word which requires something more than mere proof of service, whether by means of the active participation in the proceedings of the party concerned, either in person or through a representative, or at the very least by means of some formal step taken, at least equivalent to the entry of an appearance in English proceedings.

60) Mr. Bishop did not to refer me to s48 at all. It was a point raised by Mr. Lewis. I am willing to proceed on the basis that (as I have found) W's knowledge of the divorce proceedings and her attendance at X's offices does not mean that she *"appeared"* in the proceedings before they were concluded, and therefore this opens up the possibility for me to decline to find that the facts expressed or implied within those proceedings are true.

61) W therefore retains the right to challenge those facts and ask me to look at the reality of what happened when it comes to the assessment of whether I should decline to recognise the divorce on the basis of notice, participation or wider public policy grounds.

<u>s51(3)(a)</u>

62) In his opening note Mr. Lewis stated that *"[t]he evidence is clear that W was not told for many years that a process of divorce had begun, let alone concluded. The "nature of the proceedings" included a mandatory arbitration process to see whether the relationship could be saved, about which she knew nothing at the time."* This led him to state that *"the lack of notice to W, when judged by English standards, means that recognition <u>can</u> be refused, and the failure to enable W to engage in the Arbitration Council proceedings – a critical part of the process where parties are required to attend to see whether their differences might be worked through - means that recognition <u>should</u> be refused."*

63) It was also said by Mr. Lewis that even on H's case, W did not have proper notice in advance of the proceedings and was not enabled to take part in important elements of the Pakistani legal process before her marriage was dissolved without her knowledge.

64) Given the nature of the documentation that was produced during the hearing and W's additional oral evidence when she was recalled in relation to the WhatsApp messages Mr. Lewis modified his position. In his closing submissions he stated the notice that W ought to have been given (and he said was not given) was that she was *"about to be divorced"* and that 90 days from a particular date she would be divorced and be a single woman again. He said this was the very lowest level of information that W ought to have had. Although Pakistani law did not require the same English law does.

65) Mr. Bishop said that this central argument – that one can give all the notice you want that a divorce process has begun but if W does not know the precise date on which she will be divorced/become single, that notice is insufficient – had been invented by Mr. Lewis and he had put forward no authority for it. Although I might perhaps have chosen a different word than *"invented"* I otherwise agree with Mr. Bishop in this regard.

66) Mr. Bishop also emphasised that the test under s51(3)(a) is not actual notice but the need for H to have taken reasonable steps for giving notice to W of the divorce proceedings and for H to have given W reasonable opportunity to take part in the proceedings. However, if the evidence demonstrates a party had actual notice of the proceedings prior to the effective date of the divorce, it follows that s51(3) must be satisfied. He drew an analogy under English law, whereby if there was evidence that a party had actual knowledge of proceedings the court would readily make an order for deemed service. He said the question for recognition was *"what did she know"* and that at the core of s51 was natural justice – the principle of *audi alterem partem* – that W needed to know what was going on and was able to participate. The question was not the nature of that notice but whether she had notice.

67) In light of my finding that W had actual knowledge of the divorce proceedings (albeit that the copy of the notice was served at an address at which she no longer lived) I am satisfied that reasonable steps were taken and/or W had a reasonable opportunity to participate.

68) If I am wrong about the foregoing and the fact that H served the proceedings at W's old address meant that he did not take such steps to give notice as should reasonably have been taken and/or he did not give W such opportunity to take part in the proceedings as should reasonably have been given then I would still not exercise my discretion (*"may be refused"*) in favour of not recognising the divorce given (i) W's belated acknowledgment that in November 2016 she <u>did</u> know about the divorce papers (even if she may personally not have seen the Deed at that time); and (ii) my finding that she attended the X offices. In my view this would be the appropriate exercise of the two-stage process as described in *Olafisoye v Olafisoye (No. 2) (Recognition)* – namely were the appropriate steps taken, and if not, should the court separately exercise its discretion. If the appropriate steps were not taken I would still therefore not exercise my discretion for these reasons.

