



Neutral Citation Number: [2022] EWCA Civ 1434

Case No: CA-2021-001921

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE ARBUTHNOT
[2021] EWFC 73

Royal Courts of Justice
Strand, London, WC2A 2LL

4 November 2022

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE STUART-SMITH

Between :

NAZIA PARVEEN	<u>Appellant</u>
-and-	
ASSIM BALAL HUSSAIN	<u>Respondent</u>
-and-	
THE QUEEN’S PROCTOR	<u>Intervenor</u>

Karim Andani (instructed by **Ashwells Law LLP**) for the **Appellant wife**
The **Respondent Husband** in person
Simon Murray (instructed by the **Treasury Solicitor**) for the **Intervenor**

Hearing date : 16 June 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 4 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan :

1. I propose, for convenience, to call the parties the wife and the husband although whether their marriage in Pakistan on 19 December 2008 was a nullity is the issue in the case.
2. The wife appeals from Arbuthnot J’s determination on 3 September 2021 that her marriage to the husband was void because her previous marriage “remains undissolved by operation of law” in England and Wales. That determination was based on the previous marriage having been dissolved by a transnational divorce which, although recognised as valid in Pakistan, was not entitled to recognition under the Family Law Act 1986 (“the FLA 1986”). As a result, although not expressed in these terms, the judge determined that, as a matter of English law, the wife remained lawfully married at the time of her marriage to the husband and the marriage was, therefore, void pursuant to the provisions of section 11(b) of the Matrimonial Causes Act 1973 (“the MCA 1973”).
3. The wife was represented at the hearing of this appeal, with permission previously granted by King LJ, by her legal representative, who also appeared below, Mr Andani. The husband was in person, as he was at the hearing below. The Queen’s Proctor, who was given permission to intervene in the proceedings below and in this appeal, was represented by Mr Murray.
4. The Grounds of Appeal, as reformulated following the grant of permission to appeal, contend in summary that the judge should have determined that the marriage was valid because the wife had capacity to marry under the law of her domicile, Pakistan, since, by that law, her previous divorce was recognised as valid. The case advanced by the Queen’s Proctor, supported by the husband, is that the fact that the wife’s previous divorce is not entitled to recognition under sections 45/46 of the FLA 1986 is determinative because the court is “bound ... to apply (that) statute” for the purposes of determining whether the wife was lawfully married at the date of her marriage to the husband.
5. I have considered it appropriate to set out the legal background in greater detail than that contained in the parties’ submissions. This is because, in my view, the answer to this appeal requires a broader consideration of that background, including various Law Commission Reports.
6. As I explain below, the judge was clearly right to decide that the wife’s previous divorce was a transnational divorce which was not entitled to recognition under the FLA 1986. This was because the proceedings took place in part in England (the pronouncement of a talaq) and in part in Pakistan. However, contrary to the case advanced by the Queen’s Proctor, I do not consider that that is the end of the matter. In my view, in the circumstances of this case, section 45 of the FLA 1986 is not determinative of the effect of a divorce which is not entitled to recognition under its provisions. Rather, I consider that the issue raised by this appeal is the relationship between capacity to marry rules and divorce recognition rules.
7. In simple terms, a person’s capacity to marry is governed by the law of their antenuptial domicile. The recognition of a divorce, whether obtained in “the British Islands” (section 44) or in a “country outside the British Islands” (section 45), is governed by

the provisions of the FLA 1986. What happens when the two are in conflict? In other words, when a person, in this case the wife, has capacity to marry by the law of her antenuptial domicile, Pakistan, but her previous divorce is not entitled to recognition in England and Wales under the FLA 1986, is priority to be given to the law applicable to capacity to marry or to the law applicable to the recognition of divorces.

8. For the reasons set out below, I have concluded that, in this case, priority should be given to the law applicable to capacity to marry rather than the law applicable to the recognition of divorces with the result that the wife's marriage to the husband was not void but was, and is, valid.

Background

9. The wife was born in and, at all times up to the date of her marriage to the husband, was a national of and domiciled in Pakistan. She was clearly domiciled in Pakistan because that was her domicile of origin and she had not lived outside Pakistan at any time prior to her marriage to the husband.
10. The wife married her previous husband, Mr Aslam, in Pakistan on 1 November 2000. He lived in England and, a few weeks after the marriage, returned to his home here. The wife remained living in Pakistan. On 10 February 2008, Mr Aslam pronounced a talaq in England, by letter. A "divorce certificate" was provided by a mosque in Bradford. Mr Aslam was informed, correctly, that these steps were of no effect as a matter of English law. The divorce certificate was then sent to the wife in Pakistan and lodged with the relevant Union Council pursuant to the provisions of the Muslim Family Laws Ordinance 1961. The Union Council duly issued a certificate stating that the divorce was effective as of 29 May 2008. For the purposes of the current proceedings, this divorce has been deemed to be effective under the law of Pakistan to determine the 1 November 2000 marriage and, accordingly, that under the law of Pakistan the wife had capacity to marry the husband.
11. The husband and the wife married in Pakistan on 19 December 2008. She came to England to live with the husband on 28 March 2009 and has lived here since then.
12. The husband commenced divorce proceedings on 25 April 2018. This led to the pronouncement of a Decree Nisi of divorce on 27 September 2019. In or about August 2020, the husband applied for the Decree Nisi to be rescinded and for the Petition to be dismissed on the basis that the wife remained married to her previous husband at the date of her marriage to the husband. That application was initially dismissed but the husband was given permission to appeal out of time and his application was reinstated. Directions were then given for the progress of the application which included a direction that, if the husband maintained that the marriage was void, he must issue a nullity petition. The husband duly issued a nullity Petition on 12 February 2021 in which he contended that at "the time of the marriage the (wife) was already lawfully married".
13. On 25 March 2021, His Honour Judge Kloss set out the issues which the case appeared to raise. The first of these was: "Is it a requirement that the (wife's) divorce would have been recognised in the UK or is it sufficient that it was recognised in Pakistan (given that the (wife's) second marriage also took place in Pakistan)". She also invited the Queen's Proctor to intervene in the proceedings to assist the court.

14. The Queen's Proctor agreed to intervene and appeared through Mr Murray at the next hearing on 3 June 2021. The issues were then identified as being:

“(a) On the assumption that the Respondent's first divorce was valid in Pakistan and that she was therefore free to marry the Petitioner in Pakistan (and did so), is the Court in this jurisdiction entitled to consider whether her first divorce would have been recognised in the UK, for the purposes of proceedings relating to her second divorce?”

(b) If the Court is so entitled, the Respondent's evidence is that the talaq was pronounced in the UK and then presented to the Union Council in Pakistan where the divorce was obtained. On that basis, was this a transnational divorce incapable of recognition in this jurisdiction?”

Although, perhaps, not as clearly expressed as it might have been, the first issue can be seen as raising the question of the effect of any conflict between the capacity to marry rules under the law of Pakistan and the divorce recognition provisions of the FLA 1986.

15. However, by the time the matter was heard by Arbuthnot J, the submissions before the court focused almost exclusively on the second issue and, as a result, they did not provide the judge with the arguments with which this court has been principally concerned. It is unsurprising that, in those circumstances, Arbuthnot J considered only the effect of the FLA 1986 and did not separately consider the effect of the wife having capacity to marry under the law of her domicile. Applying *Quazi v Quazi* [1980] AC 744, *In re Fatima* [1986] 1 AC 527 and *Berkovits v Grinberg (Attorney General Intervening)* [1995] Fam. 142, Arbuthnot J decided that the wife's previous divorce was a transnational divorce which was not entitled to recognition under the FLA 1986. Accordingly, she determined that the marriage between the husband and the wife was void.
16. As referred to above, the wife submits on this appeal that her marriage to the husband is valid because she had capacity to marry under the law of Pakistan which recognised her divorce as having validly determined her previous marriage.
17. The husband did not file written submissions but, in brief oral submissions which we permitted him to make, he essentially supported the judge's decision.
18. Mr Murray's case was that the recognition provisions in sections 45 and 46 of the FLA 1986 are determinative of the issues in this case. The wife's first divorce was not entitled to recognition under those provisions because it was a transnational divorce. Her marriage to the husband was, therefore, void. He submitted that the rules applicable to capacity to marry are irrelevant because, as referred to above, the court “was bound to apply UK statutory provisions preventing transnational divorces”. This was also “consistent with public policy precluding transnational divorces”, for reasons explained by the House of Lords in *Re Fatima*.

