

SCOTLAND / JUDGMENT

# MRA v NRK [2011] ScotCS CSOH\_101 (17 June 2011)

**[2011] ScotCS CSOH\_101**

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[2011] CSOH 101, 2011 GWD 22-498 [ New search ] [ Help ] OUTER HOUSE, COURT OF SESSION  
[2011] CSOH NUMBER F51/10 OPINION OF LORD STEWART in the cause M R A Pursuer;  
against N R K Defender:

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Pursuer: Mrs M A Clarke; Thorley Stephenson SSC 17 June 2011

- [1] This is an undefended action for declarator of nullity of marriage. The action proceeds by way of evidence on affidavit in terms of Rule of Court 49.28. In terms of Rule of Court 49.29, the pursuer has moved the Court by minute to grant decree. The marriage which the pursuer seeks to have nullified is, she avers, one contracted by telephone.
- [2] Given certain formal defects and the unusual subject-matter I required the appearance of counsel. Mrs Clarke appeared for the pursuer on 28 January 2011 and moved for decree. Having heard counsel's submissions, I made avizandum .
- [3] I then took the view that there would be benefit in having further information and submissions and appointed the case to call By Order on 9 March 2011 . Mrs Clarke appeared and made further submissions. I appointed the pursuer, if so advised, to lodge further evidence within four weeks. A supplementary affidavit dated 8 April 2011 was lodged on 8 April 2011 and marked No 12 of Process. Having taken further time for consideration I have formed the opinion that the action should be dismissed.

## Background

- [4] The version of events which follows has been drawn from the averments in the summons, from the affidavits of the pursuer, her father and her mother, from the productions and from counsel's submissions.
- [5] The pursuer is female. She was born in Edinburgh on 9 August 1984 . She is a United Kingdom citizen of Pakistani ethnicity. She is currently employed as a hospital doctor.
- [6] In about 2004 the pursuer met a man on the internet. She was then 20 years of age. That man is the now defender. He said he was 27 years of age. He had a postal address in Karachi , Pakistan . He told the pursuer that he was a car showroom manager in Dubai . The defender was very keen to marry the pursuer.
- [7] The pursuer told her parents. At the time the pursuer lived with her parents at their house in Edinburgh . On 8 December 1984 the pursuer's mother travelled to Pakistan where she arranged to meet the defender. The pursuer's mother met the defender. She did not consider him a suitable husband for her daughter. The pursuer's mother returned from Pakistan on 19 January 2005 .
- [8] While in Pakistan the pursuer's mother reported back to the pursuer's father and to the pursuer in Scotland . She said that defender was not suitable. The pursuer's parents did not agree to the proposed marriage and the pursuer knew that.
- [9] Notwithstanding that her father refused permission, the pursuer continued to communicate with defender. She agreed to marry him. He asked the pursuer to send him copies of her birth certificate, passport and driving licence, which she did. She received copies of his papers in return.
- [10] The pursuer and defender agreed to marry by telephone. The telephone marriage took place on 12 January 2005 . During the proceedings the pursuer was in Scotland . She believes the defender was in Pakistan . The pursuer spoke on the telephone to someone who claimed to be a priest.
- [11] The pursuer's mother was in Pakistan on the date of the marriage.
- [12] The pursuer subsequently received what she describes as the marriage certificate with a translation. She signed the certificate. She was asked to take the certificate to the Pakistani consulate in Glasgow . She took the certificate to the consulate on 3 February 2005 . The consulate stamped the certificate on the reverse. The pursuer sent the certificate away on the same day, presumably to the defender.
- [13] The pursuer and defender have never met in person, before, during or after their marriage.
- [14] It is to be inferred that the purpose of the exercise from defender's point of view was to circumvent United Kingdom immigration controls. The pursuer's motivation is not explained beyond the fact that she claims to have been naive. She further states

[supplementary affidavit No 12 of process]: "I was going through a lot of pressure at the time and I was feeling bad about myself. I had just failed first year of university and I was getting a lot of hassle from my parents about it. It was a very difficult time for me. I was vulnerable at the time. I knew that I should not have done it, but at the time I was sincere."

- [15] There is no information as to whether money changed hands.
- [16] An opinion on Muslim and Pakistani law has been obtained by the pursuer's agents. The opinion has not been produced. The opinion reportedly states that telephone marriages are valid in Pakistan . In further submissions counsel stated that the opinion was based on the pursuer's earlier affidavit dated 21 April 2006 [not produced] and on the marriage certificate and translation [Production Nos 6/1 and 6/2]. Counsel quoted the conclusion of the opinion to the effect that the marriage is prima facie valid as a Muslim marriage by the laws of Pakistan .
- [17] This accords with the opinion of Professor Menski cited in the case of KC and NNC v City of Westminster Social & Community Services Department [see below]. Werner Menski is the Professor of South Asian Laws at the School of Oriental and African Studies in the University of London .
- [18] In the KC and NNC case Professor Menski gave an opinion on the law applicable in Bangladesh . At the time of the telephone call in that case the parties to the marriage were situated in England and Bangladesh respectively. Professor Menski said: "This form of celebration of marriage is increasingly common and accepted as entirely valid."

