St.Mary's
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Invalid foreign or domestic marriages : A bar to financial relief?

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Practitioners are occasionally asked to consider the validity of foreign marriages or divorces within the ambit of the financial remedy jurisdiction in this country. Within such marriages it is sometimes a superficially attractive argument to seek to suggest that the marriage or the divorce is not sufficiently valid for the purpose of financial remedy proceedings in England. The legal position behind such arguments is however not simple and is considered infrequently by the majority of practitioners.

This article seeks to analyse the basis for foreign marriages being recognised in this jurisdiction, and then the impact of failing to comply with the rules around marriages in both a domestic and foreign context on the ability to pursue financial remedy proceedings in this jurisdiction.

Recognition of valid foreign marriages

Courts in this jurisdiction recognise foreign marriages in the event that they comply with the conditions of the court within which the marriage was celebrated. Dicey & Morris 'The Conflict of Laws' 16th Edition provides the following:

RULE 74—A marriage is formally valid if (and only if) any one of the following conditions as to the form of celebration is complied with:

> *1) The marriage is celebrated in accordance with the form required or recognised as sufficient by the law of the country in which the marriage was celebrated;*
>
> *2) The marriage is celebrated in a prescribed country outside the United Kingdom in accordance with the provisions of the Overseas Marriages (Armed Forces) Order 2014 between parties of whom at least one is a member of Her Majesty's Forces serving in that country, or a relevant civilian as defined in that Order, or a child of, and having its home with, any such person; or*
>
> *3) (in cases not falling within the Overseas Marriages (Armed Forces) Order 2014) the marriage is celebrated in accordance with the requirements of the English common law in a country in the belligerent occupation of military forces and one of the parties is a member of those forces or of other military forces associated with them; 6 or*
>
> *4) the marriage, being between parties of whom at least one is a United Kingdom national, is celebrated in a country or territory outside the United Kingdom in which insufficient facilities exist for them to enter into a marriage under the law of that country and in accordance with the provisions of the Consular Marriages and Marriages under Foreign Law (No. 2) Order 2014;*

> *5) the marriage is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible.*

Realistically in most cases practitioners will be concerned with subsection 1, and a consideration as to whether the form of marriage was recognised as sufficient in the country within which the marriage took place. In complicated cases an expert opinion from someone learned in the legal position in that country may be regarded as necessary to resolve the issue. However in other cases a consideration of information readily available from the clients themselves, or that can be found on the internet may be sufficient to persuade a court that expert opinion cannot be regarded as necessary. This may be particularly so if the parties agree the legal position about the country of their marriage.

Thus if a marriage complies fully with the rules of that state, regardless of whether those rules equate to those in England and Wales, it will be a valid and recognised marriage. This was confirmed by the Privy Council as long ago as 1930 in *Berthiaume v Dastous* [1930] AC 79 where it was said:

> *"If there is one question better settled than any other in international law, it is that as regards marriage – putting aside the question of capacity – locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all over the world … If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere …"*

Null marriages in this jurisdiction

In this jurisdiction, The Marriage Act 1949 provides that marriages solemnized between either individuals under the age of 18 or within prohibited degrees shall be void. Notably the minimum age for marriage increased from 16 to 18 by the Marriage and Civil Partnership (Minimum Age) Act 2022.

A similar provision is included within s11 Matrimonial Causes Act 1973 where it states that:

> *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);*
> *iv) that at the time of the marriage either party was already lawfully married [or a civil partner].*

Thus for all domestic marriages that fall within these categories the marriage will be void. Parties to such marriages can apply for a 'nullity of marriage order' to bring about the end of that marriage. The Divorce, Dissolution and Separation Act 2020 inserted the concept of a conditional order and then a final order for nullity orders, as they already exist for divorces. The principal purpose of this act was to change the name of such orders to 'nullity of marriage orders' from 'granting of decrees of nullity.'

There are other categories upon which a marriage can be said to be voidable rather than immediately void. These are set out in s12 MCA 1973 and if proven can establish the making of a nullity of marriage order.

However in practice arguments about void or voidable marriages in this country rarely emerge. This is principally because parties to marriages which have been deemed to be null marriages still have an ability to pursue financial remedy proceedings. S21 MCA 1973 specifically provides that financial provision orders are available within *'proceedings for divorce, nullity of marriage or judicial separation'*. The fact therefore that a marriage was a null marriage (realistically never existed) does not prevent either party from applying for financial provision as if they had been married.

Thus whilst there could be a technical argument about the nature of the marriage, it is often a purposeless argument as it cannot avoid financial remedy proceedings being brought and orders being made. Of course the fact that it was a null marriage rather than a divorce may impact on the thinking of the judge when considering the s25 criteria, but that will depend on the facts of the case and the persuasiveness of any advocate.

The only way to avoid such an argument is to get a declaration that the marriage wasn't even void, but was a non-marriage. However for the reasons below that is a very difficult task with respect of domestic marriages.

Void or voidable foreign marriages

Whilst for the reasons above it may be purposeless in arguing the difference between a valid and a void/voidable marriage in this jurisdiction it is at first glance worthwhile to make such an argument about a foreign marriage.

As per the rule in Dicey & Morris above, foreign marriages are only recognised in this country if:

> *The marriage is celebrated in accordance with the form required or (semble) recognised as sufficient by the law of the country in which the marriage was celebrated;*

Thus on a strict reading of that provision, a marriage that has not been celebrated in accordance with the form of the law of the country in which it was celebrated, would not be recognised as a marriage in this country, and thus wouldn't be eligible for a divorce or financial remedy provision. This as an argument superficially makes a great deal of technical sense, the gateway for the order being recognised in this country has a specific criteria and if that criteria isn't met then the order is not valid.

