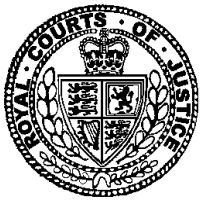

Neutral Citation Number: [2021] EWHC 3168 (Fam)

IN THE FAMILY DIVISION
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2021

Before :

MR JUSTICE POOLE

- -

Between :

Abdulsalam Al Saleh

Appellant

- and -

Nazhat Nakeeb

Respondent

- -
- -

Michael Horton QC (on direct instructions) for **the Appellant**
Richard English (instructed by Lyons Davidson) for **the Respondent**

Hearing dates: 8 and 9 November 2021

- -

JUDGMENT

This judgment was delivered in public. The anonymity of the children of the parties must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Poole :

1. The Appellant husband and Respondent wife married in Syria in 2000. The husband maintains that they divorced in 2010 but accepts that a Syrian court revoked that divorce in January 2017. Prior to the revocation, the wife petitioned for divorce in this jurisdiction in 2016. The husband contends in his grounds of appeal that although "the 2010 divorce was revoked with retrospective effect (as a matter of Syrian law)", the 2010 divorce "remained valid and effective". The physicist Erwin Schrödinger famously proposed a thought experiment in which paradoxically his cat could both exist and not exist at the same time. The paradox raised by the husband's appeal is that the parties were simultaneously both married and divorced.

2. The case comes before the court as an appeal against the decision of HHJ Bromilow in the Family Court at Bristol on 4 March 2021. He granted the wife's application, declaring that the 2010 divorce had been revoked and that the parties remained married at the date of her petition in 2016. Permission to appeal was given by Mrs Justice Judd on 14 June 2021. For the reasons given in this judgment, I dismiss the appeal.

Background

3. The application before HHJ Bromilow, heard by him on 3 and 4 March 2021, was the wife's, made as long ago as 22 July 2016, for a declaration under s.55(1) of the Family Law Act 1986 that she and the husband remained legally married at the time of her application. She purported to rely on the court's power so to grant declaratory relief under s.55(1)(d) of the 1986 Act but, as explained below, her application more properly sits under s.55(1)(b). Her stated reason for applying for such a declaration was that it would allow her to petition for divorce in England and Wales where she and the parties' children lived and continue to live.

4. The parties married on 23 November 2000 in Aleppo, Syria. It is agreed that this was a valid marriage recognised as such in the jurisdiction of England and Wales. In January 2001 the parties moved to England but in 2010 they returned to Syria with their two children. In September 2010 the husband and his solicitor attended the local Sharia court in Khan Shaikhoun to pronounce talaq (a unilateral declaration by a husband that his wife is divorced). This was formalised by the court on 23 September 2010 and a divorce document was issued by the civil registry of Khan Shaikhoun [S128[1]]. The parties returned to England in 2010 and they reconciled within three months of the talaq, during the waiting period known as the idda. They cohabited in England and had a third child born in October 2014. On 6 August 2014 the husband signed a certification confirming his marriage to the wife but on 29 December 2014, in Bristol, the father pronounced talaq to the wife directly and communicated this to relatives and friends in Syria by video so they would be witnesses. The wife did not accept that this was an effective divorce. The family register in Syria dated 15 January 2015 showed that the parties were divorced [S130]. This will have been due to the 2010 talaq divorce. The husband married his second wife in Syria in August 2015 and a translated copy of the family register in Syria dated 9 January 2016 records that at that time he and his second wife were married, but the Respondent wife was divorced. On 8 May 2016 the

[1] References are to page numbers within the Supplemental Appeal Bundle unless otherwise stated

Respondent wife applied to the Syrian court revoke the talaq dated 23 September 2010, in July 2016 she made an application to the Bristol Family Court for a declaration that the parties remained married, and on 31 August 2016 she petitioned for divorce in the same court. A District Judge made the declaration sought by the wife but that order has subsequently been set aside by consent. Decree nisi was pronounced on 4 November 2016. On 9 January 2017 the Syrian court decided that the talaq dated 23 September 2010 had been revoked as of 29 November 2010 due to the reconciliation or "return" during the period of the idda.

5. In November 2018 the husband applied in Syria for recognition of his divorce of the wife in Bristol in December 2014. He obtained such an order from the Syrian court on 31 December 2018, albeit that court does not appear to have been appraised of the decision of 9 January 2017. He informed the wife's solicitors that he had made that application but the wife was not a party to those proceedings and did not participate.

6. The decision as to whether the divorce in 2010 was effective is of significance to both parties. The husband married another woman in 2015 and they have children together. His marital status to this second woman has been recognised by the immigration authorities in this jurisdiction and her current immigration status here depends upon it. If he was in fact married to the Respondent wife at all relevant times then his second marriage is invalid and their children would be illegitimate. If, on the other hand, the parties were divorced from 2010 onwards then the third child of the husband and wife will be illegitimate, a matter that is of particular concern to the Respondent wife. The illegitimacy I refer to would be under the law of England and Wales. Under Sharia law, it seems that all the children would be considered to be legitimate. If the parties remain married then, until their divorce, the wife has certain rights as widow in the event of the husband's death, for example in relation to his pension. On the other hand, if they are not married, and the husband's second marriage is valid, then his second wife would have those rights. The current status of the relationship between the parties might have a bearing on financial remedies arising out of their divorce (or pending divorce) but if the marriage did not subsist at the time of the wife's petition then she would be able to apply for financial relief under Part III of the Matrimonial and Family Proceedings Act 1984. I shall proceed on the basis that any differences to the financial relief afforded to the wife that depend on whether the declaration of HHJ Bromilow is upheld or overturned, will not be significant.

