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Re IC (2008)

[2008] EWCA Civ 198: (2008) 2 FLR 267 : (2009) 2 WLR 185

19/03/2008

Barristers
Alex Verdan KC

Court
Court of Appeal

Summary
The marriage, celebrated in and valid according to the law of Bangladesh, of a Bangladeshi woman to a British national who lacked the capacity to marry under English law by reason of his mental impairment, was not recognised as a valid marriage in the jurisdiction of England and Wales.

Facts
The appellants (K and N) appealed against a declaration ((2007) EWHC 3096 (Fam)) that the marriage of their son (C) was not valid under English law. K and N were British nationals of Bangladeshi origin who were domiciled and habitually resident in England and Wales. C, who suffered from autism and severe impairment of his intellectual functioning, lacked the fundamental capacity to marry under English law. Marriage was not, however, precluded in Bangladesh and C was married in a Muslim ceremony conducted over the telephone, he being in England and his bride being in Bangladesh. The parties accepted that, as a matter of law, the marriage had been celebrated in Bangladesh. In declaring the marriage to be invalid under English law, the judge applied the dual domicile rule, refused recognition of the marriage on the grounds of public policy and rejected submissions made by K and N that, pursuant to the Matrimonial Causes Act 1973 s.12(c) the marriage was merely voidable rather than void and the court therefore had no power to deny it recognition. The issue was whether he had been right, on those bases, to make the declaration he did.

Held
HELD: (1) The dual domicile rule was a rule of general application and was not limited to those cases in which the marriage was prohibited in the jurisdiction of the domicile of one of the parties, X City Council v MB (2006) EWHC 168 (Fam), (2006) 2 FLR 968 approved. Even though there was authority to the effect that there were alternative bases for the recognition of a foreign marriage falling foul of the dual domicile rule, such exceptions to the rule did not assist N and K, and the judge had been correct in his application of it, Vervaeke v Smith (1983) 1 AC 145 HL distinguished. (2) Equally, the judge had been correct to introduce public policy considerations. Not every marriage that was valid according to the law of some friendly foreign state was entitled to recognition in England and Wales, Cheni (otherwise Rodriguez) v Cheni (1965) P 85 PDAD considered. C lacked the capacity to marry in English law and it was inconceivable that he could be lawfully married in England and Wales. There was expert evidence to

suggest that the marriage was potentially highly injurious to him and, moreover, were his wife to engage in physical intimacy with him she would be guilty of rape or sexual assault under English law. N and K's engineering of the marriage was potentially, if not actually, abusive to C and it was the duty of the court to protect him from such abuse. The refusal of recognition of the marriage was an essential foundation of that protection and was justified even if not precedented. (3) The judge had, however, been wrong to reject submissions founded on s.12(c) of the 1973 Act. The reasoning in Roberts (Deceased), Re (1978) 1 WLR 653 CA (Civ Div) was clear and binding; lack of consent made a marriage voidable rather than void, Roberts followed. Moreover, the Family Law Act 1986 made it clear that no declaration could be made by a court to the effect that a marriage was at its inception void. The only route to a judicial conclusion that a marriage was void at its inception was a petition for nullity. Had the judge had his attention drawn to the provisions of the 1986 Act he would not have made the declaration that he did. The appeal would therefore be allowed, but only to the extent of varying the language of the declaration so that it declared that C's marriage, valid according to the law of Bangladesh, was not recognised as a valid marriage in the jurisdiction of the English courts. (4) The parties' acceptance that the marriage had been celebrated in Bangladesh meant that the issue of the place of celebration of the marriage had been dealt with without the investigation it required. However, in cases of marriages contracted by trans-national telephone calls, the ascertaining of the place of celebration was likely to involve difficult problems of great legal significance, and the court did not wish to endorse whatever consensus had been reached between the parties in the instant case to the effect that the marriage was celebrated in Bangladesh.

Appeal allowed in part