Mr Justice Moylan considered this exact point in Assad v Kurter [2013] EWHC 3852 (Fam). In this case a marriage was sought to be undertaken in Syria. An expert on Syrian law took the view that whilst the ceremony took place in a church and was a marriage ceremony they had not obtained permission from the 'Ministry of the Interior' as the Husband was not a Syrian national. The expert also confirmed that there was no concept of non-marriage in Syria or of a void/voidable marriage. Moylan J came to the conclusion that the effect of the evidence was *'as a legal marriage was not effected, there is no marriage'.*

He latterly restates this by saying:

> *'The marriage in the present case failed to comply with the formal requirements of Syrian law and, as a result, under Syrian law is not a valid marriage. Accordingly, it is not a valid marriage for the purposes of English law either.'*

However Moylan J goes on to consider whether it is a void marriage (capable of a grant of nullity) or a non-marriage (not capable of a grant of nullity). He quotes extensively from the case of *Burns v*

Burns [2008] 1 FLR 813 where a similar issue had arisen. Within this case Coleridge J said the following:

> *Am I precluded from granting a decree of nullity in relation to a foreign marriage, which all accept is invalid by the local law, because that local law does not categorise this invalid marriage by its own terminology as void? Mr Moor says if it is not void in California, it cannot be void here, so no decree is obtainable. Mr Scott says once invalidity is established, the role of the foreign law is largely exhausted and the lex fori, ie England, produces the necessary remedies.* ***I agree that the foreign law is the litmus paper by which validity is tested. Thereafter, our own law determines the remedy, in this case a decree of nullity.***

Moylan J agrees with this proposition stating:

> *It is for the English court to decide what remedy, if any, is available under English law. It is clearly for this court to decide whether any English law remedy should be provided. Although the Matrimonial Causes Act 1973 does not specifically provide that a nullity decree can be granted in respect of a foreign marriage this is clearly the intended effect of the 1973 Act as there is no suggestion that the court's previous power to do so was abolished.*

He later states the following:

> *The English court must, in any event, decide whether, having regard to the English law concepts of void, voidable and non-marriage, the ceremony is one in respect of which the English remedy of a nullity decree is available.*

Finally Moylan J helpfully summarises the position as follows:

a) *whether the defect makes the marriage valid or invalid is a matter to be determined by the applicable law, being in the case of the formalities of marriage the law of the place where the marriage was celebrated;*

b) *the English court must determine the effect of the foreign law by reference to English law concepts; if the applicable foreign law determines the effect of the defect by reference to concepts which clearly (or sufficiently) equate to the same concepts in English law then the English court is likely to apply those concepts; if the foreign law does not, then it is for the English court to decide which English law concept applies; and*

c) *in any event, it if for the English court to decide what remedy under English law, if any, is available for the reasons set out in Burns v Burns para. 49.*

All of this means that despite the initially superficially attractive argument that, because a foreign marriage is not valid it cannot be recognised in this country and thus there is no right to financial relief, this is not a valid legal argument to pursue. Moylan J in Asaad and Coleridge J in Burns make it abundantly clear that unless it can be deemed a non-marriage (by reference to the English definition) regardless of whether it is void in the foreign jurisdiction, and thus whether it can be recognised in this country, the English court can determine what remedy is available to the parties. In the situation where a foreign state does not have the concepts of void/voidable/non-marriage then the English courts can apply these concepts to the facts of individual cases.

This means, as in Asaad, that the failure to comply with a rule in Syria made it a void marriage which was capable of an order of nullity in the English system. The discretion about making such an order

will clearly lie with the judge, but these two cases appear to rule out that particular argument being run in any court below the High Court, provided that the judge is made aware of either of these cases.

Is a declaration of non-marriage the answer?

Thus for the parties to both English and foreign marriages seeking to divorce in the English courts, the only realistic argument against a grant of nullity (with the same rights as on divorce) is to get a declaration that what occurred is a non-marriage. This would appear to be the only mechanism to avoid a nullity of marriage order except in some limited circumstances for foreign marriages.

That said to obtain a declaration of non-marriage, what occurred will have to fall outside of the remit of either a void or voidable marriage, which is heavily defined within the Matrimonial Causes Act.

Bodey J offered the following guidance as to the categorisation of non-marriages in *Hudson v Leigh* [2009] EWHC 1306 (Fam)

> Questionable ceremonies should I think be addressed on a case by case basis, taking account of the various factors and features mentioned above including particularly, but not exhaustively:
>
> a) whether the ceremony or event set out or purported to be a lawful marriage;
> b) whether it bore all or enough of the hallmarks of marriage;
> c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage [I was referring to lawful under English law]; and
> d) the reasonable perceptions, understandings and beliefs of those in attendance.

Indeed Coleridge J in Burns described non-marriage requiring a marriage ceremony that was:

> *"so deficient of the character of marriage that almost as a matter of public policy, they cannot attract the kind of relief ancillary to a nullity decree …".*

This is clearly a very high burden for any party to reach but is what would be required so as to avoid the argument successfully being made that this is a null marriage capable of being awarded financial relief.

Conclusions

The rules around recognition of foreign marriages whilst potentially appearing slightly daunting to practitioners are in fact incredibly well settled and clear. Arguments about the validity of foreign marriages realistically cannot occur unless something went dramatically wrong within the celebration of that marriage (according to the rules of that country).

Even if the rules were not followed it is likely that at the very least a nullity of marriage order would be the outcome, with the same ability to pursue financial remedy proceedings as if they had been validly married. Whilst some greater arguments might exist for foreign jurisdictions that have a

wider concept of non-marriage than this country, in the vast majority of cases the foreign marriage however technically flawed, will be valid enough to proceed with an argument for financial relief.

Thus answering my question posed in the heading, the answer appears in very limited circumstances to be a definitive ….. No.