



Neutral Citation Number: [2021] EWHC 2307 (Fam)

Case No: ZZ20D14768

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Remotely (MS Teams), as if from: Family Court
Coverdale House
East Parade
Leeds

Date: 16/08/2021

Before:

THE HONOURABLE MR JUSTICE COBB

Between:

Joana Yaa Botwe
- and -
Johnson Anom Brifa

Applicant

Respondent

The Applicant was present, and unrepresented
The Respondent was present, and unrepresented

Hearing dates: 13 & 14 July 2021

Approved Judgment

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public.

The Honourable Mr Justice Cobb:

Introduction

1. The recognition, or non-recognition, of divorce affects a party's status; this in turn can affect matters as diverse as nationality, immigration status, and the freedom to marry. These considerations lie behind an application dated 8 December 2020 made by Ms Joana Botwe (who, for convenience – although I realise that this terminology lies at the heart of the dispute – I shall refer to as “the wife”) who seeks a declaration that she is currently married to Mr Johnson Brifa (“the husband”); this application is brought pursuant to the provisions of *sections 51 and 55 Family Law Act 1986*.
2. The parties agree that they were married on 4 March 2017 in Accra, Ghana, in accordance with tribal custom. There is no dispute in this case as to the validity of the marriage by the *lex loci celebrationis* and it is evidenced, for our purposes, by a marriage certificate (see §3.1 of *PD7A FPR 2010*¹).
3. The issue arising in this application is whether the parties have been divorced by similar tribal custom in Ghana, and whether, if so, this court should recognise the same. In this regard, I have conducted a hearing to consider the following specific questions:
 - i) As a matter of fact, did the parties go through a custom/procedure in Ghana in the presence of the parties’ families (as would be required), on or about 25 August 2019, to bring an end to their marriage by divorce, as the husband maintains?
 - ii) Was the certificate of registration of divorce in Ghana, which followed the alleged customary divorce, lawfully and legitimately obtained, and signed by the wife’s father as a witness, as the husband maintains?
 - iii) Was the alleged registration of the divorce by the parties’ families an integral part of the ‘process’ of the divorce, or merely evidence of the same? Thus, if there was a customary divorce, was it obtained by a “judicial or other process”?
 - iv) If the customary divorce procedure was followed exactly as the husband maintains, was this procedure effective to achieve a divorce in Ghana?
 - v) Depending on whether the divorce was obtained by “judicial or other process”, will the divorce be recognised in this country? Relevant to this question will be a consideration of where the parties were domiciled and/or habitually resident at the time of the alleged divorce.
4. For the purposes of determining the application, I have heard oral evidence from the wife and the husband. Both of them appeared without legal representation before me. I have heard oral evidence from the wife’s father, Mr Ernest Appietu, and from the husband’s mother, Mrs Lydia Asantewaa both of whom joined the hearing by video-link from Accra, Ghana; Ms Asantewaa’s evidence was given in her native language of Twi. I have received a number of supporting statements from family members. The parties have both filed a range of other documents which they maintain support their

¹ Validity of the marriage is proved by a certificate of the marriage issued under the law in force in the country where the marriage registration took place.

respective cases. At my direction, the parties jointly commissioned an expert's report from Ms Charlotte Boaitey, a barrister at the English and Ghanaian Bar. Following the hearing, and while reflecting on the evidence and preparing this judgment, I caused further questions to be posed of Ms Boaitey, which she has helpfully answered.

Background facts

5. The parties are Ghanaian nationals. The husband has lived in this country for many years. The wife had been living here since 2012. It is material to note that the wife came to this country nine years ago under a 2-year family visitor visa (to visit her sister); she accepts that at the end of that period she became an 'overstayer'. In 2014, she met the husband, and they co-habited. In 2016, they made preliminary arrangements to be married in England; the registrar refused them permission given the wife's lack of immigration status. Following this, the wife was detained by the Home Office and held for a period of 2-3 months as an overstayer. On her release, the parties arranged to be married in Accra, Ghana, and this took place on 4 March 2017. It is not disputed that their marriage was conducted in apparent accordance with local domestic/tribal custom; the wife was not physically present for the marriage (she was actually in England at the time) although the husband was present. He told me that he took no actual part in the marriage ("I was not allowed to speak. it was my family who contracted the marriage for me"); the customary marriage rites were performed on their behalf by their respective family heads and relatives. This was a first marriage for the wife and a second marriage for the husband, who has children from a former marriage.
6. Following the customary formalities, the marriage was registered at Ayawaso East Municipal Assembly in Ghana. I have seen the marriage certificate, and the formal statements attesting to its truth which are dated 6 June 2017.
7. On the evidence of both the wife and the husband, they were living in England during the years up to and including 2019. Their centre of interests was (and is) here. The wife declared in her application for a declaration of marital status that both parties were habitually resident in this jurisdiction in the year before the date of her application; I am satisfied that this was so, and indeed there is no reason to doubt that they remain so habitually resident.
8. The marriage proved not to be a happy one; it is unnecessary for me to rehearse here the cross-allegations of behaviour of the parties which do not bear upon the central issue. A material dispute arises between the parties about the date on which they separated. The husband asserts it was in December 2018. The wife maintains that it was not until 10 September 2019; she says that she only left after the husband's adult daughter Caroline arrived to stay. Caroline has filed a statement asserting that she has never met the wife. The issue is of some significance because it is the wife's case that the parties were still living together as husband and wife in the matrimonial home at the time when the husband asserts that they went through the alleged Ghanaian customary divorce. There is evidence, which I reference later, that the wife was living at [Address B] in the spring of 2019, while the husband continued to live at [Address A], the former matrimonial home.
9. It is the husband's case that on 25 August 2019, members of the parties' extended families came together in Ghana, at the home of the wife's father, and agreed, in according with custom, that the marriage should come to an end. The husband goes on