## Submissions

- [19] Counsel's submissions were candid and to the point, the point being that this action is predicated on the proposition that the marriage had occurred in two places, Scotland and Pakistan . Counsel stated that the key question was: what was the place of celebration of the marriage? A marriage was valid, or not, according to the *lex loci celebrationis* .
- [20] If a marriage happened in two places it was not a valid marriage, said counsel, unless valid according to the law of both jurisdictions. This was not a valid marriage according to the law of Scotland . Accordingly it was not and had never been a valid marriage.
- [21] Counsel referred to E M Clive, *The law of husband and wife in Scotland* , 4 th edn ( Edinburgh , 1997) at 122, § 09.040: "It is settled that the law of the place of celebration governs formal validity."
- [22] Counsel referred next to the Marriage ( Scotland ) Act 1977 as amended which provides: "
13. - Preliminaries to solemnisation of religious marriages.
- (1) A marriage shall not be solemnised by an approved celebrant unless -

- (a) the parties produce to him before the marriage ceremony a Marriage Schedule, in respect of the marriage, issued in accordance with this Act;
  - (b) both parties to the marriage are present; and
  - (c) two persons professing to be 16 years of age or over are present as witnesses."
- [23] Counsel submitted that because both parties were not present, the marriage could not be formally valid in Scotland in terms of the 1977 Act s 13 (1) (b). (This was not, of course, a marriage solemnised by "an approved celebrant".) That provision was reinforced by section 23A which guarantees the validity of a marriage the particulars of which are entered in the Register of Marriages, provided both parties were present at the ceremony.
- [24] Counsel drew my attention to an English case featuring a telephone marriage, *KC and NNC v City of Westminster Social & Community Services Dept*
- [2008] EWCA Civ 198 (19 March 2008). The telephone marriage took place between IC, a 24 year old United Kingdom male of Bangladeshi ethnicity located in England , and a Bangladeshi female located in Bangladesh . The male had the mental age of an infant. He lacked the capacity to marry in English law. Protection issues were in the forefront of the case. Matrimonial issues appear to have been secondary. The case was decided on grounds of lack of capacity in English law.
- [25] The first instance judge found that the marriage was valid in Muslim law and in Bangladeshi civil law. The judge left undecided the identification of the *lex loci celebrationis* . He found that the father's consent given as the lawful marriage guardian of his incapacitated son was sufficient in Islamic law to constitute appropriate consent [§ 35]. The father was apparently present at the ceremony in Bangladesh [§ 34].
- [26] The judge recognised that it could be argued that the celebration of the marriage had occurred in both countries but was inclined to proceed on the agreement of parties that it was more probable than not that the celebration of the marriage occurred in Bangladesh. Thorpe LJ in the Court of Appeal regretted that the issue had not been fully dealt with at first instance [§§ 36-39, 42].
- [27] His lordship adverted to the public policy issues involved [§§ 40-42]. He noticed the provision of the French Civil Code, article 146 (1): "The marriage of a French person, even where contracted in a foreign country, requires his presence." English law had recognised that marriage by proxy in a foreign country was not contrary to public policy [ *Apt v Apt*
- [1948] P 83 (CA)].
- [28] Counsel drew my attention to the current United Kingdom Border Agency Entry Clearance Guidance for settlement in the United Kingdom applications, SET03 - Spouses. SET 3.17 Marriage by Telephone provides: "A telephone marriage is one where the exchange of vows or other marriage contract takes place over the telephone... A telephone marriage celebrated whilst one of the parties is in the UK is not valid. This is because telephone marriages are

not valid in the UK ... For cultures where marriage consists of an offer made by a man and accepted by a woman, the marriage is considered as taking place in the country where the woman is. If the woman is resident in the UK then a telephone marriage is not valid. If the woman is resident in a country where telephone marriages are valid then a telephone marriage may be valid."