7. If I had allowed this appeal, then the declaration would be set aside, but that would not automatically result in a recognition of the 2010 divorce. In those circumstances, consideration would have been given as to what further orders should be considered by this court or the Family Court.

The Statutory Framework

8. The parties in this case are Syrian nationals but since 2001 they have been habitually resident in England and Wales. Save for relatively short visits to Syria in 2010 and to Dubai in 2013, they have both continued to live in this jurisdiction from 2001 to the present. The talaq divorce pronounced in 2010 was obtained through a court process albeit without the participation of the wife. In the circumstances, the relevant statutory provisions to be considered are as follows.

By s.45 of the Family Law Act 1986,

> 45. 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.

By s.46 of the Family Law Act 1986,

> 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.
>
> …
>
> (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.

By s. 51(3) of the Family Law Act 1986,

> Refusal of recognition.
>
> (3) Subject to section 52 of this Act, 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 ….
>
> …
>
> (c) in either case, recognition of the divorce, annulment or legal separation would be manifestly contrary to public policy.

9. Declaratory relief under Part III of the 1986 Act is provided for, so far as relevant, under s.55(1),

> Declarations as to marital status.
>
> (1) Subject to the following provisions of this section, any person may apply to the High Court or the family court for one or more of the following declarations in relation to a marriage specified in the application, that is to say—
>
> (a) a declaration that the marriage was at its inception a valid marriage;
>
> (b) a declaration that the marriage subsisted on a date specified in the application;
>
> (c) a declaration that the marriage did not subsist on a date so specified;
>
> (d) a declaration that the validity of a divorce, annulment or legal separation obtained in any country outside England and Wales in respect of the marriage is entitled to recognition in England and Wales;

> (e) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in England and Wales.

10. By s.58(1) of the 1986 Act,

> General provisions as to the making and effect of declarations.
>
> (1) Where on an application to a court for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.

The Decision Under Appeal

11. In his judgment of 4 March 2021 HHJ Bromilow quoted from an important earlier judgment of his dated 3 January 2020 in which he dismissed the husband's application to recognise the 2014 Bristol talaq divorce and declared that it was not effective and would not be recognised in this jurisdiction. The husband's application for recognition had been made under the Family Law Act 1986, but section 44 of the Act provides,

> Recognition in United Kingdom of divorces, annulments and judicial separations granted in the British Islands.
>
> (1) Subject to section 52(4) and (5)(a) of this Act, no divorce or annulment obtained in any part of the British Islands shall be regarded as effective in any part of the United Kingdom unless granted by a court of civil jurisdiction."

HHJ Bromilow held in January 2020,

> "I have concluded that the arguments and submissions advanced by Mr English on behalf of the wife are correct. They must succeed and the application for recognition of the divorce on 29 December 2014 must fail. As at that date, the parties were lawfully married. They were living together in Bristol, albeit it in a state of disharmony. I am quite satisfied that they regarded themselves as married notwithstanding a divorce in Syria in 2010. They had reconciled within the idda and they had had another child. Their marriage subsisted. On 29 December 2014, the husband terminated the marriage by talaq and the parties separated. The talaq was pronounced in Bristol and the husband took no further steps in relation to the divorce. He regarded the marriage to be terminated in accordance with Sharia law. He believed himself to be divorced and free to marry. He re-married

> in Syria in August 2015. In my judgment, this divorce was clearly obtained in the British islands and it cannot be regarded as effective because it was not granted by a court of civil jurisdiction. This has to be the effect of section 44 of the Family Law Act 1986."

The husband did not appeal that decision. Notwithstanding that the husband had sought recognition in this jurisdiction that the parties had divorced in 2014, he then contended that the parties had in fact been divorced in Syria in 2010 and he therefore opposed the wife's July 2016 application for a declaration that the parties remained married.

12. HHJ Bromilow's judgment and order of 4 May 2021 followed a day hearing submissions on 3 May 2021. No oral evidence was called but HHJ Bromilow had the benefit of written expert evidence from Mr Ian Edge, a barrister and expert in Islamic law and the contemporary laws of the Middle East, jointly instructed by the parties. His report, dated 1 March 2021, sought to answer the question of whether "the alleged divorce is a valid divorce in Syrian law" [paragraph 5 of his report]. In his judgment, HHJ Bromilow relied heavily on Mr Edge's expert evidence. He quoted from paragraphs 13-14 of Mr Edge's report,

> "All declarations of talaq in Syria now count only as a single talaq and are, therefore, revocable. This means that a talaq is not final on declaration but only after a period of time has passed without the parties reconciling. This reconciliation is known as return or returning. If the husband returns to the wife during the waiting period, then the talaq is revoked and the parties' marriage continues according to the original marriage contract. If the parties wish to reconcile after the waiting period has ended, then they must go through a new marriage contract as the talaq becomes final and ends the original marriage once the waiting period ends without reconciliation. The husband under Syrian law has the sole power of divorce by talaq/return following talaq. Neither act requires the consent of the wife. Return can be by any act which indicates that the conjugal life of the parties continues so that the talaq is presumed revoked. Most commonly, the parties resume mutual cohabitation but return can also be by way of written declaration. The fact of return, and hence revocation of the talaq, will mean that the parties are not committing any sin by continuing to live together but the situation will not be fully legalised until one party seeks a court order of return and revocation of talaq. The new status can then be used to inform the civil authorities who will amend the civil record."