Legal Framework

19. The issue in this case is whether the marriage between the parties in Pakistan on 19 December 2008 is void pursuant to section 11(b) of the MCA 1973. As referred to above, I consider that the answer depends on whether the issue of whether the wife remained lawfully married at that date should be determined by the law applicable to capacity to marry or by the English statutory provisions applicable to determine the recognition of a divorce. In order to put the matters raised by this appeal in their proper context, I address below the relevant statutory provisions; the authorities; a number of Law Commission working papers and Reports; and the textbooks.

20. Section 11 of the MCA 1973 sets out when a marriage will be void. These include:

“(b) that at the time of the marriage either party was already lawfully married ...”

21. Section 14 of the MCA 1973 provides:

“14 Marriages governed by foreign law or celebrated abroad under English law.

(1) Subject to subsection (3) where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11, 12 or 13(1) above shall —

(a) preclude the determination of that matter as aforesaid; or

(b) require the application to the marriage of the grounds or bar there mentioned except so far as applicable in accordance with those rules.”

Subsection (3) does not apply. The marriage in the present case is, in so far as relevant, one “governed by foreign law”, as explained below. Accordingly, the effect of section 14 is that section 11 does not exclude the normal application of the choice of law rules of private international law to the determination of “any matter affecting the validity of a marriage” such as capacity.

22. The marriage in the present case is governed by foreign law under the relevant rules of private international law. These were summarised in my judgment in *Akhtar v Secretary of State for Work and Pensions* [2022] 1 WLR 421:

“Validity of Marriage

[60] Under English rules of private international law: (a) the general rule is that the formal validity (i.e. the formalities) of a marriage is governed by the law of the country where the marriage was celebrated, *Dicey* at para 17R-001; and (b) the general rule is that capacity to marry (or essential validity) is governed by the law of each party’s antenuptial domicile, *Dicey*

at para 17R-057 (now 17R-054). Bigamy is “a matter of capacity”, *Dicey* at para 17-082 (now 17-079).

[61] If a marriage is valid in respect of both form and capacity it will be recognised as valid under English law and, as a result, the parties will be recognised as having the status of husband or wife.”

My summary adopted the clear formulation of the rules as now set out in *Dicey, Morris & Collins on The Conflict of Laws* 16th Ed (2022) (“*Dicey*”), including at 17R-054, which states:

“Rule 75

As a general rule, capacity to marry is governed by the law of each party’s antenuptial domicile.

(1) Subject to Exceptions 2 and 6 below, a marriage is valid as regards capacity when each of the parties has, according to the law of his or her antenuptial domicile, the capacity to marry the other.

(2) Subject to Exceptions 1, 3, 4, 5 and 6 below, a marriage is (normally) invalid when either of the parties lacks, according to the law of his or her antenuptial domicile, the capacity to marry the other.”

Exceptions 2 and 6 do not apply in this case.

23. The recognition of divorces in England and Wales is governed by Part II of the FLA 1986. This Act replaced the Recognition of Divorces and Legal Separations Act 1971 (“the 1971 Act”) which was passed to implement the 1970 Hague Convention on the Recognition of Divorces and Legal Separations (“the 1970 Convention”). It applies, as referred to above, both to a divorce obtained in “the British Islands” (section 44) and to a divorce obtained in a “country outside the British Islands” (section 45),
24. Section 45 of the FLA 1986 provides:

“Recognition in the United Kingdom of overseas divorces, annulments and legal separations.

Subject to sections 51 and 52 of this Act, the validity of a divorce, annulment or legal separation obtained in a country outside the British Islands (in this Part referred to as an overseas divorce, annulment or legal separation) shall be recognised in the United Kingdom if, and only if, it is entitled to recognition –

(a) by virtue of sections 46 to 49 of this Act, or

(b) by virtue of any enactment other than this Part.”

Section 46(1) sets out when an overseas divorce “obtained by means of proceedings” will be recognised and section 46(2) sets out when an overseas divorce “obtained otherwise than by means of proceedings” will be recognised. Proceedings are defined by section 54 as “judicial or other proceedings” (the same phrase appeared in the 1971 Act). One element common to both sections 46(1) and 46(2) is that the divorce must be “effective under the law of the country in which it was obtained”.

25. In respect of a divorce obtained by means of judicial or other proceedings, section 46(1)(b) also provides that the divorce will only be recognised when:

“at the relevant date either party to the marriage —

(i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or

(ii) was domiciled in that country; or

(iii) was a national of that country.”

Section 46(3)(a) defines the “relevant date” as being: “in the case of an overseas divorce, annulment or legal separation obtained by means of proceedings, the date of the commencement of the proceedings”. The provisions in the 1971 Act were to the same effect, although the expression used was the “institution of proceedings” rather than the “commencement of the proceedings”.

26. The 1971 Act (section 7) specifically addressed, and the FLA 1986 (section 50) specifically addresses, the effect of the non-recognition of a divorce by another country when that divorce is entitled to recognition under the 1971 Act and the FLA 1986. As noted by the Law Commissions of England and Wales and of Scotland (“the Law Commissions”) in their 1970 Report on the 1970 Hague Convention (The Law Commission and The Scottish Law Commission, Hague Convention on Recognition of Divorces and Legal Separations, Law Com. No. 34, Scot. Law Com. No. 16) (“the 1970 Report”), section 7 was enacted to give effect to Article 11 of the 1970 Convention which provides:

“A State which is obliged to recognise a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognise that divorce.”

As set out in the 1970 Report, at [13], Article 11 was “inconsistent” with the position at common law and legislation was, therefore, “necessary to secure that our own law is made consistent with the terms of the Convention”. This was further explained in the Law Commissions’ 1984 Report on the Recognition of Foreign Nullity Decrees and Related Matters (Law Com. No. 137 and Scot Law Com. No. 88) (“the 1984 Report”), at [6.55]:

“Section 7 is intended to implement Article 11 of the 1970 Hague Convention ... It was accepted by the Law Commissions that Article 11 was incompatible with English law in the form of the *Arias Case*, and with what was perceived to be

Scots law also. Section 7 was the legislative provision proposed to ensure that our law was consistent with the 1970 Hague Convention.”

The case referred to was *R v Brentwood Superintendent Registrar of Marriages, Ex parte Arias* [1968] 2 QB 956, which I deal with further below.

27. Section 7 provided as follows:

“7. Non-recognition of divorce by third country no bar to re-marriage.

Where the validity of a divorce obtained in any country is entitled to recognition by virtue of the foregoing provisions of this Act or by virtue of any rule or enactment preserved by section 6 of this Act, neither spouse shall be precluded from re-marrying in Great Britain on the ground that the validity of the divorce would not be recognised in any other country.”

Section 7 was not enacted in the form proposed by the Law Commissions in their 1970 Report. It was more limited as it dealt only with remarriage *in* the UK. This limitation was later referred to as being, “perhaps, unfortunate”, by the Law Commissions in the 1984 Report, at [6.55]. That Report recommended that it should apply to any remarriage, wherever it took place, and even when it was not recognised by the law of the domicile of one of the parties. This was largely because, at [6.56]:

“There would seem, in the past, to have been general agreement as to the policy that where a divorce or annulment is recognised in this country, the parties should be free to remarry, whether here or abroad, even though regarded as incapable by the law of their domicile because of non-recognition there of the divorce or annulment. In our view that is the right policy to adopt.”

A recommendation was made to that effect.

28. This recommendation was implemented by section 50 of the FLA 1986 which provides as follows (as further amended to include civil partnerships):

“Non-recognition of divorce or annulment in another jurisdiction no bar to remarriage.

Where, in any part of the United Kingdom —

(a) a divorce or annulment has been granted by a court of civil jurisdiction, or

(b) the validity of a divorce or annulment is recognised by virtue of this Part,

the fact that the divorce or annulment would not be recognised elsewhere shall not preclude either party to the marriage from forming a subsequent marriage or civil partnership in that part of

the United Kingdom or cause the subsequent marriage or civil partnership of either party (wherever it takes place) to be treated as invalid in that part.”

