

SCOTLAND / JUDGMENT

Kaur v. Singh [2005] ScotCS CSOH_96 (22 July 2005)

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Kaur v. Singh [2005] ScotCS CSOH_96 (22 July 2005) OUTER HOUSE, COURT OF SESSION

[2005] CSOH 96 F3/03 OPINION OF R F MACDONALD QC (Sitting as a Temporary Judge) in the
cause JUNE KAUR or SINGH (AP) Pursuer against BIKRAMJIT SINGH Defender

Pursuer: Miss M. V. Ross; Erskine MacAskill & Co 22 July 2005

Introduction

- [1] This is an action for declarator of nullity of marriage. The pursuer concludes for declarator that a pretended marriage between her and the defender at Jaipur, India on 26 September 2001 is null by reason of lack of consent on her part, the pretended marriage having been entered into under duress. The relevant averments in the summons may be summarised as follows. [2] At the beginning of August 2001 the pursuer, who was then 18 years old and had been in a relationship with a man, Keith Singh, whom she describes as her partner, in Edinburgh for approximately two years, went on holiday with her mother to India to visit relations. During the holiday her mother became determined that she should be married and her mother and extended family began to introduce her to eligible men with a view to assessing their suitability as potential husbands. The pursuer, who refused to participate in this process, met the defender in the course of these introductions but refused to speak to him. She repeatedly told her mother that she did not wish to get married. Her mother, without her knowledge, arranged for a marriage to take place between her and the defender. When the pursuer was told that her wedding was to take place during her holiday she was shocked, disappointed and terrified. Although she had always expressed her opposition to

the idea of an arranged marriage (being already in a long-term relationship) and repeatedly told her mother that she did not want to get married, her mother told her there was no option. Her mother was in possession of her passport and travel documents, which she kept in a locked suitcase, and told her that if she did not go through with the marriage ceremony the documents and passport would be destroyed and she would be left in India. The pursuer had no other means of returning to Scotland. Her mother told her that an agreement had been entered into between her family and the defender's family and that if she were to break this agreement by refusing to marry the defender she would bring great shame upon herself and her family. She was aware of the expense incurred by her family in relation to the marriage ceremony itself and the post-ceremony party which had been organised as a wedding reception. Her mother and other family members in India exerted considerable pressure on her to agree to be married. She was without support in a foreign country, had no one to turn to for help or guidance and felt isolated and very vulnerable. Her family allowed her very little time on her own in an attempt to stop her from fleeing. Her elder sister had previously rejected an arranged marriage and been ostracised by the family as a result. She had every reason to believe that her mother was capable of carrying out the threats made and therefore went through the marriage ceremony with the defender. On the day of the arranged marriage ceremony she was anxious and upset, felt trapped and could not see a way out and felt compelled to comply with the wishes of her mother and other family members present. After the ceremony at Jaipur she and the defender undertook a ten hour car journey to his house in Patiala. They were accompanied in the car by the defender's friend, father, mother, sister and aunt. The day after the wedding they arrived at the defender's house, where the pursuer stayed. She refused to have sexual relations with the defender. She slept on the bed and he slept on the couch. She left his house a week later at the end of her holiday and returned to Scotland on 2 October 2001. She then resumed her relationship with Keith Singh and began living with him. She has had no further contact with the defender.

Procedural History

[3] The summons was signetted on 7 February 2003. It was served personally on the defender in Patiala, India on 12 November 2003 by an Indian advocate and a process server. In a report regarding service of the summons it is stated that the signatures of the defender were obtained to dispense with the period of notice and to state that he did not intend to defend the action. On 26 November 2003 a three page typed foolscap (A3) document (no 10 of Process) headed "Written statement filed on behalf of the defender - Bikramjit Singh" was received by the General Department. It is unsigned but at the foot of the third page states that it is submitted by the defender. The first paragraph states as follows: "The defender above named submits the following written statement as under:- Preliminary Objections:-

1. That the Hon'ble Court has got no jurisdiction to entertain the present case.
2. That no cause of action has arisen to pursuer to file the present case.