to assert that the customary divorce was subsequently formally registered as such. The formal signed registration of divorce document (dated 6 September 2019) specifically (and to my mind importantly) references that Mr Brifa was living at [Address A] and Ms Brifa was living separately at [Address B]. I have been shown letters from the Second Deputy Judicial Secretary of the Judicial Service in Ghana (26 September 2019) and from the Ghanaian consulate in London (10 December 2019) which both confirm the authenticity of the documents which comprise the registration of the divorce.

10. The husband's case is that he personally handed a copy of all of the Ghanaian divorce registration documents to the wife on 19 March 2020, and informed her that he would advise the Home Office of their change of marital status on the following day. The husband's case is that the wife responded by asking him not to tell the Home Office as this would "not help" her immigration status; he added:

"... she requested of me another divorce here in the United Kingdom since the date of the divorce from Ghana would be a problem in retaining her residential permit here in the United Kingdom, but I refused and said we cannot annul the same marriage twice and that will amount to illegality."

The wife denies the conversation and claims that she first saw any Ghanaian divorce documentation on 25 October 2020 when it was produced within her English divorce proceedings.

11. Five days after this alleged conversation, on 24 March 2020, the wife submitted a petition for divorce at the Family Court at Bury St Edmunds. She alleged unreasonable behaviour as her ground for divorce. The husband filed a 'Response' document (30.3.2020) in which he alleged that the divorce had already taken place in Ghana, and that the date of the dissolution, purported to be in the presence of both families, "with all tribal rites performed", was 25 August 2019; he also filed an 'Answer' (albeit out of time, on 9.4.2020) contesting the allegations of unreasonable behaviour.
12. The husband's case was set out thus:

"... a statutory declaration was once again declared on our behalf before a Notary Public by our family representatives (in accordance with Ghanaian law) and later registered with the Customary Marriage and Divorce Registry where a Divorce Certificate was again issued as it was done with the Marriage Certificate. The Divorce Certificate was certified and attested by both the Judicial Service and Foreign Ministry of Ghana in September 2019.... When I finally received the divorce certificate, I sent it to the Ghana Consulate here in the United Kingdom so they could attest the document brought in from Ghana as the law demands."

13. The wife's case is that she has never been a party to any divorce proceedings in any court other than those currently before the English Court; she disputes that the husband contacted the wife's family to ask them to perform the necessary divorce rites as custom demands, she disputes that there was ever a meeting between the families in Accra in

August 2019, and claims that no customary divorce has ever taken place in Ghana. She initially maintained that there was no record of the divorce held by the Ayawaso East Municipal Assembly; she later accepted that there was a record, but that she had not been served with it by the Ghanaian authorities.

14. Directions were given on the petition by DDJ Stuart on 27 August 2020, requiring the husband to provide evidence of the Ghanaian divorce. He did so. On 28 October 2020, HMCTS wrote to the wife with a communication from DDJ Todd: “If there remains an issue between the parties as to the validity or otherwise of the Ghanaian divorce, an application will have to be made pursuant to *section 55 Family Law Act 1986* for a declaration of marital status.” The petition was stayed, pending the outcome of this application.

Expert opinion

15. Before discussing the evidence, it is convenient to reference here the opinion, dated 14 June 2021, from the Single Joint Expert, Ms Charlotte Boaitey; she was selected jointly by the parties to provide advice in the case. She is a practising member of the English Bar and of the Ghanaian Bar.
16. She has described the various types of marriage recognised under the law of Ghana; these include (i) customary marriages, (ii) marriage of Mohammedan law (Islamic); (iii) Christian and other marriages. The parties in this case accept that their marriage was attained in a customary manner, which (per Ms Boaitey) “is essentially a marriage between the man’s family and that of the woman’s family. The family therefore plays a very important role in ascertaining whether or not a valid customary law marriage exists.”
17. Ms Boaitey advises that the requirements of the customary marriage are:
- i) An agreement between the parties to live together;
 - ii) Consent of the families of the parties that they should be married;
 - iii) Consummation of the marriage.

As I have indicated above, there is no dispute that these requirements were fulfilled and that a lawful marriage was joined in accordance with Ghanaian custom, between these parties in March 2017.