69) In reaching this conclusion I bear in mind the comments in *Olafisoye v Olafisoye (No. 2) (Recognition)* per Holman J at [36] that *"[t]he effect of non-recognition here of a divorce which is effective in the country where it was made is the create a so-called 'limping marriage' i.e., that the parties are treated as still being married here, when they are not so treated elsewhere. That is so obviously undesirable that the court leans, so far as possible and consistent with the legislation and justice, against exercising a discretion so as to produce a limping marriage."*

70) If I had concluded that W had not been served with a copy of the notice in writing <u>and</u> she had not known about the proceedings <u>at all</u> prior to the effective date of divorce my conclusion may have been different. However, this is not the case.

<u>s51(3)(c)</u>

71) W's claim under the refusal of public grounds is the very serious (and somewhat wider) allegation about whether H's status as a wealthy and *"politically connected"* man means that he has been able to generate false official paperwork in Pakistan for presentation within these proceedings in England. It was said that W makes this allegation in the full knowledge of how serious it is, but she is clear that the evidence of Mr. K has been manufactured. Much the same goes for the evidence of Mr. V, a statement given in the jactitation proceedings in Pakistan and where Mr. V in essence

repeats Mr. K's evidence.

72) It was said by Mr. Lewis that if I find that the evidence on which H relies was manufactured and that he has had witnesses lie for him, there can be no question but that I must decline to recognise the divorce obtained in Pakistan.

73) I have already said that I reject W's evidence that the documents on which H relies were manufactured and that he has had witnesses lie for him. Having done so there is no basis upon which I can decline to recognise the divorce on public policy grounds.

Jurisdiction

74) Given my decision above I do not have to go on to consider the issue of the jurisdictional validity (or otherwise) of W's divorce order application of 3rd May 2023. However in case I am wrong as to the foregoing I shall do so.

75) As Mr. Bishop acknowledged the parties' written statements barely dealt with the facts necessary to establish domicile or habitual residence. W briefly addressed matters relevant to habitual residence in her first statement of 10th January 2024 at [49]-[52] but does not deal with the facts relevant to domicile at all. H briefly responds in his second statement of 21st February 2024 at [54]-[61].

76) Following the UK's departure from the European Union on 31st January 2020, the law as to jurisdiction is as set out in DMPA 1973 s5(2) (as amended):

> (2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) on the date of the application—
> (a) both parties to the marriage are habitually resident in England and Wales;
> (b) both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there;
> (c) the respondent is habitually resident in England and Wales;
> (c.a) in a joint application only, either of the parties to the marriage is habitually resident in England and Wales;
> (d) the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made;
> (e) the applicant is domiciled and habitually resident in England and Wales and has resided there for at least six months immediately before the application was made;
> (f) both parties to the marriage are domiciled in England and Wales; or
> (g) either of the parties to the marriage is domiciled in England and Wales.

Domicile

77) The common law concept of domicile was summarised in *Barlow Clowes International Limited v Henwood* [2008] BPIR 778 per Arden LJ (as she then was) at [8]:

> (i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it.
> (ii) No person can be without a domicile.
> (iii) No person can at the same time for the same purpose have more than one domicile.
> (iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.
> (v) Every person receives at birth a domicile of origin.
> (vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise.

(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice.
(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious …

78) W may have a domicile of origin and thereafter dependency in either country A or Pakistan (depending on her father's domicile as at the date of her birth). The question therefore is whether she had acquired a domicile of choice in England as at the time of issue of her divorce order application. This can be acquired by the combination of (i) residence in a country (which is this context means physical presence as an inhabitant); and (ii) an intention of permanent or indefinite residence (the *animus manendi*). These two elements must also co-exist.