3. That the present case has been filed by the presure (sic) with the malafide (sic) intention, just to harass the defender." There then follow, in the style of a set of defences, eight numbered paragraphs answering each article of condescendence in the summons and thereafter what is termed "Reply to the Plea in Law" in the following terms: "1. That in reply to plea in law, the marriage between the pursuer and defender was not entered into under duress and without the consent of the pursuer, so decree of declarator should not be pronounced in favour of the pursuer and against the defender." The last paragraph, which follows immediately thereafter, is in the following terms: "It is therefore prayed that the petition filed by the pursuer before this Hon'ble Court may kindly be dismissed with heavy costs, in interest (sic) of justice." [4] On 12 November 2004 a Minute for Decree signed by counsel was lodged along with the documents specified in the Schedule, namely, an affidavit of the pursuer and an affidavit of her partner, both dated 22 October 2004, and the marriage certificate no 6/2 of Process. The Minute moved the court for decree in terms of Conclusion 1 of the summons (declarator of nullity) and further stated: "In regard to expenses moves that there should be no award of expenses to or by either party as the Defender has made no defence to the action." The Minute for Decree and the documents specified in the Schedule were placed before me for consideration and, in light of the document no 10 of Process, which has the appearance of a defence to the action, I appointed the case to call By Order on 9 December 2004. Having heard counsel (Mr McFarlane) on that date, I issued an interlocutor in the following terms: "The Temporary Lord Ordinary, having heard counsel for the Pursuer, in respect that a document had been received by the court from the Defender on 26 November 2003, no 10 of Process, which may be intended by the Defender to be a Defence to the Action, continues the cause By Order to a date to be fixed in order that the General Department of the Court of Session can contact the Defender to ascertain if a Defence to the Action is to be lodged in terms of the Rules of the Court of Session." [5] On 17 December 2004 the General Department sent by International Recorded Delivery a letter to the defender in India in the following terms: "I refer to the action raised in the Court of Session by June Kaur or Singh seeking declarator that her marriage to you is null. We have received the attached response by you to the summons. Would you please confirm that this is intended to be a formal defence to the action and that you are disputing that decree of declarator should be granted. If so, the action will be the subject of further formal procedure of which you will be advised. You are also required to pay the Scottish Court Service a fee of £81 to lodge defences in this family action." No reply to that letter has been received from the defender by the General Department. The court fee for the lodging of defences has not been paid by the defender. [6] The case called again By Order on 4 February 2005 when Mr McFarlane again appeared. Following short submissions from him I continued the case to a further By Order diet for further submissions on (1) jurisdiction; (2) whether the document no 10 of Process is a defence to the action; and (3) sufficiency of evidence. On 2 June 2005 an affidavit (no 16 of process) from a further witness who was present in India immediately before and at the time of the marriage was lodged. The further By Order diet was subsequently fixed for 9 June 2005, when Miss Ross appeared for the pursuer and made full submissions. It became clear in the course of her submissions that, in

addition to the three points mentioned above, a further point arose for consideration, namely, choice of law in determining lack of consent due to duress. In the course of her submissions Miss Ross tendered a faxed document which is dated 3 May 2005 and bears to be from the defender, although the signature on it is difficult to decipher. She advised me that this document was received unprompted by the pursuer's solicitors, although she understood that there might have been a preceding communication direct to the pursuer herself to advise her that it would be coming. This document was received and marked no 17 of Process. It is in the following terms: " IN THE COURT OF SESSION EDINBURGH (SCOTLAND) June Kaur Vs Bikramjit Singh I Bikramjit Singh S/o Amarjit Singh age 25 years R/o H. No. 15, Preet Nagar, Gurudwara Tripuri Town, Patiala (India) do hereby declare as under:- That I have no objection if decree of divorce (sic) is passed in favour of June Kaur." [7] The last point to be mentioned in the procedural history of the case is that, following the submissions on 9 June 2005, in response to a request from me, I received a supplementary affidavit from the pursuer dated 8 July 2005 dealing with the issue of her domicile, which had not been addressed either in the averments in the summons or in her previous affidavits. In that affidavit she depones that she was born in London on 30 June 1983 and lived there with her mother, who was born in India but came to the United Kingdom in 1976, until she was three years old, when she came to live in Edinburgh with her mother and sister. She has been brought up and educated in Edinburgh and intends to live in Scotland for the foreseeable future. She is a UK citizen. [8] I now turn to deal with each of the issues of law which arises in this case. Jurisdiction [9] Miss Ross pointed out that there was no doubt about the domicile of the pursuer: she was a citizen of the United Kingdom who had lived in Scotland since childhood and intended to continue living here. She was in a relationship with her partner in Edinburgh and was due to give birth to his child or had already done so. She had gone to India only on holiday at the time of her purported marriage. The defender, on the other hand, lived in India, and, so far as the evidence indicated, intended to continue living there: he was therefore domiciled in India. The relevant statutory provisions for the jurisdiction of the Court of Session in actions for declarator of nullity of marriage are sections 7 and 12 of the Domicile and Matrimonial Proceedings Act 1973 as amended ("the 1973 Act"), which, so far as relevant, are in the following terms: " .- (1) Subsections (2) to (8) below shall have effect, subject to section 12(6) of this Act, with respect to the jurisdiction of the Court of Session to entertain -