18. Ms Boaitey advises, in relation to divorce, that:

“By the same token, the family plays an equally important role in ascertaining whether a customary law marriage has been dissolved when there is a divorce between the married couple. In fact, a divorce cannot take place without the consent of the respective families of the man and the woman.”

She adds further, and importantly:

“The customary rites for valid divorce proceedings vary from tribe to tribe but the differences are as matter of style rather than contents. The relatives of the two parties to the marriage meet and when all efforts at reconciliation fail, those assembled, ask the parties which of them has lent anything to the other party. Any borrowed item must be returned to the partner who lent it, except that the man may say that even though he lent a particular item or particular items to the wife, he does not intend to claim it or them back. The wife may do likewise. The only item that must be returned to the husband is the ‘ti nsa’ or "head money"² which he paid, at the time of the marriage, to the wife's family. If the dissolution of the marriage was due to the man's fault, he will be requested by those assembled to "send off" (i.e., compensate) the wife. If on the other hand, the wife is in default, i.e., she occasioned the dissolution by either acts of prostitution or adultery, she will be required to compensate the husband. The dissolution is sealed by the ceremony called Hyireguo or powdering. A member of those assembled, takes white powder in his hand and puts it on the shoulder of the wife. He then says to her: "today we have powdered you. We have no matter with you again." The speaker then hands over the woman to her family and that ends the ceremony. The important point to note is that the ceremony must comply with the custom of the parties to the marriage.”.

19. Pausing here, it is no part of the husband’s case that the wife was present at the customary divorce ceremony, and she could not therefore be ‘powdered’ as Ms Boaitey has described above. I caused enquiry of Ms Boaitey as to whether the absence of the ceremony called Hyireguo would be material to her overall opinion. She replied:

“... the practice of Hyireguo contemplates the presence of the wife at the divorce but, in the modern world where there is quite a substantial number of Ghanaians in the diaspora, that customary requirement of Hyireguo is entirely dispensed with and is no longer a strict requirement of a dissolution of a Customary marriage. The wife does not need to be present. The fact that the Hyireguo did not take place because of the absence of the wife does not make the Customary divorce ineffective because the meeting of the two families, if Ms Asantewaa’s evidence is to be believed, went through all the other processes which are part of the constitutive elements in the dissolution of Customary marriages. Therefore, if the powdering did not happen it has no effect on the validity of the customary divorce.”

20. Ms Boaitey describes the process for the registration of customary marriages and customary divorces in accordance with *Part I* of the consolidated Ghanaian legislation (the *Marriages Act 1884-1985* (CAP 127)); each application for registration is to be

² ‘ti nsa’ are the Twi words; ‘Head Money’ is the literal translation

accompanied by a statutory declaration stating the names of the parties to the marriage and shall be “supported by the parents of the spouses, or the persons standing in the place of the parents living at the time of the application for registration”. She says:

“The entry into the registry of marriages of the customary marriage means that upon dissolution according to the applicable custom, it must also be registered as dissolved in accordance with this law, i.e., Part One of CAP 127. The registration of dissolution of the marriage must be in the same district as where the marriage was registered”. (Emphasis by underlining added).

21. The relevant part of the Ghanaian domestic law relating to registration is quoted by Ms Boaitey:

“Where a marriage registered under this Part is dissolved in accordance with the applicable customary law, the parties shall within the prescribed period, notify the Registrar of the district in which the marriage was registered of the dissolution.

On the registration of a marriage or the dissolution of a marriage, the Registrar shall issue to the parties concerned a certified true copy of the entry in the register on a payment of the registration fee ...”.

22. In the context of marriage, she advised:

“The essence of registration and its further entry into the Register is its admissibility in evidence as sufficient proof of the registration of the marriage in any legal proceedings”.

In like terms for divorce, she advised:

“In order for the divorce or dissolution of marriage to be recognised as valid in Ghana law, the best evidence is registration” (Emphasis by underlining added).

23. I specifically asked Ms Boaitey to advise further on whether registration is/was an essential part of the customary divorce process in Ghana, or whether it merely provides evidence of the same. She replied:

“Registration of customary marriage divorce is not part of the customary marriage divorce process. Failure to register the customary divorce will not render it invalid, as long as the two families went through the customary divorce process. Those actions constitute customary marriage divorce.

A registration of a customary marriage divorce becomes imperative for the purposes of providing evidence that a customary divorce has taken place. Registration is popular

among Ghanaians in the diaspora. Indeed, customary marriage divorces exist throughout Ghana that have not been registered”. (Emphasis by underlining added).