And from paragraph 18 of his report,

> "The parties accept that there was reconciliation on 29 November 2010 when they continued to live together as man and wife in England. This reconciliation occurred during the idda/waiting period and so would be effective to revoke the declaration of talaq made by the applicant. However, until such time as one or both of the parties brought an action in the Syrian courts for revocation of the talaq on the basis of return/ reconciliation, then the situation in Syrian law would be that the parties would be considered divorced from the end of the idda period (approximately 23 December 2010)."

And from paragraphs 20-21,

> "The applicant appears to have commenced a case in the Syrian courts in 2016, seeking recognition of the return/reconciliation and hence requesting the revocation of the talaq declared by proxy for the respondent on 23 September 2010. The Syrian court accepted to hear the applicant's application and did not consider either the passage of time or the effect on third parties. This may have been because the Syrian court was not aware of the full facts. Notice to the respondent was effected by advertisement in a local newspaper. The applicant sought the conclusive oath from the respondent concerning the fact of reconciliation/return which the court accepted. Following the failure of the respondent to appear (almost certainly because he was unaware of the proceedings) the Syrian court, by its decision dated 9 January 2017, found that the return/reconciliation had occurred during the idda/waiting period following the declaration of talaq on 23 September 2010 and held that the talaq had, therefore, been validly revoked. This determination would be retrospective and so the talaq would be considered revoked from 29 November 2010 and the original marriage would have continued from that date… The legal situation in January 2017 was, therefore, that, as regards Syrian law, the parties were considered to be still married and had been married, according to the original marriage contract between them, since 2000."

Mr Edge also advised in relation to the husband's 2018 proceedings in Syria,

> "…the Syrian court by its decision dated 30 December 2018 nonetheless accepted that the [husband] had made a valid declaration of talaq on 29 December 2014.
>
> As with the talaq of 23 September 2010,the talaq of 29 December 2014 would be considered a single revocable talaq in Syrian law. It is accepted by both parties that they finally separated on 29 December 2014 so that no return or reconciliation occurred

> during the idda/waiting period. The talaq dated 29.12.14 would therefore be considered to be final around about 29 March 2015 in Syrian law. The Syrian court was not apprised of the court decision dated 9 January 2017 but, in any event, could not have made its order without considering that the original marriage was still existing. The new Syrian court decision would however impact on the effect of the 9 January 2017 decision so that, although the first talaq (dated 23.09.10) was revoked, the second talaq (dated 29.12.14) was not revoked and would have been considered final and effective to end the marriage at the end of the idda/waiting period in or about 29 March 2015."

13. The Appellant husband put written questions to the expert Mr Edge, which were answered on 1 March 2021 (the same date as his report). He was asked to confirm that at the time of the petition for divorce in August 2016 the legal position in Syria was that the parties were divorced. He responded,

> "I agree with the question as far as it goes but it is not the whole story. In July 2016 and August 2016 the Syrian courts considered that the parties were divorced; but the court decision of 09.01.17 changed that situation."

In answer to a further question, Mr Edge made it clear that revocation of the 2010 talaq "could only apply from the date of the revocation", and accordingly "the talaq was revoked from its inception and the marriage therefore continued." Mr Edge was referred to a previous report he had given in 2015 during earlier proceedings. He stood by the opinion he had given at that time, on the basis of the information then provided to him, namely that "Until such time as legal proceedings are taken for revocation of the talaq in Syria … it must be taken that the parties are at present divorced in Syrian law."

14. HHJ Bromilow referred to s. 46 of the 1986 Act and concluded that

> "… my task is not a discretionary exercise. I must reach my conclusions on the facts and I must ask myself upon those facts whether or not a divorce was effectively obtained in Syria." [23]

He concluded that the reconciliation of the parties within the waiting period (idda) allowed either of them to revoke the talaq but that,

> "until any action to that end was taken in a Syrian court, the parties were considered to be divorced. On 9 January 2017, a Syrian court decided, following application by Ms Nakeeb, that

> by reason of reconciliation within the waiting period the talaq was revoked and this decision could operate retrospectively.
>
> "On these facts, I conclude that the marriage survived. I conclude that no divorce, effective in Syria, had been obtained. Therefore, there is no divorce to be considered as capable of recognition in the United Kingdom." [23-25].