29. As referred to above, section 7 was enacted to give effect to Article 11 of the 1970 Convention (as from 1 January 1972) and to make our law consistent with the latter’s provisions. Further, as can be seen, section 7 of the 1971 Act and section 50 of the FLA 1986 deal *only* with the effect of the recognition of a divorce in the UK when that divorce is not recognised somewhere else. They do not address the converse situation, namely the effect of the non-recognition of a divorce in the UK when that divorce *is* recognised somewhere else and, in particular, by the law of the party’s antenuptial domicile.
30. The relationship between the rules applicable to capacity to marry and those applicable to the recognition or non-recognition of a divorce and the background to section 7 were considered by the Law Commissions in their 1983 Consultation Paper on the Recognition of Foreign Nullity Decrees and Related Matters (“the 1983 CP”) and in the 1984 Report. This was principally from the perspective of a nullity decree, because of the subject of those documents, but they made a number of comments relevant to the issues in this appeal. I set out passages from both the 1983 CP and the 1984 Report at some length because, in my view, they do not support Mr Murray’s submission that section 45 is determinative of the effect of the non-recognition of a divorce under the FLA 1986. Rather, they support the opposite conclusion, namely that non-recognition under section 45 is *not* determinative of capacity to marry and the validity of a subsequent marriage. They also support the conclusion that there is scope for some flexibility when determining whether priority should be given to the law applicable to capacity to marry or to the law applicable to the recognition of divorces.
31. Starting with the 1984 Report, in the section dealing with “The Present Law and its Defects”, it was noted, at [2.35], under the heading “Capacity to remarry after a foreign nullity decree” that:

“... it is a generally accepted rule of English and of Scottish private international law that a person’s capacity to marry is determined by the law of his premarital domicile. Consequently, a conflict of rules might arise if a foreign nullity decree is recognised in this country but not in the country of the domicile of one of the spouses. This problem, which also applies to the recognition of foreign divorces, was resolved in England at common law by the decision of the Divisional Court in *R. v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias*, where it was held that the rule relating to the parties’ capacity to marry should prevail over that for divorce recognition, with the result that, although the English court might recognise a foreign divorce, the parties would not be regarded in England as free to remarry unless the divorce was recognised by the law of their domiciles. The decision in the *Arias* case was reversed by section 7 of the Recognition of Divorces and Legal Separations Act 1971, as amended by section 15(2) of the Domicile and Matrimonial Proceedings Act

1973, but only as to remarriage in the United Kingdom after a valid foreign divorce (not nullity decree) ...”.

The commentary, repeated at [6.50] (see below), made clear that, under the common law, “the rule relating to the parties’ capacity to marry (prevailed) over that for divorce recognition”.

32. Later, in the section dealing with “Implementing our Conclusions: Consequential Considerations”, under the heading “Capacity to Marry”, the 1984 Report commented as follows:

“[6.49] Section 7 of the 1971 Act deals with capacity to marry in the United Kingdom after recognition of a divorce in accordance with the Act. It is provided that, where the validity of a divorce obtained in any country (whether in the British Isles or abroad) is entitled to recognition, neither spouse shall be precluded from re-marrying in the United Kingdom on the ground that the validity of the divorce would not be recognised in any other country. The question arises whether a similar provision is desirable in relation to annulment, and to what extent, if any, modifications to it, in respect both of annulments and of divorces, are required. This is a complicated matter because it involves consideration of the effect of the recognition of divorces and annulments on capacity to marry, both in this country and abroad; and it leads on to a consideration of the effect of United Kingdom divorces and nullity decrees on such capacity to marry; and of the effect of the non-recognition of foreign divorces and annulments on capacity to marry. It also provides the most striking example of an issue already referred to in this report, namely whether priority should be given to the rules relating to divorce or nullity recognition or to the rules governing choice of law relating to marriage. We have already indicated our general preference that the former should prevail.”

I deal below with the Law Commissions’ consideration of this “complicated matter” in both the 1983 CP and the 1984 Report. I would first highlight the reference to this being “the most striking example ... (of) whether priority should be given to the rules relating to divorce or nullity recognition or to the rules governing choice of law relating to marriage”. The comment that this issue had already been referred to, and the observation about “our general preference”, both relate back to [1.12], which I quote below (paragraph 37).

33. In dealing with the above-mentioned complicated matter, the 1983 CP and the 1984 Report analysed those circumstances which the Law Commissions considered were *not* covered by section 7, including importantly the effect of the non-recognition of a foreign divorce. I first set out the paragraphs in the 1983 CP dealing with that issue at some length, both because of what they say but also because the recommendation they made for legislation were abandoned in the 1984 Report. The relevant paragraphs are [6.49]-[6.51] (emphasis in original):

“[6.49] Finally, there is the question of what effect the non-recognition in the United Kingdom of a foreign divorce or annulment should have on the capacity to re-marry of either spouse, if the divorce or annulment is recognised as valid by the law of the domicile. This question can arise, not only on a refusal of recognition under the 1971 Act, but also under section 16 of the Domicile and Matrimonial Proceedings Act 1973, which sets out particular circumstances in which a divorce is not to be recognised. These circumstances could include those in which the law of the domicile would recognise the divorce. Given the generous nature of United Kingdom recognition rules, the question is not likely to occur frequently, but it should be considered.

[6.50] The rule in the Arias Case would render the spouses capable of contracting a subsequent marriage in the United Kingdom if their divorce was valid according to the law of their domicile, notwithstanding that the divorce would not be recognised here. It seems, on the face of it, anomalous that the same law should at once refuse recognition to the divorce and yet hold the spouses capable of a subsequent marriage. Nevertheless such authority as there is suggests that this may be the true legal situation. Moreover it is consistent with much academic opinion. The academic answer is to divide the problem into the "incidental" and the "main" question, and to prefer the law governing the latter. It is not easy to say which question is which, but most commentators have viewed the capacity to marry as the main one. Thus the law of the domicile - which governs capacity to marry - prevails over the rules of recognition of the divorce or annulment, despite the apparent absurdity of the result. But this result is inconsistent with the policy behind section 7 of the 1971 Act and the principles on which we have suggested that section 7 should be extended. In our view, if a foreign divorce or annulment is refused recognition in the United Kingdom, and the marriage is otherwise valid and subsisting, the spouses should not be regarded here as capable of re-marrying, whatever the view taken by the law of their domicile. This would seem to accord with common sense, even if it is not the traditional view. It is not unreasonable that the law of the place of intended celebration of the marriage should prevail over the law of the domicile in case of conflict between them. A statutory rule to this effect, for both divorce and annulment, is, in our view, required.

[6.51] These proposals would make recognition or non-recognition in the United Kingdom of a foreign divorce or annulment the conclusive factor in determining the capacity of the spouses to contract a subsequent marriage. Where the divorce or annulment was recognised in the United Kingdom each spouse would be free to remarry in the United Kingdom, and a

United Kingdom court would recognise and accept a marriage outside the United Kingdom regardless of whether the law of the domicile of either spouse recognised the divorce or annulment. Where the divorce or annulment was obtained in the United Kingdom, either spouse could remarry in the United Kingdom, and a United Kingdom court would recognise and accept a marriage elsewhere, regardless of the view taken of the divorce or annulment by the law of the domicile of either spouse. Finally, if the foreign divorce or annulment were refused recognition by a United Kingdom court, no United Kingdom court would regard the spouses as free thereafter to remarry, in the United Kingdom or elsewhere, even if the divorce or annulment would be regarded as valid by the law of the domicile of one or both of the spouses. In our view this rule has the merits of simplicity, certainty and consistency, though it marks a further departure from the tradition of the common law that status is exclusively to be determined by the law of the domicile.