- (a) an action for declarator of nullity of marriage (3A) The Court shall have jurisdiction to entertain an action for declarator of nullity of marriage if (and only if) -
 - (a) the Scottish Courts have jurisdiction under the Council Regulation; or
 - (b) the action is one to which subsection (3B) below applies and either of the parties to the marriage -
 - (a) is domiciled in Scotland on the date when the action was begun .. (3B) This subsection applies to an action -

- (a) which is an excluded action ...
- (5) In this Part of this Act
- (c) "the Council Regulation" means Council Regulation (EC) No 1347/2000 of 27 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses; and
- (d) "excluded action" means an action in respect of which no court of a Contracting State has jurisdiction under the Council Regulation and the defender is not a person who is -
- (i) a national of a Contracting State (other than the United Kingdom or Ireland); or (ii) domiciled in Ireland.
- (6) Nothing in this Part of this Act affects any court's jurisdiction to entertain any proceedings begun before the commencement of this Act." [10] Miss Ross submitted that in the present action the Court of Session had jurisdiction under section 7(3A)(a) of the 1973 Act. That provision, which was effective from 1 March 2001, was inserted into the 1973 Act by regulation 2 of the European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001 (SSI 2001 No 36). In order to determine whether the Scottish courts had jurisdiction under the Council Regulation, and therefore under section 7(3A)(a) of the 1973 Act, it was first of all necessary for me to determine whether the Council Regulation applied in a case where one party could not found jurisdiction in a Member State. Put another way, did the Council Regulation apply only as between Member States? There was no decided case on the point in either Scotland or England. There was jurisdiction under article 2.1(a) of the Council Regulation on two separate grounds. The pursuer had been habitually resident in the Member State for at least a year before the raising of the action, and she had been habitually resident here for at least six months before the raising of the action and was both a national of and domiciled in the Member State. Article 8.2 envisaged a case where the respondent in the proceedings had no jurisdictional connection with a Member State and was thus an indication that the Regulation applied in a case such as the present one. Article 8 is headed "Residual jurisdiction" and article 8.2 reads as follows: "As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his "domicile" within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State." [11] Miss Ross went on to submit that, if the Council Regulation was restricted in its application to cases where both parties could found jurisdiction in a Member State, the action was an excluded one under section 7(3B)(a) of the 1973 Act and there was therefore jurisdiction under section 7(3A)(b)(a). The fact that the marriage was a foreign marriage did not affect the issue of jurisdiction. In *Szechter v Szechter*