15. In fact there was no application before HHJ Bromilow to recognise the divorce, only an application by the wife for a declaration that the marriage subsisted at the date of the application so as to enable her to commence divorce proceedings in the jurisdiction of England and Wales. The declarative order made by HHJ Bromilow was,

> "The applicant's application for a declaration as to marital status in respect of the parties' marriage is successful, it being confirmed that the divorce that the respondent states took place on 23 September 2010 was not effective in Syria and was not therefore an overseas divorce to be considered as capable of recognition in the United Kingdom, and further, that at the date of the commencement of divorce proceedings in the United Kingdom, the parties were therefore married."

This was a declaration that the purported divorce in Syria in 2010 was not effective in Syria rather than a decision to refuse to recognise an overseas divorce. It was also a declaration that the marriage subsisted at a specific time and therefore came under the power provided to the court by s. 55(1)(b). As such s.58(1) applied. The Judge was not, however, alerted to the public policy proviso within s.58(1) and so did not address it.

The Parties' Submissions

The Appellant Husband

16. The Appellant husband relies on grounds of appeal and a skeleton argument prepared by Mr Scott QC who did not appear at the hearing of the appeal. Mr Horton QC appeared for the husband at the appeal. He adopted the Mr Scott QC's written skeleton argument and supplemented it with oral submissions. The first three grounds of appeal were taken together by Mr Horton QC. In short, the husband submits that Mr Edge's expert opinion was that the divorce in Syria was effective until revoked in January 2017. Hence, at the commencement of the wife's divorce petition on 31 August 2016 the parties were divorced in Syria and there was no marriage capable of being dissolved by the English court.

17. Mr Horton QC directs the court's attention to the President's Guidance (Interim) dated 23 April 2018 regarding Defective Divorce Petitions/Decrees. The then President noted that petitions issued in breach of section 3, for example because they were issued within

one year of the marriage, are null and void and the court has no jurisdiction to entertain them with the consequence that any decrees purportedly granted would likewise be null and void. The Guidance was interim because it was anticipated that when fully operational the online divorce project would prevent such errors. The Guidance does not appear in the 2021 edition of The Family Court Practice. By analogy, the husband contends, a petition that is issued at a time when the parties are already divorced, cannot be subsequently corrected. The husband submits that, similarly, if the parties were already divorced at the date of the petition it is null and void and cannot subsequently be corrected.

18. The husband's fourth and final ground of appeal is that, in any event, the Judge should have refused (pursuant to s.58(1) of the Family Law Act 1986) to make the declaration sought by the wife on the ground that it would be manifestly contrary to public policy to do so because,

    i) The court order of 9 January 2017 was obtained by deception: the wife told the Syrian court that the husband's address was not known when she knew it.

    ii) The wife failed to disclose the existence of the ongoing Syrian proceedings in her English divorce petition dated 31 August 2016.

    iii) By such means the wife prevented the husband from knowing of the proceedings in Syria and thereby prevented him from participating in those proceedings.

    iv) The effect of the declaration is that the husband, who remarried when he believed he was free to do so, now finds that his second marriage is invalidated, with consequences for the immigration status of his second wife.

    v) The wife would not suffer any significant prejudice if the declaration were refused. In particular there would be no significant financial prejudice to her.

    vi) The wife was guilty of delay in having the "return" or reconciliation recognised in Syria – the delay was between the end of 2010 and mid 2016 when she made her application to the Syrian court. The husband maintains that the wife was notified of the September 2010 talaq. He also says that the parties visited a registrar in Swindon in 2014 to give notice of the husband's intention to marry and to confirm their Syrian divorce and have it registered in England. He says that the registrar required proof of the Syrian divorces by way of verification of documents from Syria by the Syrian embassy but that there was no Syrian embassy at the time in England.

    vii) There ought to be consistency between the recognition of the divorce in Syria and in England. The declaration made by HHJ Bromilow results in inconsistency.

    viii) The disparity in outcome between the two jurisdictions creates a "limping marriage".

    ix) The husband was entitled to expect that his re-marriage in 2015 was valid – he had obtained copies of registration in Syria showing that he was divorced from the Respondent wife.

x) There is a significant effect on the legal rights of the parties and the husband's second wife from making the declaration, including her immigration status and her rights as a widow under the husband's pension, or her claims on his estate on intestacy.

xi) Neither party wishes to affirm the marriage.

19. Neither Mr Horton QC nor Mr Scott QC appeared in the court below – the husband had been represented by other Counsel who had drafted a skeleton argument, but he appeared in person at the hearing. HHJ Bromilow's attention was not drawn to the public policy exception. Mr English, for the wife, who did appear below, properly accepted responsibility for not having recognised the relevance of s.58(1) and failing to alert the lower court accordingly. The parties to the appeal agreed that since HHJ Bromilow had not addressed the question of the public policy exception under s.58(1) this court should consider that matter unrestricted by any question of whether the Judge below was in error.

The Respondent Wife

20. For the wife, Mr English submits that, as advised by Mr Edge, the effect of the Syrian court's decision on 9 January 2017 was that the parties remained married according to the original marriage contract between them, and therefore since 2000. Accordingly, since the husband's second talaq is not recognised in this jurisdiction, the parties remained married in this jurisdiction when the wife petitioned for divorce in England in August 2016.