34. I have quoted the above at length for three principal reasons. The first is that these paragraphs make clear that the Law Commissions did *not* consider that non-recognition under the 1971 Act was determinative of a person's status and capacity to marry. This remained, as set out in the first sentence at [6.49], a "question ... if the divorce or annulment is recognised as valid by the law of the domicile". Hence the proposal for a new "statutory rule" to the effect that "if a foreign divorce or annulment is refused recognition in the United Kingdom, and the marriage is otherwise valid and subsisting, the spouses should not be regarded here as capable of re-marrying, whatever the view taken by the law of their domicile".
35. The second is the acknowledgement that there was significant support for the capacity to marry rules prevailing over the divorce recognition rules as demonstrated by *Ex parte Arias*; "such authority as there is" (being *Schwebel v Ungar* (1964) 48 D.L.R. (2d) 644, see below); and academic opinion most of which supported the law applicable to capacity to marry, considered to be the "main" question, being determinative.
36. The third is that, as set out below, in their subsequent 1984 Report the Law Commissions abandoned their proposal for legislation because of the widespread opposition to it. I would also add that, no doubt like those who opposed this proposal, I do not agree with the comment, at [6.50], that the result is absurd if the law of the domicile prevails over the divorce recognition rules nor do I consider it inconsistent with the policy behind section 7. As referred to above, the policy behind section 7 was simply to give effect to Article 11 in respect of the *recognition* of a divorce. As to the former observation, and confining myself to the circumstances of this case, in my view it is not absurd that the capacity of a person domiciled in a foreign country to contract a valid marriage in that country should be determined by the law of that country. I emphasise that the abandonment of the proposal for a new statutory rule, as set out below, meant that the legal position remained as summarised in the 1983 CP.
37. Before dealing with the reasons given for the abandonment of that proposal, it is relevant to mention that, as referred to above, the 1984 Report also addressed, at [1.12], the scope for conflict between the rules governing the recognition of divorces and those governing the validity of marriage including capacity to marry:

“... examination of the rules of nullity recognition, and our limited re-examination of the present statutory rules relating to recognition of divorces and legal separations, throw up a number of detailed complex points. To some of them there is no obvious logically compelling answer. Indeed they may well illustrate a conflict between two well established sets of rules, such as those governing recognition of foreign divorces and those regulating the validity of marriages. Good arguments may be put, and were put to us on consultation, for favouring one set of rules rather than another. The general underlying policy which we have favoured in this report is that of recognising the validity of divorces or annulments and of any later marriage entered into by the parties on the basis that they were free to do so.”

I am not sure that the “general underlying policy” of favouring recognising the validity of divorces and of any later marriage emerged clearly from the 1983 CP but it was probably better reflected in the 1984 Report. However, I would add that it is a general policy of English law to seek to uphold the validity of marriages. I deal with this further below.

38. Why then did the 1984 Report abandon the recommendation made in the 1983 CP, as summarised at [6.51] (paragraph 33 above), about “making recognition or non-recognition in the United Kingdom of a foreign divorce or annulment the conclusive factor in determining the capacity of spouses to contract a subsequent marriage”? There had been “considerable opposition” to this proposal and, as explained in the passages quoted below, it was not pursued:

“[6.60] We discussed in our Consultation Paper the question of what effect the *non-recognition* in the United Kingdom of a foreign divorce or annulment should have on the capacity to re-marry of either spouse, if the divorce or annulment is recognised as valid by the law of the domicile. Our provisional conclusion was that it would be desirable to provide that a person whose foreign divorce or annulment is not recognised as valid in the United Kingdom should not be regarded as free to re-marry (whether in the United Kingdom or elsewhere) notwithstanding that the law of, for example, his domicile recognised the divorce or annulment. There was considerable opposition on consultation to this proposal and it has persuaded us not to proceed with it and to make no recommendation on this matter in this report. It may be of interest to note that, in Australia, although the relevant legislation deals with the effect of recognition of foreign divorces and annulments on capacity to marry (as we have recommended in paragraphs 6.49-6.59, above) it is silent on the question of the effect of non-recognition. There are a number of reasons for our decision not to recommend legislation on this issue. No problem of conflict between recognition and marriage rules is likely, in practice, to arise in the case of a re-marriage in the United Kingdom because of the general rule that, even if the parties have capacity under the

relevant foreign law, capacity under the law of that part of the United Kingdom in which they wish to marry would also seem to be required. It would not be satisfactory to lay down a general rule of priority of the recognition rule in a case where the parties' divorce is recognised in the country of their domicile at the time of their marriage but later the question of the recognition of that divorce falls for decision in England. Our current, and proposed, rules for the recognition of foreign divorces and annulments are such that it will be rare for such a foreign order to be denied recognition in the United Kingdom. If it is denied recognition this is most likely to be because recognition would be contrary to public policy and it has been argued that a decision taken against recognition in such a case ought not to be a bar to the recognition of the validity of a remarriage elsewhere. Indeed, as we recognise divorces obtained in the country of the domicile and the law governing capacity to marry is probably determined by the domiciliary law, the likelihood of a conflict of rules is limited indeed. We have decided, therefore, as the issue is not one of any practical significance, to follow the Australian precedent and not to recommend a provision to deal with the effect of non-recognition on capacity to marry."

The decision "to follow the Australian precedent" was clearly understood to mean that our domestic legislation would equally *remain* "silent on the question of the effect of non-recognition".

39. I am probably labouring the point but I repeat that the Law Commissions clearly did *not* consider that the recognition provisions in the 1971 Act or in their proposed new legislation (which was incorporated into the FLA 1986) determined the effect of non-recognition as submitted by Mr Murray. Indeed, as I have just noted, they expressly decided "to follow the Australian precedent and not to recommend a provision to deal with the effect of non-recognition on capacity to marry". This recommendation, as with other aspects of the 1984 Report, is inconsistent with Mr Murray's submission. Another example is the express conclusion, at [6.60], I repeat, that:

"It would not be satisfactory to lay down a general rule of priority of the recognition rule in a case where the parties' divorce is recognised in the country of their domicile at the time of their marriage but later the question of the recognition of that divorce falls for decision in England."

The Law Commissions perhaps underestimated the scope for "a conflict of rules" but they considered this would be very unlikely because "we recognise divorces obtained in the country of the domicile and the law governing capacity to marry is probably determined by the domiciliary law".

40. I next refer to the 1985 Working Paper/Consultative Memorandum (Law Com. No. 89 and Scot. Law Com. No. 64) ("the 1985 CP") and the 1987 Report on Private International Law, Choice of Law Rules in Marriage (Law Com. No. 165 and Scot. Law Com. No. 105) ("the 1987 Report"). The Law Commissions decided against recommending any significant legislative changes in respect of the choice of law rules

relating to marriage including, in particular, in respect of those governing capacity to marry.

41. As set out in the 1987 Report, at [1.4]:

“The consultation document was published in April 1985. It raised for discussion whether it was appropriate to introduce legislative reform of the choice of law rules relating to the validity of marriage and to annulments.”

The conclusion was that “major legislative change in, and codification of, the choice of law rules ... should not be attempted”. It was noted, at [2.6], that: “Retention of the personal law, i.e. the law of the domicile, to govern capacity to marry received almost universal support”. The conclusion, that legislation was not recommended, was supported by a number of reasons. For the purposes of the issue in the present case, the most relevant is the following, which I quote in full:

“[2.14] There is one final argument against comprehensive legislation in this field which we find very persuasive. It is that major statutory intervention at this time might be not only unhelpful, it might actually be harmful. Some marriage choice of law rules are still in the process of development. This can be illustrated by recent developments in the area of capacity to marry where the courts have been approaching the issue with considerable flexibility, concerned to uphold, wherever proper, the validity of a marriage and, if appropriate, to develop fresh choice of law rules for particular types of circumstance. Much of the flexibility of such development would be lost in new, firm statutory rules, and if they were not fairly fixed in nature they would not achieve the certainty which might be their justification. The law in this field is, as has been said, still developing and it is better to leave that process to the judges for the time being. Obviously, if practical difficulties or problems arose, legislative intervention might be needed, but that has not occurred to any significant degree. In our view, the case for major legislation has not been made out and we recommend that there should be no comprehensive restatement in statutory form of the choice of law rules relating to marriage.”

The cases referred to as demonstrating “considerable flexibility” so as to “uphold, wherever proper, the validity of a marriage” were: *Radwan v Radwan* (No. 2) [1973] Fam 35; *Vervaeke v Smith* [1983] 1 AC 145; and *Lawrence v Lawrence* [1985] Fam 106. I refer to the last of these below.

42. The effect of the 1987 Report was summarised in *Dicey*, at 17-066, as follows:

“In 1985, the Law Commission published a Working Paper, *Choice of Law Rules in Marriage*, which supported the dual domicile test. Subsequently, however, the Law Commission decided against recommending the enactment of the test in statutory form: they discerned in the then most recent cases a

new flexibility of approach based on a policy of upholding (where proper) the validity of marriage, and they felt that this flexibility would be lost if firm statutory rules were adopted. The result is that no legislation has been passed on capacity to marry: the courts remain free to develop the law.”