24. She points out that the domestic Ghanaian statute “emphasises the family as being a cardinal part of the customary law marriage” and divorce, and identifies no other ‘cardinal’ (by which I understand her to mean ‘essential’ or fundamental) features. She advises that the registration of the dissolution of the marriage has to be in the same district where the marriage was registered and the process (including the requirement for support for the application for dissolution from the parents of the spouses) mirrors that for the registration of the marriage. There is an opportunity under statute for “a person who knows of a cause why the Registrar should not have registered the dissolution under the applicable customary law” to file an objection to the registration of the dissolution, and if successful, the entry in the register recording the dissolution shall be “expunged” (*section 8 of the Marriages Acts*).
25. The opinion given by Ms Boaitey appears to correspond entirely with expert evidence given by Ms Mercy Akman, a family barrister practising in England and Ghana, in the case of *NA (Customary marriage and divorce – evidence) Ghana* [2009] UKAIT 9, a decision of the Immigration and Asylum Tribunal. An issue arose in that case as to the status of a marriage of an appellant, which was said to have been dissolved by customary divorce, but there being no written evidence of registration of the same. The Tribunal concluded, at [24], that:

“(a) A customary marriage is a lawful form of marriage in Ghana which must be carried out under the relevant particular tradition and customary practices.

(b) Although registration was mandatory from 1985 to 1991, failure to register did not affect the validity of the marriage. Registration is now optional.

(c) Customary marriages can be lawfully dissolved in accordance with the applicable customary law. Dissolutions may also be registered but again registration is optional. Once a customary marriage has been dissolved, the parties are free to enter into another marriage. Customary law generally permits polygamy but this is not permitted for marriages under the Marriage Ordinance Act”. (Emphasis by underlining added).

The Tribunal accepted the effectiveness of the appellant’s customary divorce without him having produced evidence of registration of the same.

26. In reviewing this advice, I also considered the decision of *O v B-M* [2019] EWFC B23 (Mr Nicholas Allen QC sitting as a Deputy High Court Judge) in which a Petitioner sought a declaration of marital status under the *FLA 1986*; the judgment considered the validity of a Ghanaian customary marriage. I note (per [18] of the judgment) that the Judge recorded:

“On 25th April 2017 P registered in Ghana what she says was the parties' customary marriage (it being common ground that such a marriage does not have to be registered for it to be valid)”.

Mr Allen had referenced the earlier decision of Singer J in *Alfonso-Brown v Millwood* [2006] EWHC 642 (Fam), [2006] 2 FLR 625, where it is to be noted that the judge accepted that an unregistered Ghanaian customary marriage would be effective and recognisable as such; the issue in that case, as in *O v B-M*, was whether both parties were consenting to being married.

27. Finally, I record that the wife has provided me with a 2019 article (‘A Brief Note...’) written for a website ‘Ghanalawhub’ by a Selasi Kuwomu in which a contradictory impression is given of the requirement for registration of a divorce; it is there said that:

“Divorce under customary law depends on the laid down procedure of the custom of the parties. The grounds and procedure for divorce, therefore, differ from tribe to tribe. It is worth noting that a customary divorce must be registered with the parties making a statutory declaration stating that the marriage has been dissolved in accordance with customary law.” (Emphasis by underlining added).

Was there a divorce by Ghanaian custom?

28. I turn first to consider the questions of fact posed at §3(i) & (ii) above. Where I make findings of fact, and/or declare myself in this judgment as ‘satisfied’ of a fact, I do so applying the civil standard of proof in accordance with the well-known guidance from *Re B* [2008] UKHL 35.
29. There is a straight issue of starkly disputed fact as to whether the parties’ families came together in Accra on 25 August 2019 to effect the divorce of the parties in accordance with Ghanaian custom. On this issue, I heard the evidence of Mrs Asantewaa (the husband’s mother) and Mr Appietu (the wife’s father). Given the clear conflict of their evidence, one of them is not telling the truth.
30. Mrs Asantewaa was clear that on 25 August of 2019 she visited the home of Mr Appietu in Dansoman Beach, Accra. In her witness statement, she had said this:

“That I finally received a call from my son telling me that Joana Yaa Botwe has refused to return to the matrimonial home 8 months since she left. He continued they have agreed mutually to annul (sic.) the marriage thus I should confer with Joana Yaa Botwe’s dad and family so that we can go and perform the necessary customary rites to bring the marriage to an end as custom demands.

That I consulted with Joana Yaa Botwe’s family severally and they confirmed that they had received same information from their daughter, a lot of deliberations went on between

both families as to how and when the customary rites could be performed to end the marriage”.