21. In relation to the fourth ground of appeal, Mr English responds that:

i) The Court of Appeal has held that the similar public policy exception under s.51(3)(c) has a high threshold before the court would decide that it applies – *Lachaux v Lachaux* [2019] 2 FLR 712 at [96]. It should be exercised only in exceptional cases.

ii) The wife accepts that the husband was ignorant of the proceedings in Syria but denies that she deliberately took steps to deprive the husband of the opportunity to participate in those proceedings. She had no ulterior purpose in seeking to have the marriage recognised in Syria, save to have the true position registered there.

iii) In any event, since the husband accepts that the parties reconciled in 2010 within the period of idda, the Syrian court would have inevitably come to the same conclusion in January 2017 even if the husband had participated. The wife was not dishonest but even if she had been dishonest, she has not benefited from such dishonesty, and the husband has not suffered any detriment. Mr English points to the judgment in *A v L (Overseas Divorce)* [2010] EWHC 460 (Fam); [2010] 2 FLR 1418 in which Sir Mark Potter, then President of the Family Division, applied the public policy exception under s.51(3)(a) of the 1986 Act. The husband had obtained a divorce in Egypt in the face of an injunctive order in this jurisdiction preventing him from doing so and without notice to the wife.

He noted that the husband had been "devious" and had deliberately avoided bringing the wife's attention to the Egyptian proceedings "in order to deprive the wife of the opportunity to play any part in those proceedings or for her to obtain a further direction from this court in respect of his own attendance and participation at the hearing in Egypt." [79]. Similarly, in *Liaw v Lee* [2015] EWHC 1462 (Fam), [2016] 1 FLR 533, Mostyn J noted at [30] that the "sharp practice" of the husband and his solicitor when obtaining a divorce in Malaysia prevented the wife from "applying in the waiting period to set aside the decree nisi." Mr English submits that the key to those decisions was that in each case the husband's conduct was dishonest and it deprived the wife of an opportunity to do something to change the outcome (the divorce). In the present case the wife was not dishonest and had the husband been aware of the proceedings in Syria in 2016/17 he could not have done anything to change the outcome (revocation of the divorce).

iv) As Mr Edge has confirmed, unless or until the decisions of the Syrian courts are challenged, they are considered as binding. They have not been challenged therefore they remain binding on the parties in Syria.

v) The wife denies that she was aware of the divorce in 2010 and she applied to the Syrian court to revoke the divorce within a reasonable time of becoming aware of it (in 2014) given the civil war in Syria and the fact that she was living in England. HHJ Bromilow did not make any finding of fact that the wife was notified of the 2010 divorce (but he was not considering factors relevant to the public policy proviso).

vi) The discrepancy between the marital status of the parties in Syria and in England and Wales is due to the operation of s.44 of the Family Law Act 1986. If the declaration causes a limping marriage it need not be limping for long – the wife's petition for divorce can progress and the divorce finalised in this jurisdiction. It is agreed that both parties want to be divorced. The wife is however anxious that it should be confirmed that their third child was born within the marriage, not at a time when they were divorced.

vii) The parties lived together as husband and wife from returning to England in 2010 until the second talaq was pronounced in December 2014 and they separated.

viii) The parties did not have a merely tenuous connection to Syria. They are Syrian nationals and were married in Syria. The wife has not used the Syrian legal system artificially. Indeed both parties have applied to the Syrian courts and obtained court orders on which each seeks to rely. The judgments of the Syrian court should be respected.

ix) The court order of 9 January 2017 merely gives recognition to the return to marriage that both parties agree took place. It cannot be regarded as contrary to public policy to recognise that in this jurisdiction.

Conclusions

Grounds 1-3 – The 2010 Divorce

22. The decision of HHJ Bromilow on 3 January 2020, applying s.44 of the Family Law Act 1986, was that the talaq made by the husband in December 2014 was not recognised as a divorce in England and Wales. That decision was made in the knowledge that the divorce had been recognised in Syria in December 2018 and is not inconsistent with the Syrian court's decision – it is a decision about the effectiveness of the divorce in the courts of this jurisdiction. Nor has HHJ Bromilow's decision of January 2020 been appealed. Hence, for the purposes of the law in this jurisdiction, if the parties were married prior to the talaq on 29 December 2014, they remained married after that date.

23. I accept that a petition for divorce can only be presented by a "party to a marriage" (s.1 Matrimonial Causes Act 1973). If the parties were not in a marriage recognised in this jurisdiction, as of 31 August 2016, then the wife was not a party to a marriage and the petition would be null and void. Mr English accepts that premise on behalf of the Respondent wife.

24. HHJ Bromilow relied on the evidence of the jointly instructed expert, Mr Edge. No challenge to his opinion has been made either in the lower court or on appeal. Mr Edge's opinion was authoritative and he was well qualified to give it. HHJ Bromilow was right to rely on Mr Edge's evidence and the appellant has not sought to argue otherwise. Mr Edge's opinion appears to me to be clear:

    i) The Syrian court's decision of 9 January 2017 was that the revocable talaq of 23 September 2010 was in fact revoked by the return or reconciliation of the parties within the period of the idda, namely on 29 November 2010, such that the original marriage between the parties continued. There was no break in the marriage.

    ii) Until the decision of 9 January 2017 the Syrian court would have treated the parties as divorced from the end of the idda period (approximately 23 December 2010) because the return had not been registered or formally recognised by the Syrian courts.

    iii) The Syrian Court making the determination on 9 January 2017 was unaware of the husband's talaq made in Bristol on 29 December 2014. That talaq was a valid declaration, it was not followed by reconciliation, and so, as recognised by the Syrian Court on 31 December 2018, the divorce became final and ended the marriage between the parties from around 29 March 2015.

    iv) Notwithstanding possible deficiencies in procedure (in relation to both the Syrian court proceedings in 2016/17 and those in 2018) the Syrian court decisions in those proceedings are unchallenged and so are binding in Syria.