79) The question whether a person has acquired the necessary intention sufficient to change a domicile is a question of fact and the burden of proof lies upon the propositus (i.e. W in this case). The court will view a person's conduct as a whole. Every case has to be assessed separately, with particular attention to the history and personality of the person in question. The importance of any one fact is relative: the real question is what is the proper conclusion to be drawn from all the circumstances. The standard of proof is the civil standard.

80) On H's behalf it was said that although W was resident in this country as at the date of issue of her divorce order application she did not have the necessary intention of permanent or indefinite residence. On W's behalf it was said she did have such an intention although it is fair to state that Mr. Lewis did not push this submission particularly forcefully nor indeed the suggestion that W's domicile was likely to have changed between May 2023 and June 2024.

81) In my view W has not established the necessary mental element: the intention permanently to stay in England. Although it formed part of W's case that she was (in Mr. Lewis' words) *"terrified of returning to Pakistan"* I am unpersuaded by this, especially as she has been back twice since 2021 (visits that she accepted in evidence she had made *"without difficulty"*) and has socialised whilst there. In any event, a determination not to live in Pakistan is not sufficient: there must be evidence of a settled intention to remain indefinitely in England. There is no evidence about this and the fact that W retained a penthouse in her home-town in Pakistan whilst not even taking (for example) a long lease in England points the other way.

82) I therefore find that W had not acquired a domicile of choice in England as at the date of issue of her divorce order application in May 2023.

Habitual Residence

83) From March 2001 when the UK joined the Brussels II Regulation (later Brussels IIA/Brussels IIBis) two of the grounds under Article 3.1(a) on which a potential petitioner could rely to claim jurisdictional status with no reference to the respondent were that jurisdiction is with the courts of the Member State in whose territory (i) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made; or (ii) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and

Ireland, has his or her 'domicile' there. These are knowns as the fifth and sixth 'indents' respectively.

84) For some time there was a question as to whether habitual residence had to be for the entire previous period of six or 12 months preceding the issue of the divorce order application, or was it sufficient solely for there to be habitual residence on the day of issue, provided the petitioner had resided in the country for the preceding six or 12 months as applicable. This was important given that it was held in English law (and later confirmed also by the CJEU) that a person can have only one habitual residence at any one time, although able to have more than one parallel (simple) residence.

85) There were conflicting High Court decisions at first instance in what became known as the *"Marinos/Munro debate"* given the conflicting decisions in *Marinos v Marinos* [2007] 2 FLR 101 and *Munro v Munro* [2008] 1 FLR 1613. In *Marinos* Munby J (as he then was) held that ordinary (or simple) residence during the previous six or 12 months was sufficient so long as the petitioner had habitual residence as at the date of issue. In *Munro* [2008] 1 FLR 1613, Bennett J held that habitual residence must be not only on the date of issue but also over the prior continuous period of six or 12 months. In *Pierburg v Pierburg* [2019] 2 FLR 527 Moor J in preferred the *Munro* interpretation. The question was never considered by the Court of Appeal or the CJEU and the UK then left the EU.

86) As divorce jurisdiction for all cases was only found in EU law it had to be replaced by national legislation. In drafting the new legislation the Ministry of Justice indicated they intended to follow EU law for continuity and comity. However DMPA 1973 s5(2) (as amended) departs from the EU wording. Rather than repeating Article 3 verbatim and stating habitual residence *if*, the statute states habitual residence *and*. In other words the *Marinos* interpretation was adopted. So the current English legislation requires the applicant to be habitually resident only on the day of issue provided he/she has had ordinary or simple residence for the previous six or 12 months, possibly in parallel with ordinary or simple residence in one or more other countries.

87) In *BM v LO* (Case C462/22) the German court referred the *Marinos/Munro* debate to the CJEU. In its judgment of 6th July 2023 the CJEU was clear that the fifth and sixth indents require habitual residence throughout the relevant period and not just on the day of issue. There was no need to draw a distinction between the concepts of residence and habitual residence.