- [1971] P 286, where the marriage had taken place in a prison in Poland and both parties had been domiciled in Poland at the time of the marriage but in England at the time the proceedings were raised, Sir Jocelyn Simon P held that the English courts had jurisdiction to grant decree of nullity of marriage on the grounds of common residence and common domicile in England. In the earlier case of *Ponticelli v Ponticelli*
- [1958] P 204 Sachs J granted decree of nullity of a proxy marriage in Italy between an Italian man domiciled and resident in England and an Italian woman resident and domiciled in Italy.
- [12] In my opinion all these submissions on the issue of jurisdiction made by Miss Ross are sound. The evidence contained in the pursuer's affidavit of 8 July 2005 establishes that she is domiciled in Scotland. I am satisfied that the Court of Session has jurisdiction under section 7(3A)(a), failing which section 7(3B)(a), of the 1973 Act and the fact that the marriage was celebrated in India does not affect the issue of jurisdiction. I am of the view that the Council Regulation is not restricted to cases where both parties can found jurisdiction under article 2.1 and that it applies in a case such as the present, where (to use the terminology of the Regulation) the respondent in the application is not habitually resident or domiciled in, or a national of, a Member State. Article 8.2 is an indication that it applies in such a case. Moreover, I do not see why the Council Regulation should, so far as the issue of jurisdiction (as opposed to that of recognition and enforcement of judgments) is concerned, be restricted in its application to cases in which both parties can found jurisdiction in a Member State. The provisions of the Regulation dealing with jurisdiction are contained in Chapter II, whereas the provisions dealing with recognition and enforcement of judgments are dealt with in Chapter III. In any event, it is in my view clear that, if the Council Regulation does not apply in this case, it is an "excluded action" within the meaning of section 7(3B)(a) of the 1973 Act and the Court of Session therefore has jurisdiction. Is the action defended? [13] I have set out above the procedural history of the action. A Minute for Decree in Form 49.29-A together with affidavits and a supporting document have been lodged on the basis that this is a family action "in which no defences have been lodged" in terms of rule of court 49.28(1)(a). Rule of court 18.1(1) provides as follows: "Defences to an action shall consist of -
- (a) numbered answers corresponding to the articles of condescendence annexed to the summons; and
 - (b) appropriate pleas-in-law." Defences require to be signed by counsel or other person having a right of audience, or, in the case of a party litigant, the party litigant: rule of court 4.2(4). The court fee for lodging defences due under the Table of Fees (at present £81) is payable when they are lodged in process. [14] Having considered the procedural history of this action as set out above, I am satisfied that it is a case "in which no defences have been lodged" in terms of rule of court 49.28(1)(a) and that it should therefore be allowed to proceed as an undefended action. It seems to me that the real question is whether the document no 10 of process is to be regarded as a set of defences. On the face of it that document has all the appearance of a set of defences as it consists of numbered answers corresponding to the

articles of condescendence annexed to the summons and appropriate pleas-in-law, as required by rule of court 18.1(1), but it is not signed as required by rule of court 4.2(4) and the fee due for lodging defences was not paid when it was sent to the General Department. Had the defender been serious about defending the action he could and should have replied to the letter from the General Department dated 17 December 2004 (which he must have received as it was sent by International Recorded Delivery) confirming that he wished the document no 10 of process to be regarded as his defence to the action. As the document no 10 of process is unsigned and the court fee for lodging defences has not been paid, I am of the view that no 10 of process cannot be regarded as "defences" within the meaning of rule of court 18.1 and that this is therefore a family action in which "no defences have been lodged" in terms of rule of court 49.28(1)(a). [15] In reaching this conclusion I have ignored the faxed document no 17 of process, which bears to be a form of consent to decree of divorce. On the assumption that this document came from the defender, Miss Ross submitted that it was impossible to know whether it indicated that he did not understand the difference between divorce and nullity or whether he was making a point. That document could be of relevance in the present context only if I was satisfied that it came from the defender and that it indicated an intention on his part not to defend the present action for declarator of nullity. I am not satisfied about either of those matters. The signature, which appears about two inches below the typescript, is indecipherable and the reference is to "decree of divorce". Duress: choice of law [16] The ground upon which declarator of nullity is sought is duress. It is therefore necessary to decide which law should be applied in determining whether the pursuer entered into this purported marriage in India under duress. [17] The only consideration of this question in a Scottish case was by Lord Guthrie in *Di Rollo v Di Rollo* 1959 SC 75 . That was an action of divorce raised by the wife pursuer on the ground of the defender's adultery with an alternative conclusion that an annulment granted by the Rota in the Vatican was a decree in rem and so valid in Scotland. The marriage had taken place in Scotland. The pursuer was of Italian extraction but was born and had lived all her life in Scotland, where she intended to remain. She averred that she did not wish to marry the defender as he had assaulted her five days before their wedding day but, as all the plans for the wedding had been arranged, she yielded to pressure from her parents to go on with it. In holding that the pursuer had not relevantly averred that by the law of Scotland the marriage had been annulled by the decrees of the Rota Lord Guthrie stated as follows at p 78: "Now, the pursuer and the defender entered into a regular marriage in Scotland, celebrated in church, and admittedly not subject to challenge by the law of Scotland on the ground that the pursuer did not consent to enter into the contract of marriage. In my opinion, the question whether the pursuer gave true consent to the marriage is to be decided by the law of Scotland as the *lex loci celebrationis* ." [18] In the case of *Szechter* (supra) Polish law, as the law of the ante-nuptial domicile of both parties, was applied to the determination of the question whether the marriage was void for duress. Polish law was also, of course, the *lex loci celebrationis* , but Sir Jocelyn Simon P expressly stated that he was applying it as the law of the domicile. At p 294G to p 295C he stated as follows: "The second preliminary question is what is the proper law to apply in order to