25. It would be wrong to say that the parties differ in their interpretations of Mr Edge's evidence; rather, they each emphasise different parts of it. The husband emphasises the evidence that between 23 September 2010 and 9 January 2017 the recognised status of the parties in Syria was that they were divorced. Hence, at the date of the wife's petition in this jurisdiction on 31 August 2016 they would have been recognised as divorced in Syria. The wife emphases the evidence that the return in 2010 revoked the talaq divorce

of 23 September 2010 so that the parties remained married, as recognised by the Syrian court's decision of 9 January 2017.

26. The husband challenges the retrospective effect of the decision in Syria on 9 January 2017. It is useful however to look at both that decision and the later decision, on his application, on 31 December 2018. If those decisions have retrospective effect, then the outcome of the two Syrian proceedings is that the parties remained married from their marriage in 2000 until 29 March 2015. By the law in Syria, the husband will have married his second wife at a time when he was divorced from the Respondent wife. The expert opinion evidence from Mr Edge is that the retrospective decisions are effective in Syria and that the outcome in Syrian law is indeed that the parties were married from 2000 until 29 March 2015. Notwithstanding that the husband was not notified of the wife's application in 2016, and that the 2018 court was not aware of the 2017 court's decision, each retrospective decision remains unchallenged and therefore binding.

27. If, on the other hand, the decisions in Syria were not retrospective in effect, then the parties were married in 2000, divorced from the end of the idda following the talaq on 23 September 2010, married from 9 January 2017 until 31 December 2018 and then divorced from 31 December 2018. The husband will therefore have married his second wife whilst divorced from the Respondent wife, but found that from 9 January 2017 he was married to both of them simultaneously until 31 December 2018.

28. The apparent paradox in this case arises from Mr Edge's evidence that whilst on 9 January 2017 the Syrian court revoked the talaq of 23 September 2010 - and thus, according to Syrian law, the marriage continued from 2010 until the subsequent divorce in or around the end of March 2015 - prior to the revocation, and therefore at the date when the wife petitioned for divorce in England on 31 August 2016, the parties would have been treated by the courts in Syria as divorced. Hence, viewed from a pre- January 2017 perspective the parties were divorced in 2010, but viewed from a post-January 2017 perspective the parties were not divorced in 2010. Can the parties have been simultaneously both married and divorced?

29. To resolve this apparent paradox it is helpful to consider the translation of the Syrian court's decision of 9 January 2017 at [S113-118]. The Syrian court recited that the divorce in 2010 was "revocable" and that as such it did "not put an end to marital status and the husband may return his wife during iddat by saying or action…". The Syrian court confirmed "the [husband's] return of the [wife] on 29/11/2010 prior to the end of Iddat period of her divorce made by the [husband] on 23/09/10." Its decision was, "To register the return fact on the records of both parties in the completed civil registry." The effect of the decision was, as Mr Edge has advised, to record a fact that had occurred in 2010, namely the reconciliation or "return" and that the return had revoked the talaq divorce "from its inception". The "return" in 2010 revoked the divorce but that was not recorded until 2017. There was no caveat in the Syrian court's order. On its face, the effect of the order was to register the return or reconciliation with the consequence that the revocable divorce in 2010 did not put an end to the marriage, and the marriage continued. The fact that this was not known or registered to be the case until 2017 does not alter the parties' true marital status before that time. As Mr Edge concluded in his report of 1 March 2021, "as a result of the revocation of the talaq (as decided by the Syrian court in its decision dated 09.01.17) the original marriage between the parties continued." The decision was made in 2017 but the talaq was revoked in 2010.

30. The husband refers to the Syrian court decision in 2017 as having revoked the divorce, but it was the return/reconciliation that revoked the divorce. In 2017 the Court amended the register accordingly and in order to correct the record in order to register that they had not been divorced in 2010. In this case the only reason why a Syrian court in, say 2016, would have regarded the parties as divorced is that it had not been presented with the uncontested evidence that the parties had reconciled within the idda/waiting period.

31. Curiously, whilst the husband denies that the January 2017 decision retrospectively altered the parties' marital status as it would or should have been viewed before January 2017, he himself relies on the Syrian court's order of 31 December 2018 having a such a retrospective effect. That order recognised that the parties were divorced in accordance with Syrian law with effect from about 29 March 2015. There would be no need for such recognition if the parties were already divorced in 2010. The husband relies on that order in Syria to have retrospectively changed the parties' marital status before 31 December 2018, so that when he married his second wife in August 2015 he did so, at that time, as a divorced man. Irrespective of whether his second marriage is viewed from a pre-December 2018 perspective, or a post-December 2018 perspective, the husband maintains that he was free to marry his second wife in August 2015. Yet, he contends that the same approach cannot be taken to the Order in relation to the order of 9 January 2017. The true position is that in each case the Syrian court was giving recognition to an earlier event – the return/reconciliation in 2010 and the talaq divorce in 2014/15. The husband's marital status did not change on 9 January 2017 or on 31 December 2018 when the courts made their orders. In Syrian law he was not divorced in September 2010 and he was divorced in March 2015.