43. I now turn to consider some of the authorities to which we were referred and others which I consider relevant.
44. The provisions of the 1971 Act (and the equivalent provisions of the FLA 1986) raised the issue of what were included within the scope of “judicial and other proceedings”. There were two aspects to this issue, namely when would a divorce have been obtained by “means of proceedings” and when would those proceedings be within the scope of the Act. These issues were substantively addressed by the House of Lords in *Quazi v Quazi* and in *In re Fatima*.
45. In *Quazi v Quazi*, the House of Lords determined that a divorce effected in Pakistan in a manner which had complied with the procedural requirements of the Muslim Family Laws Ordinance 1961 was a divorce obtained by means of proceedings. The procedural requirements of the 1961 Ordinance are, in summary, that, after pronouncing the talaq, the husband must give notice of his having done so to the chairman of the relevant Union Council (an administrative body) and that the chairman must “constitute an arbitration council” to which each party must nominate a representative. The council seeks to effect a reconciliation and, if that fails, the talaq becomes effective. As explained in the speech of Lord Scarman, at p.826 B:

“Under the law of Pakistan, therefore, talaq is the institution of proceedings officially recognised as leading to divorce and becomes an effective divorce only after the completion of the proceedings and the expiry of a period laid down by statute. The proceedings in this case were, therefore, officially recognised, and led to a divorce legally effective in Pakistan. Further, the trial judge was correct in holding that the effective divorce was obtained *by means of* these proceedings: for without them there would have been no effective divorce.”
46. The case of *Re Fatima* considered how the decision in *Quazi v Quazi* applied when the talaq had been pronounced by the husband in England with the rest of the process taking place in Pakistan in accordance with the 1961 Ordinance. The specific issue in the case, as set out by Lord Ackner (who gave the sole speech), at p.531 D, was “whether the divorce obtained by Mohammed Afzal is to be recognised as a valid overseas divorce”. The House of Lords decided that the pronouncement in England of the talaq was the “institution” of the divorce proceedings. This meant that the divorce could not be recognised under the provisions of the 1971 Act because, at p.534 B/C, they required “that the ‘proceedings’ ... must be a single set of proceedings which have to be instituted in the same country as that in which the relevant divorce was ultimately obtained”.
47. Lord Ackner also referred to the then provisions of section 16(1) of the Domicile and Matrimonial Proceedings Act 1973 (since replaced by section 44 of the FLA 1986) which provided that:

"No proceedings in the United Kingdom, the Channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of those countries."

He then said, at p.534 G:

"That provision was intended to reverse the decision in *Qureshi v. Qureshi* [1972] Fam. 173, where recognition was given to full talaq proceedings which took place wholly within the United Kingdom. It is thus clearly the policy of the legislature to deny recognition to divorces obtained by persons within the jurisdiction, and therefore subject to the laws of the United Kingdom, by any proceedings other than in a United Kingdom court. It would seem contrary to that policy to encourage the obtaining of divorces essentially by post by Pakistani nationals resident in this country by means of the talaq procedure."

This latter passage was heavily relied on by Mr Murray in support of his argument that the strong public interest in discouraging transnational divorces would be significantly undermined if the wife's marriage to the husband was not treated as a nullity.

48. The ratio of the decision in *Re Fatima* was applied to the slightly different wording of the FLA 1986 by Wall J (as he then was) in *Berkovits v Grinberg*. He decided that the definition of "overseas divorce" continued to exclude, as determined in *Re Fatima*, a divorce obtained by means of proceedings instituted in one country but concluded in another.
49. *Brook v Brook* (1861) 9 H.L.C. 193 is now generally seen as having established the principle that capacity to marry is governed by the law of each party's antenuptial domicile. The husband had married his deceased wife's sister in Denmark. Both parties were domiciled in England. The marriage was valid by the law of Denmark but was void under English law. The marriage was held to be void because English law determined whether the parties had capacity to marry. This principle was applied by the Court of Appeal in *Sottomayor v Barros* (1877) 3 PD 1 so that a marriage in England between Portuguese domiciled parties was void because the parties did not have capacity to marry under the law of Portugal.
50. The decision of *In re Bozzelli's Settlement, Husey-Hunt v Bozzelli* [1902] 1 Ch 751 was provided to us by Mr Murray during the course of the hearing. It is relevant because the court had to determine whether an English statutory provision meant that a marriage, which was valid by law of Italy where both parties were domiciled, was invalid. The relevant statute was the Marriage Act 1835, referred to as Lord Lyndhurst's Act. This provided that:

"All marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever."

The wife in that case had married her deceased's husband's brother in Italy. It was, therefore, "null and void" under the provisions of that Act. Swinfen Eady J (as he then

was) applied *Brook v Brook* and *Sottomayor v Barros* and decided that the parties' capacity to marry was governed by the law of their domicile and was not affected by the provision in Lord Lyndhurst's Act. This is, therefore, an example of an express statutory provision not overriding the effect of the law applicable to determining capacity to marry. A different outcome had been reached in the older decision of *The Sussex Peerage Case* (1844) 11 Cl & Fin 85 but that case dealt only with whether the Royal Marriages Act 1772 applied to a marriage contracted abroad having regard, at p.147, to the "object and purpose for which the Act was passed".

51. The next case is *Schwebel v Ungar*. The Ontario Court of Appeal's decision is reported at (1964) 1 OR 430 and the Supreme Court of Canada's decision is reported at [1965] SCR 148. The essential reasoning is found in the Court of Appeal's decision which was upheld by the Supreme Court. The parties in that case had married in Hungary, where they were both domiciled, in November 1945. They then left Hungary with the intention of moving to, what became, Israel. This took several years and in the meantime they were divorced in Italy by a get. This was not recognised as validly determining the marriage either by Hungarian law, where the parties remained domiciled, or Italian law. It was, however, recognised as valid by the law of Israel where the parties subsequently became domiciled. The issue determined by the Canadian courts was whether the wife's subsequent marriage in Canada in 1957 was valid.

52. In the judgment of the Court of Appeal, given by Mackay JA, the issue was stated, at p.436, as being whether the court's "enquiry as to personal status (should) extend beyond the simple enquiry as to what was (the wife's) status under the law of her domicile at the date of her marriage in 1957 in Ontario". A number of authorities were considered including *Brook v Brook*, *Re Bozzelli's Settlement*, *Le Mesurier v Mesurier* [1895] AC 517 and *Har-Shefi v Har-Shefi* [1953] 2 All ER 373. In the Privy Council decision of *Le Mesurier v Le Mesurier*, which dealt with jurisdiction to dissolve a marriage, Lord Watson, who gave the judgment of the court, quoted with approval what Lord Penzance had said in *Wilson v Wilson* (1872) LR 2 PD 435, at p.442, which included the following observation about:

"... the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another."

Mackay JA also quoted what Pearce J (as he then was) had said in *Har-Shefi v Har-Sefi*, at p.375 G/H:

"To hold that a marriage, which has been legally dissolved according to the law of the domicil, continues binding in this country is to create confusion and hardship,"

53. The Court of Appeal's decision in *Schwebel v Ungar* was as follows, at p.445:

"The decision in the present case turns on the marital status of (the wife) at the time of her marriage to (the husband). To determine that status, I think our enquiry must be directed not to the effect to be given under Ontario law to the divorce proceedings in Italy as at the time of the divorce, but to the effect to be given to those proceedings by the law of the country in

which (the wife) was domiciled at the time of her marriage to the plaintiff in 1957, namely Israel ... or, to put it another way, the enquiry is as to her status under the law of her domicile and not to the means by which she acquired that status. To hold otherwise would be to determine the personal status of a person not domiciled in Ontario by the law of Ontario instead of by the law of that person's country of domicile. This would be contrary to a basic principle of international law and would result in the social evil referred to by Lord Watson ...”