determine whether an ostensible marriage is defective by reason of duress. There is little direct authority on this matter. But the effect of duress goes to reality of consent and I respectfully agree with the suggestion in rule 32 of Dicey and Morris, *Conflict of Laws*, 9th Ed (1967), p 271, that no marriage is valid if by the law of either party's domicile one party does not consent to marry the other. This accords with the old distinction between, on the one hand, "forms and ceremonies", the validity of which is referable to the *lex loci contractus*, and, on the other hand, "essential validity", by which is meant all requirements for a valid marriage other than those relating to forms and ceremonies, for the validity of which reference is made to the *lex domicilii* of the parties So far as capacity (also a matter of "essential validity") is concerned, there can be no doubt that no marriage is valid if by the law of either party's domicile one of the parties is incapable of marrying the other He continued at p 295G: "Both Nina and the respondent were domiciled in Poland at the time of the ceremony of marriage on February 2, 1968. It is therefore for Polish law to answer whether, on the facts as I have found them, the marriage was invalid by reason of duress." [19] The Scottish Law Commission considered the question of choice of law rules in nullity suits in 1985 in Part V of its Consultative Memorandum No 64: *Private International Law, Choice of Law Rules in Marriage*, a joint publication with the English Law Commission, which published it as Working Paper No 89. Para 5.9, dealing with the choice of law rule in England and Wales for determining lack of consent to marriage, states that "the weight of authority is that the issue of reality of consent (as distinct from the form in which the consent is expressed) is to be determined by the parties' domiciliary law". Para 5.10, dealing with the law of Scotland, states as follows: "There is no conclusive Scottish authority on what law governs defects in consent. In all the cases in which the issue appears to have arisen Scots law was the law of the forum, the law of the place of celebration and the law of the domicile of the party whose consent was alleged to be defective; and, with one exception, no indication is given as to the basis on which Scots law was applied. In one case (*Di Rollo v Di Rollo* 1959 SC 75, 78) where the choice of law problem was mentioned, Lord Guthrie stated (obiter) that 'the question whether the pursuer gave a true consent to the marriage is to be decided by the law of Scotland as the *lex loci celebrationis*.'" At para 5.14 the Commissions considered, and rejected, the *lex loci celebrationis* as the law which ought to govern defects in consent. They stated: "We have rejected the law of the country of celebration as the basic choice of law rule for issues of legal capacity, and we do not think that a different rule should be adopted for the issue of reality of consent. The issue is not one of form but of substance. It would, we think, be inappropriate and undesirable to refer a substantive issue exclusively to the law of a country with which the parties may only have a fortuitous or fleeting connection." At para 5.18 the Commissions set forth their recommendation for the choice of law rule on lack of consent in the following terms: "Although defects in consent do not in the three legal systems of the United Kingdom create a legal incapacity for marriage, both lack of consent and legal incapacity are concerned with the essential or substantive validity of a marriage and both should, in our view, be subject to the same choice of law rules. It would be contrary to principle and inconvenient in practice to fragment the question of essential validity and apply, say, the law of the forum to the issue of consent. Our provisional

recommendation is that the issue of lack of consent should be governed by the law of the domicile." Later, at para 5.23, the Commissions stated their provisional view that the issue of a party's lack of consent should be governed by that person's ante-nuptial domiciliary law.