- [29] The Guidance continues: "One of the Immigration Rules' requirements which is particularly relevant in the case of an applicant who has undergone a telephone marriage is the requirement that the parties to the marriage have met." Reference is made to SET3.10 "Tribunal decisions on the requirement to have met." I have subsequently seen a decision in one such case, J v Entry Clearance Officer, Islamabad ( Pakistan )
- [2003] UKIAT 00167 ( 9 December 2003 ).
- [30] In further submissions counsel contrasted the present case with the case of SH v KH 2006 SC 129. She submitted that the subject matter of SH was a sham marriage, defective in mutual consent though effective in outward form: the present marriage is based on mutual consent but is defective as to the formalities.
- [31] Counsel submitted that fundamentally marriage is a contract. The crucial point, counsel submitted, is "the place of performance". (I take this to mean the place of celebration, locus celebrationis .) Counsel asked: "where is 'the place of performance' according to International Private Law rules?" On any view, counsel said, the pursuer was not in Pakistan and the defender was not in Scotland . There was either no "place of performance" - in which case there was no marriage - or there were two places, Scotland and Pakistan . If there were two places the marriage had to be valid according to the laws of both places.
- [32] Counsel referred to Sir L Collins (ed), Dicey, Morris and Collins: The Conflict of Laws , 14 th edn ( London , 2006), vol 2, § 17-013: "There is usually no difficulty in identifying the lex loci celebrationis because both parties are normally present at the ceremony. If the marriage is celebrated by proxy, as is possible under some foreign laws, the locus celebrationis is the country where the proxy takes part in the ceremony, and not the country where he or she was appointed. If no ceremony is required, but a marriage can be concluded by an exchange of promises ( per verba de praesenti ), difficulties may arise in identifying the lex loci celebrationis if the parties are in different countries when they exchange their promises. Probably the English courts would require to be satisfied that a marriage could be concluded in this manner by the laws of both countries..."
- [33] Counsel submitted that the dual validity rule represents the law of Scotland . She renewed her submission that the marriage was not and never had been a valid marriage according to the law of Scotland . (I note however that the textbook proposes the dual validity rule only for de praesenti marriages, which this was not.) Discussion [34] When I first took the matter under advisement, I noticed that Productions Nos 6/1 and 6/2 bear a Court of Session reference "A445/06" as well as the current reference "F51/10". I asked to see the process in action A445/06 and found that the pursuer had raised identical proceedings in 2006 based on

an affidavit dated 21 April 2006 . The 2006 affidavit is in substance the same as the pursuer's affidavit No 9 of Process in the present action. The productions were first lodged in the 2006 action, borrowed out and re-lodged in the present action. The 2006 action has not been proceeded with. In supplementary submissions counsel confirmed that there had been an earlier action and stated that she suspected that "there was a connection between the inactivity in the first action and getting an expert opinion".

- [35] As stated above, an expert opinion has been obtained and has not been produced to the Court. In further submissions, counsel stated that that the opinion is a "red herring". Whether or not the marriage is valid in Pakistan is irrelevant: the question is whether the marriage is valid in Scotland ; and the Court can nullify a marriage that is valid in Pakistan .
- [36] According to the "true translation" of the certificate, both the bride and the groom apparently had a "vakil", which I am told means "attorney". The "true translation" reads as if the individual who solemnised the marriage was also the vakil for both parties.
- [37] Originally I had no information as to whether the marriage might have been validly contracted on the bride's behalf by her vakil. I had no information as to whether the reported validity of the marriage in Pakistan is a function of the part played by the vakil. If that were the case, the physical absence of the bride might be irrelevant.
- [38] In her affidavit No 9 of Process at paragraph 12, the pursuer implies that the "certificate" she received showed the marriage to have been already registered without her signature. If correct, this could be consistent with a valid marriage by proxy on her behalf.
- [39] If this marriage were truly a marriage by proxy valid in the place of solemnisation, I know of no authority which would allow me to nullify it [ Apt v Apt
- [1948] P 83 (CA)].
- [40] At section 8 the "certificate" form (in translation) asks for details of the witnesses to the appointment of the bride's vakil including their "relationship with the bride". Both are described as "cousin". This raises a question about the involvement of the bride's family.
- [41] In her supplementary affidavit No 12 of process, the pursuer states that she did not ask the man who claimed to be the priest to be her proxy; and that the bride's witnesses were definitely not her cousins and were in no way related to her. The pursuer states that she has no idea who was there ( at the ceremony ), if anyone.
- [42] I was told by counsel that the pursuer's current 10-year passport No 6/3 or 6/4 of Process issued on 9 June 2004 demonstrates that she was not in Pakistan at the time of the ceremony. There is no evidence as to whether the passport would necessarily have a Pakistani stamp in it. I am not confident that I would recognise Pakistani exit and entry stamps in any event. There are what appear to be recognisable stamps for Iran , Syria and Saudi Arabia and other stamps.