This decision was upheld by the Supreme Court of Canada. The judgment of the court was given by Ritchie J. He said, at p.154, that although “as a general rule, under Ontario law a divorce is not recognised as valid unless it was so recognised under the law of the country where the husband was domiciled at the time it was obtained” and although the divorce was not recognised in Hungary, the Court of Appeal had been right to decide, at p.155, “that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, *the governing consideration* is the status of (the wife) under the law of her domicile at the time of her second marriage and not the means whereby she secured that status” (my emphasis). In other words, although there is some debate as to the ratio of this decision, as I see it the court gave priority to the capacity to marry rules over the divorce recognition rules.

54. The next case is *Padolecchia v Padolecchia* [1968] P 314. The husband petitioned for a decree of nullity on the ground that, at the date of the marriage in England, he remained married to his first wife. Sir Jocelyn Simon P identified, at p.336 A/B, what he called a “space problem” which he defined as being “by what law does one ascertain whether the marriage was still subsisting or had been validly dissolved?”. His answer, at p.336 B/C, was that:

“First, then, for the space problem. Each party must be capable of marrying by the law of his or her respective antenuptial domicile: see Dicey and Morris, 8th ed., p. 254, r. 31. Moreover, since nobody who is still married can validly contract a marriage in a monogamous country, nor can anybody validly contract marriage in a monogamous country with a person who is already married, if either party is already married by either's personal law, the marriage is invalid (cf. *In re Paine* [1940] Ch 46; *Pugh v. Pugh* [1951] P 482).”

The petitioner husband was, at all material times, domiciled in Italy and, under Italian law, his divorce from his first wife was not recognised. This decision predated the 1971 Act, when the rules which applied to the recognition of foreign divorces were more complex, but it can be seen that the issue of whether either of the parties remained married was determined solely by reference to their capacity to marry by the law of their domicile and not by reference to whether the foreign divorce would be recognised under English law.

55. In the course of his judgment, although not necessary for his decision because the husband's domicile had not changed, Sir Jocelyn Simon P also considered what he defined, at p.336 A/B, as the “time problem”. This was: “at what time does one ascertain such law; in the context of the present case, is it at the time of the Mexican

decree in December, 1958, or at the time of the English marriage on February 1, 1964?” He decided, applying in particular *Schwebel v Ungar*, that the issue of capacity to marry was to be determined by the law of the party’s domicile at the date of the marriage.

56. In *Ex parte Arias*, the Divisional Court applied *Brook v Brook* and the rule as to capacity to marry as set out in *Dicey*. The only judgment was given by Sachs LJ who said, at p.968 C/D:

“The fact that the parties to a proposed marriage cannot marry according to the law of the country in which they are domiciled is, as a normal rule, a lawful impediment to their being married in this country. That follows from what in *Dicey and Morris*, *Conflict of Laws*, 8th ed., p. 254, is stated as rule 31: "Capacity to marry is governed by the law of each party's antenuptial domicile."”

He added, at p.971 F:

“It is, after all, no part of the functions of an English court to arrogate to itself the task of seeking in effect to impose on another country its views as to what should or should not be the law in relation to the capacity of parties domiciled there to marry.”

57. I briefly refer to Ormrod J’s (as he then was) decision in *Messina v Smith* [1971] P 322. I do so because he dealt with the impact of the change to the approach to the recognition of foreign divorces consequent on the House of Lords’ decision in *Indyka v Indyka* [1969] 1 AC 33. He identified, at p.332 A, that “the law relating (to) ... the recognition of foreign decrees in the English courts has passed through a number of phases” including that consequent on *Indyka v Indyka*. In Ormrod J’s view, the effect of that decision had been that the “courts have now, as it were, broken through into open country, and at least two of their Lordships (Lord Reid and Lord Wilberforce) invited the judges to develop the recognition rules as justice requires, in the light of all the circumstances of each case and the general guidance provided in the speeches”.
58. The statutory provisions of the 1971 Act and the FLA 1986 have replaced the common law provisions dealing with the recognition of foreign divorces but I see no reason why this more flexible approach, “as justice requires”, should not also be relevant to the effect of non-recognition. In my view, this would reflect the advantages of flexibility as referred to by the Law Commissions in the 1984 Report, at [6.60], and in the 1987 Report, at [2.14], (as quoted above, paragraphs 39 and 42), and by *Dicey* as referred to below. It would also reflect two features of the general policy of English law to which I refer below.
59. *Perrini v Perrini* [1979] Fam 84 could be said to provide an example of a flexible approach because Sir George Baker P did not follow *Padolecchia v Padolecchia*. The 1971 Act did not apply because the case concerned the effect of a decree of nullity to which the Act did not apply. The wife brought nullity proceedings in England on the basis that the husband remained married to his previous wife at the date of his marriage to the wife. The decree of nullity which had been obtained by the husband’s former wife in the USA was entitled, under the then common law rules, to recognition in

England but was not recognised under the law of the husband's domicile, Italy. In contrast to *Padolecchia v Padolecchia*, Sir George Baker P gave priority to the recognition rules in respect of a decree of nullity over the capacity to marry rules so as to find that the parties marriage in England was valid. His decision was based significantly on *Indyka v Indyka*.

60. *Lawrence v Lawrence* was decided after the 1971 Act but before the FLA 1986. Accordingly, section 2 of the 1971 Act applied in respect of the recognition of a divorce but section 7 (Non-recognition of divorce by third country no bar to re-marriage) only applied to a remarriage in the UK. The case concerned an application by a husband for a declaration that his marriage to his wife in Las Vegas was valid. The wife contended that it was void because her previous divorce (also in Las Vegas) was not recognised by the law of the country of her domicile, Brazil, and she did not, therefore, have capacity to marry. Reliance was placed by the wife on the limited scope of section 7 of the 1971 Act.
61. The divorce in that case was entitled to recognition under section 3. The majority of the Court of Appeal (Ackner LJ, as he then was, and Sir David Cairns) decided, in effect, that the recognition of the divorce had priority over the capacity to marry rules. Ackner LJ said, at p.124 G/p.125 A:

“Section 7 of the Act does not, in my view, detract from, or diminish the extent of the recognition to be accorded by virtue of section 3 to an overseas divorce. As regards the reference to the section to the "United Kingdom", this is wholly explicable by the fact that that is the forum over which Parliament has jurisdiction and any attempt to have legislated further afield would have been without effect.

I, accordingly, conclude that any incapacity said to be due to a pre-existing marriage cannot be relevant where the validity of the divorce dissolving such a marriage has to be recognised under the Act.”

Later, at p.125 C/D, he said:

“The inevitable consequence of our recognising the Nevada divorce - as we are obliged to do under the Act - is to recognise that it dissolved the Brazilian marriage. Thereafter, that dissolved marriage could no longer be a bar to the wife's remarriage and no other incapacity is alleged.”

This outcome would now be the same under the provisions of section 50 of the FLA 1986.

62. We were also referred to *Botwe v Brifa* [2022] 1 FLR 784 in which Cobb J decided that a customary divorce in Ghana, although effective there, was not entitled to recognition in England and Wales under the FLA 1986. That case does not assist as the only issue was whether the divorce in Ghana was effective under the FLA 1986 and did not raise the issue with which this appeal is concerned.

63. It can be seen, as acknowledged by Mr Murray, that there is no authority which supports his submission that a person's capacity to marry is determined, not by the law of their prenuptial domicile, but by the fact that their previous divorce is not entitled to recognition under section 45 of the FLA 1986.
64. I now refer to two general policy considerations which are relevant to this appeal.
65. This first can be simply stated and is encapsulated in what Sir George Baker P said in *Perrini v Perrini*, at p.92 E/F, namely that "the court should if possible uphold a marriage".
66. The other general policy feature is to seek to avoid, what are called, "limping marriages", namely when parties are regarded as being married in one country and not married in another. I have already referred to what Pearce J said in *Har-Sefi v Har-Shefi* which, as Lord Pearce, he repeated in *Indyka v Indyka* at p.77 F. In *Messina v Smith* Ormrod J identified, at p.336 E/F, that one of "the basic considerations of policy which must affect the decision" whether to recognise a divorce, was "the need to avoid creating 'limping' ... marriages". A more recent example is *Olafisoye v Olafisoye (No 2) (Recognition)* [2011] 2 FLR 564 in which Holman J said, at [36], when deciding whether to refuse recognition of a foreign divorce under section 53 of the FLA 1986:

"to create a so-called 'limping marriage' ie, that the parties are treated as still being married here, when they are not so treated elsewhere ... 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."