[20] It is now proposed that the recommendations of the Law Commissions on choice of law be implemented by clause 28(2) and (3) of the Family Law (Scotland) Bill, which is in the following terms: "(2) The question whether a person who enters into a marriage -

- (a) had capacity; or
- (b) consented, to enter into it shall, subject to subsection (3) and to section 50 of the Family Law Act 1986 (c.55) (non-recognition of divorce or annulment in another jurisdiction no bar to remarriage), be determined by the law of the place where, immediately before the marriage, that person was domiciled.
- (3) If a marriage entered into in Scotland is void under a rule of Scots internal law, then, notwithstanding subsection (2), that rule shall prevail over any law under which the marriage would be valid." It will be seen that clause 28(3), if enacted, would provide a subsidiary role for the *lex loci celebrationis* in that a marriage celebrated in Scotland would be void if there were lack of consent on the part of one party according to Scots law, notwithstanding that the law of the domicile of that party would not consider that there had been lack of consent. [21] While the review of the decided cases in the Law Commissions' publication is helpful in attempting to discover what the existing law is, the recommendations of the Law Commissions and the contents of clause 28(2) and (3) of the Family Law (Scotland) Bill are, I must remind myself, simply proposals about what the law should be, and must not be taken as statements of the existing common law, which is what I must determine in this action. [22] In my opinion the law which governs the issue of consent to marriage is the law of the domicile of the party claiming lack of consent. There is no doubt that capacity to marry is governed by the ante-nuptial domicile of the party, and it seems to me to accord with principle that consent should also be governed by the same law. I fully concur with the statement by the Law Commissions at para 5.18 of their publication that "both lack of consent and legal incapacity are concerned with the essential or substantive validity of a marriage and both should be subject to the same choice of law rules". The obiter dictum of Lord Guthrie in *Di Rollo* that "the question whether the pursuer gave a true consent to the marriage is to be decided by the law of Scotland as the *lex loci celebrationis* " is unsupported by reasoning and unvouched by authority. I therefore decline to follow it. I prefer the reasoning of Sir Jocelyn Simon P in *Szechter* and that of the Law Commissions. It is unnecessary for me to consider whether the rule proposed in clause 28(3) of the Family Law (Scotland) Bill is part of the existing law as it cannot apply to the facts of this case, the marriage not having been entered into in Scotland. I shall accordingly apply Scots law to determine whether the pursuer did not consent to marry because of duress. Sufficiency of Evidence [23] When the papers were first placed before me I had concerns about the sufficiency of evidence as the only evidence came from the pursuer herself and her partner Keith Singh, who was in Scotland at the time of the marriage. The evidence of

the pursuer in her affidavit is generally along the lines of the averments which I have summarised above. In his affidavit Mr Singh speaks to having had a four year relationship with the pursuer and to her going on a six week holiday to India at the beginning of September 2001. During her holiday she kept in touch with him by phoning from a phone box in India. Towards the end of her holiday she phoned him in a distressed state to say that her family had arranged a marriage for her and asked if he could try to stop it happening. He was aware that the pursuer had always made it clear to her family that she wanted to marry someone of her own choice but he and the pursuer felt it was probably best that she should go through with the marriage because there was such a lot of pressure being put on her. They knew that her family would be likely to leave her in India if she refused to go through with the marriage. So far as the question of duress is concerned, the evidence of Mr Singh is in my view clearly hearsay, being based on what the pursuer told him on the telephone about the pressure to which she was being subjected in India to cause her to enter into a marriage. [24] Section 1(1) of the Civil Evidence (Scotland) Act 1988 ("the 1988 Act") provides as follows: "In any civil proceedings the court or, as the case may be the jury, if satisfied that any fact has been established by evidence in those proceedings, shall be entitled to find that fact proved by that evidence notwithstanding that the evidence is not corroborated." Section 2(1) of the 1988 Act, which deals with the admissibility of hearsay, provides as follows: "In any civil proceedings -