31. In her oral evidence, confirming the contents of her written statement, she told me that she visited Mr Appietu at his home and was accompanied by three family members: her brother, her husband’s nephew and her younger son (the husband’s younger brother). She told me that they were met by members of the wife’s family at Mr Appietu’s home (she recalled that there were about four in number), but she did not know their names, and was not introduced to them. She told me that the families discussed the ‘trouble’ in the marriage, and agreed that the couple ‘should go their separate ways’. The families discussed the payment of the ‘ti nsa’ (see the second quote in §18 above); she said that Mr Appietu had requested payment of 15,000 Ghanaian Cedis, but that they had negotiated and had ultimately agreed the payment by the husband’s family of 10,000 Cedis. She told me that the money had later been withdrawn from her bank account and handed over in cash; she told me that she did not see what Mr Appietu did with the money when she handed it to him. I was curious to know the provenance of the money; she told me that the money had been accrued by contributions from members of the family, which was distributed from time to time for needy causes (I interpreted it as a ‘rainy day fund’). She said that she had spoken with her family at that time, and they had agreed that this was a proper use of the money. She told me that she had later signed the formal registration of the divorce before an official at the court together with Mr Appietu. She told me that she was given a copy, which she handed to one of her children, to send to the husband in England.
32. Mr Appietu denied emphatically that this meeting had ever taken place. He denounced Mrs Asantewaa as a liar. He initially told me in his oral evidence that he had “never” met Mrs Asantewaa, but later accepted that he had met her at the ‘marriage’ ceremony in 2017, although she had not in fact introduced herself at that time. He denied that he had signed the certificate seeking registration of the divorce. Somewhat to my surprise, he also told me that although his signature appeared on the marriage certificate, he had not in fact signed that document either; he told me that a member of his family had ‘impersonated’ him and signed on his behalf. He accepted that his daughter had phoned to tell him that the marriage was in difficulties but that he felt powerless to help her given that she was in England. He told me that at no time had he made any search for the divorce certificate at the Ayawaso East Municipal Assembly, notwithstanding that the wife told me that the family (she did not expressly refer to her father) had made such searches.
33. The husband and wife both gave evidence about events surrounding the alleged customary divorce. The following important evidence was given.
34. First, as I indicated at §8 above, it is the husband’s case that the wife had left the matrimonial home in December 2018; the wife maintains that she had not left until September 2019. The husband produced, and was able to point to, a number of text messages which had passed between the parties in the first half of 2019. These include:
 - i) (Wife to Husband): “Hope you’re well. Wanted to know if any letter came through the post for me” (11.1.19);

- ii) (Wife to Husband): “Hi hope u r ok. Can I please ask for another 50 pounds?”... [No response] “U ignore my calls and now u ignore my messages. No problem. I get the message. Have a good night and Thank u” (20.4.2019)
 - iii) (Wife to Husband): “please kindly text me [landlord’s] account details”; (Husband to wife): the husband sends these to her by return; (26.4.2019);
 - iv) (Husband to Wife): “you have a letter, let me know when and where”; (wife to husband) “please drop it in my letterbox” (3.6.2019)
 - v) (Wife to Husband): “was just wondering if any mail has come through the post for me” (11.7.2019); (husband to wife) “The only one is what I sent to you on...”
 - vi) (Husband to Wife): “you have a letter, arrange to pick it when convenient for you” (13.8.2019).
35. The wife’s case is that she was merely requesting the husband to forward her mail to the ‘temporary’ address which she had fled to, given his behaviour.
36. Secondly, in May 2019, the husband asked (by text) for the wife to send him her address, so that he could forward some mail to her; the wife sent him her address, which is [Address B], by return. This is the address which is recorded on the formal divorce certificate issued in Accra in September 2019.
37. Thirdly, the husband pointed to a text communication which he had received from the wife on 26 August 2019, namely the day after the formal customary divorce in Ghana. In that conversation, the wife said this:
- “Thanks for coming today. I do appreciate it. Once again I am truly sorry for anything that I said or did to offend u. I will try my very best to work on my weaknesses and my flaws to be the best me I can be” (sic.).
- The husband told me that this reflected the conversation which they had had about the divorce. He replied:
- “Thank you too, God’s time is the best”.
- He told me that by then, the wife knew that the marriage had come to an end in Ghana.
38. Fourthly, I heard evidence of an alleged conversation between the husband and wife on 19 March 2020 when the husband allegedly handed her a copy of the Ghanaian divorce certificate by hand (see §10 above); he said that he had told her that he would send it to the Home Office on the next day. It was explained to me that if the wife had not been married to the husband for 3 years this would affect her immigration status as she is/was dependent on him as an EEA national. As I earlier recorded (§10) the wife denies that the conversation ever happened.
39. Fifthly, I have seen the husband’s bank statements which show that he made payments to the wife’s landlord in respect of [Address B] over a period of time in 2019.