67. It also relevant to note for the purposes of this appeal that, as Lord Diplock observed in *Quazi v Quazi*, at p.804 G/H:

"The mischief which the (1970) Convention was designed to cure was that of 'limping marriages' that is, marriages that were recognised on some jurisdictions as having been validly dissolved, but in other jurisdictions as still subsisting."

This was also referred to in the 1984 Report, at [5.12]:

"it is desirable, as we said in 1970 when examining the rules for divorce recognition, that (limping marriages) should be minimised."

The reference is to what was said in the 1970 Report, at [29(b)], namely that there was a "need to avoid situations where the parties are regarded as being married in one country and not married in another". This can also be seen, as noted in the 1984 Report, at [3.2], from what Lord Hailsham LC said when moving "the second reading of the Bill that led to the 1971 Act". He "said that it was a measure whose principal object was to reduce the number of "limping" marriages, and to alleviate their unsatisfactory consequences". In the same vein, the 1984 Report stated, at [6.25]:

“The object of any system of recognition of foreign matrimonial decrees is to avoid inconsistencies of status from one country to another.”

68. I now turn to consider the textbooks, in particular, *Dicey*.
69. *Dicey* first addresses the issue of bigamy when dealing with the incidental question. The incidental question is described as follows:

“[2-044] The incidental or preliminary question is a technical problem of considerable difficulty which was first noticed by academic writers especially in Germany. It arises in this way. Suppose that an English court is called upon to decide a question which has foreign elements and, in order to do so, has to consider a subsidiary question which also has foreign elements. Suppose that by the relevant English rule of the conflict of laws the main question is governed by the law of a foreign country. Should the subsidiary question be governed by the English conflict rule appropriate to that question, or should it be governed by the appropriate conflict rule of the foreign system of law governing the main question? ...

[2-045] It will be appreciated that this is a fundamental problem that can arise in any conflicts system (at least if it is of the traditional type). It will occur if, but only if, the following three conditions are satisfied. First, the main question must, by the English conflict rule, be governed by the law of some foreign country. Secondly, there must be a subsidiary question involving foreign elements which is capable of arising in its own right and which has a conflict rule of its own available for its determination. Thirdly, the English conflict rule for the determination of the subsidiary question must lead to a different result from the corresponding conflict rule adopted by the country whose law governs the main question.”

70. *Dicey* goes on specifically to consider this question in relation to bigamy, at [2-048]-[2-056]. I quote these paragraphs at length in part because, as with the extracts from the Law Commissions’ Reports and other material referred to above, there is no suggestion that the provisions of the FLA 1986 are determinative of the effect of non-recognition as submitted by Mr Murray, indeed they (in particular [2-056]) are to the opposite effect:

“[2-048] At first sight it might be thought that (where no question of polygamy arises) bigamy could not produce a problem in the conflict of laws, since all legal systems prohibit it. The difficulty, however, lies in the fact that, while all relevant systems of law may unite in rejecting bigamy, they may disagree as to whether or not a particular marriage is bigamous. This could occur where one of the parties to the marriage has entered into a previous marriage and, according to the conflict rules of one country, this marriage is valid and subsisting at the time of

the second marriage while, according to the conflict rules of the other country, this is not the case. Such a situation could arise where the one regards the first marriage as valid, while the other regards it as void ab initio; or where a decree of nullity or divorce is not recognised by the one, but is recognised by the other.

[2-049] In this situation, the principal question is whether the second marriage is invalid for bigamy. This raises a question of capacity, which is governed (in general) by the law of the parties' domicile. (It will be assumed, for the sake of simplicity, that the parties are both domiciled in the same country.) That law will no doubt say that the second marriage is valid only if neither party to it is a party to an earlier, subsisting marriage. This latter question is the incidental question and the problem then becomes: should one decide the incidental question by the conflict rules of the domicile or by the English conflict rules?

[2-050] This problem can arise in two different situations: the first is where the prior marriage is valid and subsisting under the English conflict rules but not under the conflict rules of the domicile (for example, if a prior divorce is not recognised in England but is recognised in the country of the domicile); in the second, the position is reversed and the prior marriage is subsisting according to the conflict rules of the domicile but not according to the English conflict rules. These situations should be distinguished because the consequences of applying the conflict rules of the domicile differ markedly in the two cases: in the first, it will mean that, in English eyes, both marriages are valid and subsisting; while in the second, neither marriage will be valid and subsisting."

71. *Dicey* then analyses the Canadian decision of *Schwebel v Ungar* which is described as "an example of the first situation". *Dicey* considers, at [2-051], that the reasons for the outcome in that case are "not entirely clear" and puts forward two alternative possibilities. In my view, as described above, I consider that *Dicey's* second alternative is the "correct interpretation" and that "the Canadian courts were prepared to uphold the second marriage without recognising the divorce"; i.e they gave priority to the capacity to marry rules over the divorce recognition rules. I should also note that *Dicey* described this outcome, at [2-052], as "curious" but I do not propose to engage with that view in this already overlong judgment.
72. *Dicey* next refers to a number of English authorities, including *Padolecchia v Padolecchia* and *Ex part Arias*, before stating, at [2-056]:

"The solution to the incidental question applied in the *Brentwood Marriage Registrar* case was, however, overturned by Parliament. Under s.50 of the Family Law Act 1986, where a decree of divorce or nullity is granted by an English court, or is recognised in England, the fact that the decree would not be recognised elsewhere will not preclude either party to the marriage from remarrying in England, nor will it render the

remarriage of either party invalid, irrespective of whether the remarriage takes place within or outside the United Kingdom. *This solves the problem in the situations covered by the Act; it does not, however, mean that the same solution will apply in the reverse case, that is where the divorce or nullity decree is not recognised in England, but is recognised in the foreign country: it remains to be seen whether Schwebel v Ungar will be followed in England.*” (emphasis added)

I repeat that what is said at the end of [2-056] does not support Mr Murray’s submission that section 45 of the FLA 1986 is determinative in the present case.

73. The issue of bigamy is separately addressed in *Dicey* in the context of capacity to marry, at [17-078]:

“Except in the case of polygamy, which is discussed below, it might seem at first sight that there could be no conflict of laws with regard to bigamy, because the relevant laws will always be the same. However, though the law of all monogamous countries prohibits bigamy, there may be disagreement as to whether a particular marriage is in fact bigamous. This may be due to differing views as to the validity of the first marriage or as to the recognition of a decree of nullity or divorce. In such a situation these latter issues would have to be decided as preliminary questions in order to decide the main question, the validity of the second marriage. Two problems then arise. First, what law governs the validity of marriage where the issue is bigamy? Secondly, if the governing law is that of a foreign country, should the English court refer to it only in order to determine whether bigamy invalidates a marriage, or should it also allow the foreign law to decide whether the particular marriage in question is bigamous? If the latter alternative is adopted, the foreign rules of the conflict of laws would be applied to decide the preliminary issues. This second question is the problem of the incidental question. It was considered in Chapter 2 and need not be discussed further. It should, however, be noted that if the first alternative mentioned above is correct, it does not matter very much what law governs the question of bigamy; but if the second is preferred, it matters a great deal.”

74. How does *Dicey* suggest that these questions and issues should be resolved? The question is phrased, at [19-172], as being: “whether to give priority to the rules governing the recognition of foreign divorces or those governing capacity to marry”. Reflecting what was said, for example, in the 1984 Report, *Dicey* proposes a flexible approach. This can be seen from the following paragraphs in the section dealing with the incidental question.

“[2-046] In the past, academic writers have tried to find a general solution, based on logic and theory, that would apply in every case, though they are sharply divided as to what it should be ...

[2-047] But it is neither possible nor desirable to find a solution which would apply in every case. Rather, each situation should be looked at separately in order to find a solution that produces the best results in that situation. As one writer put it, “there is really no problem of the incidental question, but as many problems as there are cases in which incidental questions can arise.” Instead of trying to solve the problem on the basis of general theory, one should consider the practical consequences in each situation.”

After considering legitimacy and succession, *Dicey* concludes the section on the incidental question by saying:

“[2-063] Only three areas of the law have been discussed but it is hoped that enough has been said to show both the varied situations in which the problem can arise and the varied considerations that should be taken into account in order to find a solution. In particular, it is suggested that a priori reasoning should be avoided and a flexible approach adopted, taking into account policy considerations such as those of favouring legitimacy and upholding the validity of marriages.”