88) The present position under English law is therefore uncertain. The new post Brexit divorce jurisdiction legislation followed *Marinos* as being the perceived correct interpretation but <u>also</u> purported to follow EU law. However this is now not the EU position (if indeed if ever it was).

89) There is to date no reported decision on the interpretation of the amended English provisions. On a literal approach the legislation is clearly the *Marinos* interpretation. However on a purposive approach the UK government intended to replicate EU law which probably was at the time, and certainly is now, the *Munro* interpretation. Post-Brexit, the courts of England and Wales may still take account of CJEU decisions (European Union (Withdrawal) Act 2018 (as amended) s6(2)).

90) In my view, the purposive interpretation is to be preferred because (i) the Ministry of Justice indicated they intended to follow EU law for continuity and comity; and (ii) the

position in the EU is now clear and the English courts may still take account of such decisions. In addition, the *Pierburg* analysis – which prefers the *Munro* interpretation - is to my mind wholly persuasive. I therefore take the view the present position under English law is that habitual residence is required throughout the relevant period and not just on the day of issue.

91) Mr. Bishop summarised the principles relating to habitual residence in relation to BIIA/BIIBis with which Mr. Lewis did not disagree. I gratefully adopt this summary as a correct statement of the law:

a) habitual residence connotes a genuine connection between a person and a member state (*Z v Z (Divorce: Jurisdiction)* [2010] 1 FLR 694 per Ryder J at [42]; *V v V (Divorce: Jurisdiction)* per Peter Jackson J (as he then was) at [39]);

b) the definition of habitual residence is *"the place where the person has established, on a fixed basis, the permanent or habitual centre of his interests, with all the relevant factors being taken into account for the purpose of determining such residence"* (*L-K v K (No. 2*) [2007] 2 FLR 729 per Singer J; *Marinos; Z v Z*). It is not possible to have more than one habitual residence at the same time (*Marinos* at [38]; *Z v Z* at [41]);

c) in *Tan v Choy* [2015] 1 FLR 492 at [31] Aikens LJ identified that habitual residence required the satisfaction of three tests (i) that there is a permanence or stability in the residence of the individual in the relevant territory; (ii) that this location is the centre of the person's interests; and (iii) the individual has, at the time, no other habitual residence;

d) the interpretation of habitual residence involves not a purely quantitative evaluation of the time spent by a person in a particular place but instead a qualitative evaluation of all the facts pertaining to an individual's links with a place (*Z v Z* at [37]). The enquiry is highly fact specific. An individual's centre of interests is identified by taking into account all relevant factors, including both intention and objective connecting factors (*Z v Z* at [41]). Intentions matter in the sense of the reasons for a party's actions (*V v V* at [38]);

e) the centre of interests does not have to be permanent but rather habitual (*L-K v K (No. 2)* at [38]) it must have a stable character (*Z v Z* at [41]);

f) the establishment of a centre of interests can take place over a long or a short time; length of time is not a conclusive factor (*L-K v K (No. 2)* at [38]; *Z v Z* at [37] and [40]); and

g) there is nothing to prevent the acquisition of an habitual residence simultaneously with the loss of a previous habitual residence or immediately after arriving in a country (*Marinos* at [89-90]).

92) I have seen a copy of W's passport which confirms (via immigration stamps) that W left Pakistan on 8th October 2021. I cannot see a subsequent entry stamp into Pakistan until 14th September 2022. W then left Pakistan on 19th October 2022 and was also in that country from 25th January 2024 – 13th February 2024 when she says returned to sell her penthouse.