- (a) evidence shall not be excluded solely on the ground that it is hearsay;
 - (b) a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible; and
 - (c) the court, or as the case may be the jury, if satisfied that any fact has been established by evidence in those proceedings, shall be entitled to find that fact proved by the evidence notwithstanding that the evidence is hearsay." Section 8 of the 1988 Act, which deals with evidence in actions concerning family relationships etc, provides as follows: " . - (1) In any action to which this subsection applies (whether or not appearance has been entered for the defender), no decree or judgment in favour of the pursuer shall be pronounced until the grounds of action have been established by evidence.
- (2) Subsection (1) above applies to actions for divorce, separation or declarator of marriage, nullity of marriage, legitimacy, legitimation, illegitimacy, parentage or non-parentage.
 - (3) Subject to subsection (4) below, in any action for divorce, separation or declarator of marriage or nullity of marriage, the evidence referred to in subsection (1) above shall consist of or include evidence other than that of a party to the marriage (or alleged or purported marriage)." Subsections (4) and (5) enable the Lord Advocate to provide by statutory instrument that subsection (3) shall not apply, or shall apply with modifications, in respect of such class or classes of action as may be so specified. No exception or modification has been enacted in respect of actions of declarator of nullity of marriage. [25]

Had the evidence in this action remained as it was up until 2 June 2005 and consisted only of the evidence of the pursuer and of Keith Singh, it would have been necessary for me to determine whether his evidence, insofar as it consisted of hearsay of the pursuer, constituted evidence other than that of a party to the purported marriage within the meaning of section 8(3) of the 1988 Act. In my view the expression "evidence other than that of a party to the marriage (or alleged or purported marriage)" in section 8(3) must be construed as referring to primary evidence from a party other than that of a party to the marriage. It is in my view plain that the purpose of section 8(3) is to ensure that the court is provided with evidence from a source other than a party to the marriage, and if evidence from someone who is not a party to the marriage consisting of hearsay of a party to the marriage were to be accepted as satisfying section 8(3) the effect would be that the purpose of section 8(3) would be nullified. The evidence of a witness who is not a party to the marriage consisting of hearsay of a party to the marriage is of course admissible evidence under section 2(1) of the 1988 Act, but it cannot in my view be regarded as "evidence other than that of a party to the marriage (or alleged or purported marriage)" within the meaning of section 8(3). The reason why that is so is because the evidence in question is simply the evidence of a party to the marriage given through the mouth of a witness who is not a party to the marriage. [26] Accordingly, had the evidence remained as it was up until 2 June 2005 I would have been of the view that it was insufficient in law as the evidence of Keith Singh about what happened in India before and at the time of the marriage consisted purely of hearsay of the pursuer and I would have considered such other evidence as he was able to give which satisfied section 8(3) of the 1988 Act (for example, about his pre-existing relationship with the pursuer and her attitude to arranged marriages) as being insufficient to constitute a separate source of evidence on the issue of duress. The deficiency which existed in the evidence prior to 2 June 2005 has in my opinion now been repaired by the lodging of the additional affidavit on that date. The witness who swore that affidavit was in India at the material time and speaks to the pursuer being told by her mother at short notice that she (the pursuer) was going to get married, the pursuer saying that she did not wish to get married and her mother threatening to rip up her passport if she did not do so. The witness also speaks to the pursuer being miserable and looking thoroughly unhappy at the ceremony and crying after it when she had to go to her husband's house. [27] I must now determine whether the evidence of the pursuer, Keith Singh (insofar as it satisfies section 8(3) of the 1988 Act) and the additional witness whose affidavit was lodged on 2 June 2005 establishes duress in law. In short what the pursuer and her witness speak to is a threat from the pursuer's mother, who held her passport, that if she (the pursuer) did not go through with the arranged marriage she would tear up her passport so that the pursuer would be left stranded in India. The question is whether such a threat is sufficient to amount to duress so as to vitiate consent to the purported marriage. [28] The question of what is sufficient to amount to duress so as to vitiate consent to marry was discussed by Lord Sutherland in *Mahmood v Mahmood* 1993 SLT 589 and by Lord Prosser in *Mahmud v Mahmud* 1994 SLT 599. The previous English decisions dealing with the issue are discussed in these two cases. In *Mahmood* at p 591C - D Lord Sutherland quoted the following dictum of Sir Jocelyn Simon

P in *Szechter* (supra) at p 297H - 298A: "It is, in my view, insufficient to invalidate an otherwise good marriage that a party has entered into it in order to escape from a disagreeable situation, such as penury or social degradation. In order for the impediment of duress to invalidate an otherwise valid marriage, it must, in my judgment, be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat of immediate danger (for which the party himself is not responsible) to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock." That dictum was followed and accepted by the Court of Appeal in *Singh v Singh*