40. Sixthly, the husband pointed to an exchange of texts in September 2019, in which he had referenced removing her name from his council tax record and giving the council [Address B], to which she had replied: “U know what u r doing will destroy the papers so I hope u bear that in mind”, which he interpreted, reasonably it seems to me, as an indication that she was concerned that by revealing that she was living apart from him would adversely affect her Home Office application.
41. The wife’s case is that the husband is seeking to exploit her vulnerable immigration status, and is relying on an alleged fictitious divorce in Accra as a form of abuse. She told me that “he is concocting the divorce in order to frustrate my ability to remain here”. In support of her case that she was still living with the husband in the summer of 2019, she pointed to the fact that in March 2019 she and the husband had opened a joint bank account, which, she argues, is inconsistent with them living apart.
42. The wife asserted that the documents evidencing the registration of the divorce (including the formal attestation) were probably obtained by fraud, notwithstanding that this would have required the husband to backdate the same, but she could not support that accusation other than by reference to some general media stories about the ease by which official documents can be fraudulently obtained in Ghana. She has queried the validity of the registration of the divorce, but interestingly has not applied in Ghana, as she could have done, to have the record of the registration expunged (see *section 8* of the Ghanaian *Marriages Acts*, quoted at §24 above).
43. The wife has produced an exchange of text messages with her uncle, in which she apparently advises him of the husband’s claim to have been divorced in Ghana; the uncle expresses astonishment. I can attach little weight to this evidence which is entirely self-serving.
44. The wife initially claimed that her family had visited the registry office at Ayawaso but had not been able to trace any registration of the divorce; when she gave her oral evidence she told me that her uncle and brother (who, she told me, had visited the registry office on her behalf) had been told that the divorce *had* been registered, but were told that there was no correspondence with the wife to prove this.
45. Taking all of this evidence together, I am satisfied that a customary divorce did take place in Ghana in August 2019, followed by its registration, as alleged by the husband. Notwithstanding the challenges of receiving the evidence of Mrs Asantewaa, I found her to be a credible witness, giving a plausible account of the meeting between the families to discuss the failed marriage, and the formalities to achieve the divorce according to Ghanaian custom. Her account of the negotiation in relation to the ‘ti nsa’ had the ring of truth, and although I pointed out to the parties that I had not been provided with a bank statement to confirm the withdrawal of funds, I could not establish how practical it would have been to obtain such a document, and consider that the absence of this evidence did not materially undermine her case. By contrast, I found Mr Appietu to be unconvincing in his rejection of the evidence about the meeting in August 2019, and in his denial of having signed the divorce certificate in 2019; his credibility in this area was plainly compromised by the fact that, as he told me, he had apparently willingly allowed someone to impersonate him for the purposes of signing the official documentation for the registration of the marriage two years earlier.

46. I find that the wife left the husband in December 2018, as the husband has alleged; I reject the wife's case about this. The text messages which I have reproduced at §34 above can only sensibly be read as indicating that the wife had moved out of the matrimonial home by that time, and that the parties were living apart. I reject the wife's case that the address which she gave the husband in May 2019 was only a 'temporary' address to which she had fled; this, in my judgment, is not consistent with (a) the regularity, over a period of time, with which she asked for mail to be directed, and (b) that, on her own case, she has been at the same address now for well over two years. Although finding that the wife lied about this, and mindful that this does not mean that she has lied throughout her evidence, it has nonetheless caused me to question her reliability on other matters. I am satisfied that the text exchange on 26 August 2019 referenced discussions about the breakdown of their marriage, and the divorce on the previous day. I accept that the conversation on 19 March 2020 (§10 and §38) which the husband described, took place as alleged, and this is consistent with the later exchange in which she referred to the damage he would do to her case for immigration status if he disclosed that they were living apart (see §40). I accept that the setting up of the joint bank account was more likely to be attributable to the husband's attempts to persuade the wife to consider a rapprochement, than evidence of their joint living.
47. In conclusion, on the evidence which I have received, written and oral, I am satisfied of the following:
- i) That the wife had moved out of the matrimonial home in December 2018 (as the husband alleges), and not in September 2019 (as the wife alleges); the text messaging throughout the early months of 2019 (§34 above) confirms that she was then living at [Address B], which she disclosed to him in May 2019 (§36 above);
 - ii) That the husband participated in the opening of the joint bank account in March 2019 (§41 above) in an effort to tempt the wife back to the home, as he wished to reconcile with her;
 - iii) That the formalities for a customary divorce took place in Accra on 25 August 2019, as the husband and Ms Asantewaa have attested (§30/§31 above). Their evidence is to a limited extent corroborated by the exchange of text messages between the husband and wife on 26 August 2019 (§37 above);
 - iv) The customary divorce was formalised in Ghana; the documents all bear dates which are consistent with the husband's case. I have no reason to question the signed letters from the Second Deputy Judicial Secretary nor the Ghanaian consulate which confirm the authenticity of the registration documents. I am entirely unpersuaded that these registration documents have been procured by fraud, and I am also satisfied that Mr Appietu signed the relevant document;
 - v) That had the wife truly wished to object to the customary divorce in Ghana, there is a mechanism for her to do so (by which the divorce could be expunged from the records: §24 above), but she has not done so;
 - vi) That the husband and wife had a conversation in March 2020 about the Ghanaian divorce, and its likely impact on the wife's immigration claim (§10); that in consequence, the wife decided to pursue her own divorce in this country in an

attempt to show that she had been married to the husband for more than three years.

Was the alleged registration of the divorce by the parties' family an integral part of the 'process' of the divorce, or merely evidence of the same? Thus, if there was a customary divorce, was it obtained by "judicial or other process"?

48. An important route-marker in the statutory journey to recognition or non-recognition of an overseas divorce is contained in *section 46 FLA 1986* and requires determination of whether the same was "obtained" in 'proceedings' (*section 46(1)*) (which are defined as "judicial or other proceedings": *section 54 FLA 1986*) or "otherwise than by means of proceedings" (*section 46(2)*).

49. In this case, as in others like it I suspect, the focus is on two linked aspects of the statute:

i) how the divorce is "obtained"?

and

ii) what is meant by "other proceedings"?