32. It seems clear to me that the difficulties for the husband arise not from the decisions of the Syrian courts, but from the decision of HHJ Bromilow of 3 January 2020. There is no dispute that the parties were validly married in 2000 and that the courts in England and Wales should recognise, and have recognised, the marriage. There was no Syrian divorce in 2010 and therefore the marriage continued. In January 2020, HHJ Bromilow correctly decided that, pursuant to s.44 of the Family Law Act 1986, the divorce recognised by the Syrian court with effect from 29 March 2015 cannot be recognised in this jurisdiction. Therefore, in this jurisdiction the husband continued to be married to the Respondent wife when, in 2015 he married his second wife and to this day.

33. The husband did not apply for recognition of the 2010 divorce either here or in Syria. Instead, he opposed the wife's application for a declaration that the 2010 divorce was revoked and that the parties remained married in 2016. His opposition to such a declaration, and this appeal, are the means by which the husband seeks to avoid the consequences of the decision of HHJ Bromilow in January 2020. The difficulty for the husband is that the Syrian courts do not recognise an effective divorce in 2010 and therefore there is no overseas divorce for the courts here to recognise.

34. The parties' marriage did not, like Schrödinger's cat, both exist and not exist at the same time. The decisions of the courts in Syria have confirmed that, for the purposes of Syrian law, the marriage lasted from 2000 until 29 March 2015. There was no break in the marriage in 2010. Given that the divorce of 29 March 2015 cannot be recognised in the jurisdiction of England and Wales because of the operation of s. 44 of the Family Law Act 1986, it follows that as of 31 August 2016 the parties marriage subsisted – they were married for the purposes of s.1 of the Matrimonial Causes Act 1973 and the

wife's divorce petition was not null and void by reason of the parties being already divorced.

Ground 4 - The Public Policy Proviso

35. The Appellant husband contends that, further or in the alternative, HHJ Bromilow should have refused to make the declaration he made on the ground that it was manifestly contrary to public policy to do so. The relevant statutory provisions are those in Part III of the Family Law Act 1986 as set out above. The declaratory powers under Part III of the 1986 Act were enacted following the Law Commission's Report No. 132 of 22 February 1984, 'Family Law, Declarations in Family Matters'. The Law Commission recommended that the declarations that are now listed under s. 55 of the 1986 Act, should be available "as of right" but subject to "the power of the court, *in exceptional circumstances*, to withhold relief as a matter of public policy." [para. 3.40, emphasis added]. In making that recommendation the Law Commission referred to the judgment of Sir George Baker P in *Puttick v A-G* [1980] Fam 1, in which he held, obiter, that he would have refused to make a declaration that a marriage abroad had been validly entered into because "the whole history is of fraud and perjury and the facts to found a decree have been brought about by criminal acts and offences and a fraudulent, deceitful course of conduct." That gives a flavour of the kind of exceptional circumstances that might justify the application of a public policy exception to the granting of declaratory relief under Part III.

36. The public policy exception under s.58(1) of the 1986 Act only applies to declarations made under Part III but there is a similar public policy exception under s. 51(3)(c) within Part II of the Act, which may be applied by the court to refuse recognition of a divorce obtained overseas. As already noted the Court of Appeal in *Lachaux* (above) referred to the "high threshold" before the public policy exception would be applied under s.51(3)(c) of the 1986 Act. In *NP v KRP (Recognition of Foreign Divorce)* [2014] 2 FLR, Parker J held that the test of whether to apply the public policy proviso under s.51(3)(c) was "essentially whether to recognise the divorce offends against substantial justice. I accept that the test must be narrowly interpreted and stringently applied." [119]. She accepted that amongst the considerations to apply were delay (see also *El Fadl v El Fadl* [2000] 1 FLR 175) and comity.

37. Here, the declaration made by HHJ Bromilow, was that the divorce in Syria in 2010 had been revoked and that the parties' marriage subsisted at the time of the wife's divorce petition. The question of the public policy proviso only arises to allow the court to refuse to make a declaration that it could otherwise make, and the court could only make the declaration in this case if the declaration was true. If HHJ Bromilow's declaration was true, as I have found it to be, should he nevertheless have declined to make it on the grounds of public policy? In my judgement the answer is that he should not have declined to make the declaration – no exceptional circumstances existed to justify applying the public policy proviso. The reasons why I reach that conclusion are as follows:

    i) As under s.51(3)(c), the public policy proviso under s.58(1) in relation to declarations under Part III of the 1986 Act should only apply in "exceptional circumstances". There is a "high threshold" for its application.