[1971] P 226 but in *Hirani v Hirani*

[1983] 4 FLR 232 (in which the decision in *Singh* does not appear to have been drawn to the attention of the court) the Court of Appeal appears to have taken a more liberal view, Ormrod LJ stating that the crucial question was whether the threats, pressure or whatever it was, was such as to destroy the reality of consent and overbear the will of the individual. His Lordship stated that the following dictum of Lord Scarman in *Pao On v Lau Yiu Long*

[1980] AC 614 at p should be followed: "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent." The previous statement of Scots law cited in the two above Scottish decisions was the passage from *Fraser on Husband and Wife* (2nd Ed) at p 444: "If either party is compelled by force to marry, or by some rational fear is terrified into compliance, the law holds that there has not been given that free consent necessary to show an agreeing mind; *quamvis si liberum esset, noluisse, tamen coactus, voluit* ." [29] In *Mahmood* Lord Sutherland allowed a proof before answer in a case where it was averred that a 21 year old woman entered into a marriage which had been arranged by her parents and the defender's parents five years earlier because, when she protested against the arranged marriage, her parents threatened to disown her, to stop supporting her financially and to send her to live in Pakistan and also told her that if she refused to marry the defender she would bring disgrace to herself, to her family and to the Pakistani community in Edinburgh. In *Mahmud* Lord Prosser granted decree of declarator of nullity to a man of Pakistani origin who was a member of a Muslim family and who since 1980 had been under pressure from his parents and other members of his family to enter into an arranged marriage with one of his cousins who lived in Pakistan. When he initially refused he was made to feel that he was bringing shame and degradation to his family. He resisted until 1992 when he finally relented and married his cousin, whom he did not see before or after the marriage ceremony. At the time of the marriage ceremony he was living with his girlfriend, whom he planned to marry, and their child. Lord Prosser, in granting declarator of nullity after hearing oral evidence, approved the dictum of Ormrod LJ in *Hirani* which I have quoted above and stated at p 601E: "I would add that in my opinion it is a question of fact whether, in the particular case and having regard to the particular individual, the reality of consent has been destroyed and the will has been overborne." [30] While I accept that the question in every case must be whether the will of the party has been overborne so that the apparent consent to marry is not a free consent, there must in

my opinion be limits to the nature of the threats which the law regards as being capable of overbearing the will. For example, a threat by parents to renege on a promise to buy the party a new car or new clothing, or even to provide a house, would not, I think, suffice. In my opinion a threat of immediate danger to life, limb or liberty, or some equally serious threat, is required before it can be said that the party "is compelled by force to marry, or by some rational fear is terrified into compliance" (Fraser , supra). I very much doubt whether the parental pressure put on the pursuer in Mahmud was sufficient to constitute duress. [31] In the present case the threats from the pursuer's mother were of a serious nature and amounted in my view to threats of immediate danger to the pursuer's liberty in that, if she did not comply with her mother's wishes, her passport would be ripped up and she would be left stranded in India. The relevant evidence in the pursuer's affidavit is as follows: "I was told that an agreement had been entered into between the families and that I would bring shame on my family if I didn't go through with the wedding ceremony. My mother said that if I didn't go through with the ceremony then she would destroy my passport and travel documents and I would be left in India. I had no other way of getting back home to Scotland. In any event my family members were keeping a very tight rein on me to make sure that I couldn't run away. I felt isolated and vulnerable. My older sister had already rejected the idea of an arranged marriage and she had been ostracised by the family. I believed that my mother was capable of carrying out the threats that she had made to destroy my passport etc. I could see no other way out than to go through with the marriage ceremony." In light of that evidence and the evidence of the corroborating witness who was present in India at the time, to which I have referred above, I am satisfied that there was in this case a threat from the pursuer's mother of immediate danger to the pursuer's liberty which caused the will of the pursuer to be overborne and vitiated her consent to marry. Decision [32] As I am satisfied, for the reasons given above, that the court has jurisdiction, that no defences have been lodged, that the law of Scotland as the law of the pursuer's domicile governs the issue of consent to marry, that the evidence consists of or includes evidence other than that of a party to the marriage and establishes that the purported marriage was entered into by the pursuer under duress and is therefore null by reason of her lack of consent, I shall grant declarator of nullity in terms of the first conclusion of the summons. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotCS/2005/CSOH_96.html

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