As to (i) above, it is important to establish whether the 'judicial or other proceedings' are fundamental or integral to the grant of the divorce (in this situation, the statute contemplates the intervention of the state or official agency, in some measure, in effecting the dissolution of the marriage), or (if there are any proceedings at all) they are ancillary to the divorce (i.e. simply providing some formal evidence of the divorce). If the former, then the route to follow is contained in *section 46(1)*; if the latter, then it is *section 46(2)*.

50. As it is clear that there was no element of 'judicial' intervention or adjudication in this case (i.e., there is no suggestion that there was any judicial act which contributed or led to the dissolution of the marriage) the essential question on these facts is whether the process by which the customary divorce was registered constitutes divorce obtained by "other proceedings".

51. First, it is clear that 'judicial or other proceedings' can be a legislative or administrative process. Balcombe J (as he then was) in *Chaudhary v Chaudhary* [1984] 3 All ER 1017, [1985] FLR 476, said this:

““proceedings” requires some form of State machinery to be involved in the divorce process; not necessarily machinery established by the state ... The act or acts of one or both of the parties to the marriage, without more, cannot amount to proceedings; there must be an intervention of some other body, a person with a specific function to fulfil, such as the Union Council in the case of the talaq considered in *Quazi v Quazi* [1980] AC 744, [1979] 3 All ER 897”.

52. In the same case, Oliver LJ opined that 'proceedings' do need a:

“...degree of formality and at least the involvement of some agency, whether lay or religious, of or recognised by the state

having a function that is more than simply probative".
(Emphasis by underlining added).

The word 'probative' in the passage quoted above (highlighted by underlining) was later appropriately interpreted as "more than just a source of proof of the divorce": *H v H (Queen's Proctor intervening) (validity of Japanese divorce)* [2006] EWHC 2989 (Fam), [2007] 1 FLR 1318: Stephen Wildblood QC sitting as a Deputy HCJ). In that case (*H v H*) it was "fundamental" to achieving the Japanese Kyogi Rikon divorce that it had been registered.

53. It is therefore unsurprising that a consensual divorce under Chinese customary law or customary Thai law was not held to constitute 'other proceedings' (see Oliver LJ in *Chaudhary v Chaudhary* [1984] 3 All ER 1017, [1985] FLR 476), nor did a process in the Gambia by which a husband simply wrote a letter to the wife confirming his wish for a divorce (*Wicken v Wicken* [1999] Fam 224). In none of these cases was there involvement from the state or other agency in the execution of the divorce.
54. It is now clear from Ms Boaitey's further advice (§23 above) that the registration of the divorce was/is not a fundamental and integral part of the process of achieving a customary divorce in Ghana. Ms Boaitey is clear that registration provides *evidence* of the fact of the divorce, which has been achieved by custom.
55. It is also clear (see §25 above) that the Immigration and Asylum Tribunal in *NA* (having received expert evidence on the issue from Ms Akman) considered that registration did *not* form a fundamental part of the divorce 'proceedings', as it was an optional process; and the court in *O v B-M* (see §26 above) accepted the joint submission of counsel that the Ghanaian customary marriage did not have to be registered in order to be valid; the same approach must apply for divorce.
56. It would of course be convenient to construe the registration of the customary divorce as importing some kind of 'proceedings', given the wider scope for recognition of such a divorce in this country. The potential for an unsatisfactory outcome if the divorce is 'otherwise' than by way of proceedings was described by HHJ Horowitz QC (sitting as a Deputy High Court Judge), in *H v S* [2012] 2 FLR 157, at [61]:

"A system of unofficial unregistered divorce would produce chaotic results in a modern world of mobility abroad and bureaucracy at home. So it is entirely unsurprising that Islamic countries have sought to build a bridge between the classical law, the central elements of which cannot be touched and the State's requirement to keep a public register and, also, to leave a written record of what was traditionally only verbal. In the Lebanon the registration process is directly mandatory. The Saudi system, as he describes it, edges by carrot rather than stick to the same result now almost universally applied. In my judgment that can properly be described as having developed into and been applied as *proceedings*".

However, I cannot do so.

57. Ms Boaitey does not suggest that the customary divorce of these parties was to any degree “obtained” by the registration process which took place later, albeit within a few weeks of the meeting of the families in Mr Appietu’s home on 25 August 2019. Under the domestic Ghanaian law (see §20 and §21 above), it appears that as the marriage had been registered so too the divorce needed to be registered. Crucially, Ms Boaitey does not suggest that it is/was a necessary step for the parties to register the marriage in the first place, nor would it have been necessary for them to register the divorce where the marriage itself had not been registered. Registration is “popular among Ghanaians in the diaspora”, but it is/was optional not mandatory; it merely provides “evidence that a customary divorce has taken place” (see §23 above).
58. Having regard to the explicit terms of the statute, and the expert opinion of Ms Boaitey, which is buttressed by the caselaw cited above, I am satisfied that the divorce between the wife and husband here was *not* ‘obtained’ by means of ‘judicial or other proceedings’. Therefore, the main statutory provisions on which focus is brought (see §60 *et seq* below) are: *section 46(2)/(3)(b), section 51(1)/(2)/(3)(b)* of the *FLA 1986*.