75. I now turn, briefly, to *Cheshire, North & Fawcett, Private International Law*, 15th Ed (2017) (“*Cheshire*”). I first note that *Cheshire* comments, at p.909, that: “There is general agreement that (capacity to marry) includes matters of legal capacity such as ... bigamy ...”; and, at p.925, that an “allegation of incapacity to marry on the grounds of bigamy involves most frequently in private international law a question of the recognition of a foreign divorce or annulment”.
76. *Cheshire* also deals with the incidental question in Chapter 4. A somewhat less flexible approach is proposed to that suggested in *Dicey*. In *Cheshire*, it is suggested, at p.54, that, in order to create greater consistency and certainty, “as it is the main question that is essentially before the court”, the incidental question should also be determined “on the basis of the conflict rules applicable to the main question”. It was recognised that there “may however be a need for a correction mechanism in specific cases”.
77. I would add that *Cheshire* equally does not provide support for Mr Murray’s submission. When addressing section 50 of the FLA 1986, at p.926, it is noted that section 50 “only applies where a foreign divorce or annulment is recognised in England” (my emphasis) and does not apply to the converse situation, namely when a divorce is not recognised in England. Reference is made to *Schwebel v Ungar* and to the incidental question being resolved in that case “in a converse way to that to be found in section 50, ie by regarding the main question as that of capacity to marry, holding the spouse capable notwithstanding the non-recognition of the divorce under the forum’s divorce recognition rules”. It is also noted that the Law Commissions “examined the problem but concluded that no legislative provision should be made for it” (as referred to above). One factor highlighted by *Cheshire* is that, because “the English recognition rules are so broad ... conflict with the law governing capacity is unlikely”. These comments would clearly not be relevant or applicable if section 46 was determinative of the outcome of any such conflict.

Determination

78. It is clear, as referred to above, that from the perspective of English law, the wife's previous divorce, comprising proceedings partly in England and partly in Pakistan, was a transnational divorce which is not entitled to recognition under the provisions of the FLA 1986 as decided in *Re Fatima*.
79. However, contrary to the submissions of Mr Murray, it is clear to me that this is not determinative of the issue of whether the wife lacked the capacity to marry the husband on 19 December 2008 on the basis that she remained married to her first husband.
80. The relevant statutory provisions are those referred to above in the MCA 1973 and the FLA 1986.
81. In respect of the latter, section 45 does not expressly state what the effect of non-recognition is on capacity to marry. Section 50 expressly provides *only* that, when a divorce is recognised as valid under the FLA 1986, "the fact that the divorce or annulment would not be recognised elsewhere shall not ... cause the subsequent marriage or civil partnership of either party (wherever it takes place) to be treated as invalid ...". In *Lawrence v Lawrence*, the Court of Appeal determined the effect of the *recognition* of a foreign divorce in respect of the validity of a foreign marriage but, as referred to above, there is no authority which deals with the effect of *non-recognition* and which supports Mr Murray's submission. There is, however, extensive analysis in the Law Commissions' Reports and other documents which support the conclusion that non-recognition under the FLA 1986 is not determinative of the effect of a divorce for the purposes of capacity to marry. There is also analysis in *Dicey* and *Cheshire* to like effect. I have set these out at length above and do not propose to repeat them.
82. As for the provisions of the MCA 1973, I also consider these do not support Mr Murray's submission. The present appeal concerns a nullity petition under section 11. Section 14 expressly provides that "nothing in section 11": (a) precludes the application of the normal rules of private international law to the determination of any matter affecting the validity of a marriage; or (b), perhaps more importantly for the purposes of the present case, requires "the application to the marriage of the grounds (set out in section 11) except so far as applicable in accordance with those rules". In my view, this provision is of more relevance to the present case than the provisions in the FLA 1986. I consider that it supports the conclusion that capacity to marry on the ground of bigamy (i.e. whether section 11(b) applies) *can* still be determined "in accordance with the rules of private international law", namely by reference to the law of each party's antenuptial domicile.
83. If section 45 of the FLA 1986 is not determinative, what approach should the court take to determining whether the marriage in this case is void? In my view, this requires deciding whether, in the circumstances of this case, priority should be given to the rule governing capacity to marry (under which the wife has capacity to marry) or the rule governing the recognition of foreign divorces (under which the wife's previous divorce is not recognised).
84. I consider that, as suggested in the 1984 Report, at [6.60], "it would not be satisfactory to lay down a general rule of priority" and that, as suggested by *Dicey*, at [2-063], "a

priori reasoning should be avoided and a flexible approach adopted”. I should also say that I agree with the proposition advanced in *Dicey*, at [2-047]:

“But it is neither possible nor desirable to find a solution which would apply in every case. Rather, each situation should be looked at separately in order to find a solution that produces the best results in that situation. As one writer put it, “there is really no problem of the incidental question, but as many problems as there are cases in which incidental questions can arise.” Instead of trying to solve the problem on the basis of general theory, one should consider the practical consequences in each situation.””

In other words, I consider that, reflecting what Ormrod J said in *Messina v Smith*, the outcome should be “as justice requires, in the light of all the circumstances of each case”.

85. In deciding what justice requires, the court should give weight, and probably significant weight, to the general policy objectives of seeking to uphold the validity of a marriage and of seeking to avoid creating a limping marriage.
86. I do not think it necessary for the purposes of the present case but, if I was to seek to narrow the approach down, I would be inclined broadly to adopt that proposed in *Cheshire*, at p.54, because, by applying the choice of law rules applicable to the main question to the issues of both capacity and recognition, it seems to me more likely to achieve those policy objectives. This is because the issue raised by this appeal will only arise when a spouse has the capacity to marry by the law of their domicile but their previous divorce (or nullity) is not recognised under the FLA 1986.
87. I certainly consider that that approach should be applied in the present case. In my view, as set out in *Dicey*, at [2-049], “the principal question is whether the second marriage is invalid for bigamy”. This “raises a question of capacity” which, in respect of the wife, is governed by the law of Pakistan. I also consider that the question of the validity of the wife’s previous divorce should be determined by the law of Pakistan, under which it was effective to determine her first marriage. This would mean that the wife had capacity to marry the husband and that the marriage is not void under section 11(b) of the MCA 1973.
88. This approach also accords with the outcome in *Schwebel v Ungar* which provides a sound precedent to follow in giving priority to the rules governing the capacity to marry over the rules relating to divorce recognition.
89. Also in deciding what justice requires, I need to consider whether there are any public policy reasons why the marriage should not be recognised. I accept that there might be public policy reasons why the divorce recognition rules should take priority over the marriage capacity rules. Mr Murray relied on what Lord Ackner said in *Re Fatima*, at p.534 G, I repeat:

“It is thus clearly the policy of the legislature to deny recognition to divorces obtained by persons within the jurisdiction, and therefore subject to the laws of the United Kingdom, by any proceedings other than in a United Kingdom court. It would

seem contrary to that policy to encourage the obtaining of divorces essentially by post by Pakistani nationals resident in this country by means of the talaq procedure.”

In my view, the key words for the purposes of the present appeal are “divorces obtained by persons within the jurisdiction, and therefore subject to the laws of the United Kingdom”. These would apply to the wife’s previous husband. They do not apply to the wife and, in the circumstances of the present case, I do not consider that they should be applied to the wife. I see no reason why the wife should be subject to this policy consideration when, at all relevant times, she was domiciled in and lived in Pakistan. I see no reason why she should be expected to obtain legal advice in England and, if she was able to do so, to commence divorce proceedings in England. She was, in my view, entitled to rely on her first marriage having been determined by a divorce which was valid in Pakistan. The public policy objectives would be sufficiently achieved by denying recognition of the divorce to the wife’s previous husband because of his connections with the UK.

90. In conclusion, therefore, the wife’s marriage to the husband is valid as she had the capacity to marry because her previous divorce was effective under the law of Pakistan. The fact that that divorce is not entitled to recognition under the FLA 1986 does not mean that she did not have the capacity to marry.

Lady Justice Asplin:

91. I agree.

Lord Justice Stuart-Smith:

92. I also agree.