ii) There have been no findings about whether the wife's failure to disclose the husband's address in the 2016 Syrian application was dishonest. I note that she did include his English address in her application to the Family Court, and her divorce petition in 2016, so she knew his address. She has not given an account of why she did not bring his address to the attention of the Syrian court. Her failure to do so led to notification of the proceedings being given by way of notice in a newspaper in Syria, which she surely knew would be highly unlikely to come to the husband's attention. In the absence of a finding about the wife's dishonesty I nevertheless proceed on the basis that she deliberately withheld notice of the proceedings from the husband. However, had he participated and attended he would have confirmed the factual basis of the decision that the court made on 9 January 2017. He accepts, and so would have confirmed to the Syrian court, that the parties reconciled in the period of idda, thereby revoking the talaq divorce of 23 September 2010. He could not have changed the outcome of the proceedings save to alert the court to the second talaq in December 2014. As it happens he did subsequently, successfully apply to the Syrian court for recognition of that second talaq. The outcome of the two sets of proceedings in Syria is now the same as it would have been had the husband been involved in the first set of proceedings.

iii) I accept that had the husband been notified of the Syrian proceedings in 2016/17 this could have prevented the need for him to bring subsequent proceedings in Syria in 2018. His application could have been dealt with at the same time as the wife's application. However, it is of note that when he did bring the proceedings in Syria in 2018 the husband did not challenge the decision of January 2017, indeed his own application only made sense if he accepted that the parties were indeed married at the time when he pronounced talaq in Bristol in December 2014. The husband knew of the 2017 decision when he made his later application. Hence, for the purposes of his 2018 application he appears to have accepted the 2017 decision and the consequence that it retrospectively changed the marital status of the parties in Syria.

iv) As I explained earlier, if the husband's contention that the Syrian court decision of January 2017 did not change the marital status of the parties between September 2010 and January 2017, then I cannot see how he can consistently maintain that the Syrian court decision of 31 December 2018 did change their marital status between March 2015 and 31 December 2018. In terms of public policy, and consistent with the principle of comity, this court should respect both of the Syrian court decisions, which were to change the previously recorded marital status of the parties to reflect their actual marital status at the material times.

v) HHJ Bromilow did not make any findings about whether the wife had been notified of the talaq divorce of 23 September 2010. However, at paragraph 8(vi) of his report, Mr Edge wrote, "The Syrian court appears to have sent a notification of the talaq to the wife on 29/09/2010 as evidence by the documents at C120-122." Those documents are now at [S172-174]. In translation they are a request by the husband for the court to notify the wife, sealed by the Syrian court. The wife denies that she received this written notification and asserts that the address which appears on the documents, to which notification was to be

sent, was not her address at the time. In November 2010 she returned to England The husband had already returned. The parties began to co-habit and live as if married, and she did not think to suppose otherwise until discussions in 2014. Even if the wife had been informed of the talaq in 2010 she would have known that the parties had reconciled thereby revoking it. Given that the parties reconciled, co-habited in England from November 2010, and had a third child whilst living together, I do not regard the wife's delay in not applying to the Syrian court to recognise the revocation of the divorce until 2016, as being culpable or as a matter that weighs in favour of applying the public policy proviso. She was not obtaining any advantage by delaying an application to change the register in Syria, even if she was aware that it needed changing. The husband has not suggested that he was ignorant of Sharia law and that the return revoked the talaq. He did not do anything to correct the register in Syria during the period in which he now accuses the wife of delay.

vi) It is a matter of fact, as found, that the Syrian court has decided that the 2010 talaq divorce was revoked by reconciliation within three months and therefore the parties continued to be married. The wish by one party to prevent that fact from being declared in order to overcome the consequences of non-recognition in this jurisdiction of the 2015 divorce, is not a "public policy" reason to refuse to make the declaration.

vii) The consequences of making the declaration are unfortunate for the husband and his second wife and children. However, there would be adverse consequences for the Respondent wife and the parties' third child if the declaration were not made. There are complicated consequences for the parties whether the declaration is made or not made.

viii) As I have noted, I regard the financial consequences of making the declaration, or not making the declaration, as insignificant. The fact that there are no significant financial consequences from not making the declaration is not an exceptional reason not to make it.

ix) HHJ Bromilow recorded in his judgment of 3 January 2020 that the parties "presented" as a married couple on return to England in 2010. It would be consistent with their expectations and understanding at that time to declare that the divorce was revoked by reconciliation in 2010.

38. The declaration reflects the facts as recorded by the Syrian courts at the time of the declaration, and the consequences of both the Syrian courts' decisions and the English court's decision of 3 January 2020. I am not persuaded that it was manifestly contrary to public policy for HHJ Bromilow to have granted the declaratory relief he granted in this case. His failure to address the question of the public policy proviso made no difference to the declaratory relief he was entitled to, and did, grant.

39. The consequence of the Syrian court's decision on 9 January 2017 is that the parties did not divorce in 2010 and their marriage continued. Given that the divorce in 2014/15 is not recognised in this jurisdiction, HHJ Bromilow was right to declare that, so far as the courts of England and Wales are concerned, the marriage subsisted at the time of the wife's application and petition for divorce. The Appellant husband has not

established any error of law or fact by HHJ Bromilow. The judge was entitled to make the declaration that he made. The appeal is dismissed.