If the customary divorce procedure was followed exactly as the husband maintains, was this procedure effective to achieve a divorce in Ghana?

59. On the evidence provided, the answer to this question can be simply stated: Yes. Under the domestic Ghanaian law, the ceremony conducted in Mr Appietu’s home on 25 August 2019 was effective (according to Ms Boaitey) to achieve the divorce of these parties according to their custom.

Depending on whether the divorce was obtained by “judicial or other process”, will the divorce be recognised here? Relevant to this question will be consideration of where the parties were domiciled and/or habitually resident at the time of the alleged divorce.

60. Recognition of foreign divorces has a statutory footing in *Part II* of the *Family Law Act 1986*.
61. *Section 45* of the *1986 Act* reads:

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

(1) 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.”

62. *Section 46* of the *1986 Act* reads:

Grounds for recognition.

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

- (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and
- (b) 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.

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

- (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained;
- (b) at the relevant date—
 - (i) each party to the marriage was domiciled in that country; or
 - (ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and
- (c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date.

(3) In this section “*the relevant date*” means—

- (a) in the case of an overseas divorce, annulment or legal separation obtained by means of proceedings, the date of the commencement of the proceedings;
- (b) in the case of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings, the date on which it was obtained.

63. *Section 51* contains the following:

Refusal of recognition

(3) [...] recognition by virtue of [section 45](#) of this Act of the validity of an overseas divorce, annulment or legal separation may be refused if—

- (a) in the case of a divorce, annulment or legal separation obtained by means of proceedings, it was obtained—
 - (i) without such steps having been taken for giving notice of the proceedings to a party to the

marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

(ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given; or

(b) in the case of a divorce, annulment or legal separation obtained otherwise than by means of proceedings—

(i) there is no official document certifying that the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; or

(ii) where either party to the marriage was domiciled in another country at the relevant date, there is no official document certifying that the divorce, annulment or legal separation is recognised as valid under the law of that other country; or

(c) in either case, recognition of the divorce, annulment or legal separation would be manifestly contrary to public policy.

(4) In this section—

“*official*”, in relation to a document certifying that a divorce, annulment or legal separation is effective, or is recognised as valid, under the law of any country, means issued by a person or body appointed or recognised for the purpose under that law;

“*the relevant date*” has the same meaning as in section 46 of this Act; and subsection (5) of that section shall apply for the purposes of this section as it applies for the purposes of that section”.

64. In relation to the statutory test, I am satisfied that:

i) The divorce, which was obtained otherwise than by means of proceedings (*section 46(2)(a) FLA 1986*) is “effective” in Ghana (see §59) above;

ii) At the relevant time, it is likely that both parties were domiciled in Ghana (*section 46(2)(b)(i) FLA 1986*);

However,

iii) Both parties were habitually resident in the United Kingdom throughout the period of one year immediately preceding 25 August 2019 (*section 46(2)(c) FLA 1986*) (see §7 above).

Accordingly, the divorce obtained in Ghana in accordance with tribal custom on 25 August 2019 cannot be recognised in England and Wales.

Conclusion

65. It follows from all that I have said that I am satisfied, and will so declare, that the parties were effectively divorced in Ghana according to the customs of that country on 25 August 2019. However, as they had both been habitually resident in the UK in the 12 months prior to 25 August 2019, I must further declare that the English court will not recognise that divorce. Accordingly, while in Ghana the parties will be treated as divorced, the customary divorce will have no effect in England on the status of the parties to it; by English law they remain married.
66. I recognise that this places these parties in a difficult situation; for obvious reasons, the courts here are loath to refuse recognition where the effect is to create what is called a ‘limping marriage’. Holman J, in considering the provisions of *section 51* of the *FLA 1986* in *Olafisoye v Olafisoye (No.2)(Recognition)* [2010] EWHC 3540 (Fam) described the approach (at [36]) thus:

“The effect of non-recognition here of a divorce which is valid or effective in the country where it was made is to create a so-called ‘limping marriage’ i.e., that the parties are treated as still being married here, when they are not so treated elsewhere. That is so obviously undesirable that the court leans, so far as possible and consistent with the legislation and justice, against exercising a discretion so as to produce a limping marriage.”

Mostyn J in *Liaw v Lee* [2015] EWHC 1462 (Fam) at [31]³ articulated further the unsatisfactory nature of the outcome which has emerged here:

“... it is undesirable to have two different decrees absolute in different places in relation to the same marriage. A decree absolute is a matter of status and it is undesirable that the parties should have inconsistent decisions as to when their marriage was finally ended”.

67. Be that as it may, the outcome of this application is that the wife is entitled to pursue her petition for divorce in this jurisdiction.
68. That is my judgment.

³ And see also *Lachaux v Lachaux* [2017] EWHC 385, [2017] 2 FCR 678, [2018] 1 FLR 380: “The cases under section 53(1)(a) do show that the court is generally reluctant to bring about a state of affairs where there is a limping marriage, that is to say with the parties being married in one place but divorced in another, but that is not a general principle and such a result is of course contemplated in a successful application under section 51(3)”.