93) In her witness statement dated 10th January 2024 W relies on the facts that (i) she has had an English bank account with Monzo since October 2021 (but accepted in cross-

examination that she still had two in Pakistan); (ii) she paid the water utility bills when living in Sheffield and for an English Three mobile contract; (iii) she has been registered with an English GP surgery since November 2011; (iv) she was registered on the electoral roll at Property M before the May 2022 local elections; (v) she has a National Insurance number; (vi) she worked in England between August to December 2022; and (vii) as of 2nd March 2022 the DWP considered her habitually resident in England for the purpose of entitlement to benefits (although the letter she relies upon is dated 2nd March 2023).

94) In his second statement of 21st February 2024 H highlights that (i) W has made it clear that her primary residence until October 2021 was Pakistan; and (ii) the letter from Universal Credit dated 2nd March 2023 identifies that for a British Citizen (a person with a British passport) the test is only to show *"a period of continual residence between 1 and 3 months"* and as W moved into Property M in December 2022 she would meet this threshold.

95) In my view W was not habitually resident in the jurisdiction as at the date of issue of her divorce order application. Therefore there is no jurisdiction whether the *Marinos* or the *Munro* interpretation is to be preferred. I am satisfied that W's presence in England since late 2021 is inextricably linked with her ambition to secure a financial award from H in this country. This is evident from her oral evidence where she responded to Mr. Bishop's question that in late 2021 she wanted a financial award in the UK by stating *"I have always wanted to seek a financial award from H anywhere in the world. I will not walk away from the divorce empty handed"* and when asked that the whole point of her coming to the UK was for a divorce and financial claim she initially said *"no"* but then said *"yes in a way"*. The registration of a home rights notice within one month of arrival is consistent with this. Therefore W's presence in this country is contingent not permanent. I accept Mr. Bishop's formulation that as at the date of issue of her divorce order application England had not become W's centre of interests, but rather the centre of her litigation objectives.

96) In reaching this conclusion I express no view whatsoever as to whether W may now be able to satisfy the jurisdictional requirements in order to issue an application under MFPA 1984 Part III. In his opening note Mr. Lewis said that I was not being asked to decide the question of permission under MFPA 1984 Part III. In his closing submissions he said that if I decided that the Pakistani divorce was valid and should be recognised I should decide whether W is habitually resident in the jurisdiction now. I do not believe that this would be appropriate and this issue will need to be determined in any subsequent proceedings that W may issue.

Conclusion

97) I therefore conclude that (i) the divorce was valid and effective under Pakistani law; and (ii) this court should recognise the same. If I were to be wrong about that I also conclude that W had not acquired a domicile of choice and nor was she habitually resident in England and Wales as at the date of issue of her divorce order application.

98) W's divorce order application dated 3rd May 2023 is therefore dismissed and H's application dated 27th September 2023 for recognition of the divorce in Pakistan is granted.

Addendum

99) This judgment was circulated in draft on 14th June 2024. I sought comments thereon by 4 pm on 21st June 2024.

100) On 19th June 2024 I received a composite list of typographical amendments which I have incorporated.

101) Both parties invited me to publish this judgment. Having considered the *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* issued by the President of the Family Division on 19th June 2024 (and in particular paragraphs 3.1 – 3.16 and 6.1 – 6.6 thereof) I shall do so. Having carried out the *"balancing exercise"* espoused in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (and helpfully summarised in *Re J (A Child)* [2014] 1 FLR 523 per Sir James Munby P) which has regard to the interests of the parties and the public as protected by ECHR Articles 6, 8 and 10, considered in the particular circumstances of this individual case, the judgment shall be published on an anonymised basis. This is also consistent with both parties' wishes.

102) Pursuant to (i) paragraphs 6.1 and 6.2 of the *Practice Direction on the Citation of Authorities* published on 9th April 2001 [2001] WLR 1001; and (ii) FPR 2010 PD27A para 4.3A.2, I confirm that this judgment is intended to be citeable.

103) This statement is intended to be an *"express statement"* within the meaning of paragraph 6.1 of the Practice Direction.

104) That is my judgment.

RECORDER NICHOLAS ALLEN KC

Draft – 14th June 2024

Final – 21st June 2024