- [43] The pursuer's mother's affidavit No 10 of Process at paragraph 16 refers to the mother's passport as showing that the mother was in Pakistan from 8 December 2004 to 19 January 2005 : but the passport has not been produced.
- [44] There is no evidence as to whether or not the defender has subsequently used his marriage certificate for the purpose of entering the United Kingdom .
- [45] The pursuer has signed what is called the marriage certificate. Assuming all other details in order, the certificate may well evidence a regular marriage with both parties present. Nothing on the face of the document, so far as the evidence goes, declares the marriage to have been by telephone. Nothing would alert the Border Agency to any entry clearance issues. Taking a severe view the pursuer, on her own account, has been complicit in falsifying the record to enable the defender to evade immigration controls.
- [46] Supposing the marriage were celebrated partly in Scotland , I should still have concerns as to whether declarator of nullity is an appropriate remedy. This is because I am told that the marriage is valid in Pakistan . Can a Scottish court nullify a marriage which is a good one by the law applicable in another jurisdiction? In *Berthiaume v Dastous*
- [1930] AC 79 at 83, Lord Dunedin, assuming naturally a single place of celebration, said: "If there is one question better settled than any other in international law, it is that as regards marriage - putting aside the question of capacity - locus regit actum . If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage. These propositions are too well fixed to need much quotation."
- [47] The dictum was cited in *Apt* [ *supra* and at the first instance [1947] P 127, 134]. (For completeness I note that the rule of the *lex loci colabrationis* is given statutory effect by the Family Law ( Scotland ) Act 2006 s. 38).
- [48] The declaration substituted by the Court of Appeal in the *KC* and *NNC* case, where the question was one of capacity rather than formal validity, was "that the marriage between *IC* and *NK*, valid according to the law of Bangladesh , is not recognised as a valid marriage" in England & Wales [ *supra* §§ 32, 103].
- [49] Was the pursuer's marriage celebrated exclusively in Pakistan ? There is little hard information about the marriage. None of the witnesses in these proceedings speaks to being present. The pursuer states in her affidavit No 9 of Process that she has produced "a certified copy of my marriage certificate and translation as relative hereto." (The marriage "certificate" may be a marriage schedule rather than a certificate in the sense of a certified extract from the register of marriages.)

- [50] The productions are photocopies. There is no self-evident certification of the copy certificate No 6/1 of Process. I would have expected an affidavit from an expert as to the nature of the document, its authenticity, the meaning of its contents and the legal effect. The photocopy does not show the consular stamp on the reverse referred to in the pursuer's affidavit.
- [51] I refer to what bears to be a copy "true translation" of the marriage "certificate" Production No 6/2. The place of solemnisation is said to be in Pakistan . The "person who solemnised the marriage", the bridegroom and the witnesses, if not the bride, were apparently present at that place. The dowry was payable in the currency of Pakistan . (There is no information as to whether payment was made.) The marriage was apparently registered or intended to be registered in Pakistan . I infer, though this is not spelled out, that the pursuer communicated her consent to Pakistan . In the absence of expert opinion to the contrary and given that the marriage is said to be valid by the laws of Pakistan, it is open to infer that, by the laws of Pakistan, Pakistan was the locus celebrationis .
- [52] The present case might be thought to represent a stronger argument for validity than the case of *McCabe v McCabe*
- [1994] 1 FLR 410 (CA) [see Conflict of Laws at § 17-014]. In *McCabe* neither party was present at the locus celebrationis . An Irish man and a Ghananian woman living together in England agreed to marry according to Ghanian tribal custom. They sent a bottle of gin and some money to Ghana where a ceremony was held. The couple remained in England . There were no proxies. The Court of Appeal recognised the union on the basis of expert opinion to the effect that a marriage in absentia was formally valid according to the customary law in question. [53] *McCabe* has been doubted on the basis that the Court of Appeal did not consider whether the law of the place where consent is exchanged rather than the law of the place where the ceremony is conducted determines the question of formal validity: Dicey and Morris , § 17-014; R D Leslie, "Foreign Consensual Marriages", 1994 SLT (News) 87.
- [54] The traditional concept of locus celebrationis involves an element of ceremony and an element of consent as well as the assumption that both elements are present in the same place at the same time. Human ingenuity and technological innovation are now conspiring to challenge the rule of the lex loci celebrationis . What is the rule if the parties are in different jurisdictions when they make their vows?
- [55] In cases of marriage said to be founded on consent alone, there is an argument for the dual validity rule and there is a competing argument for applying the rule of contract law. The contract rule is that a contract made by instantaneous communication is made in the place where the acceptance is received [ Conflict of Laws §§ 11-186, 17-013]. (Whether, in the case of marriage, that place is the location of the man or of the woman may depend on whether the culture in question envisages the "offer" being made by the former or the latter.)

- [56] Where, in addition to consent, some third-party endorsement, civil or religious, ceremonial or bureaucratic, is required to formalise the union, or where parties have agreed that the act is to be perfected in such a way, I would incline to the view that the place of the marriage is the place where it is solemnised; and that the formal regularity of the union is to be determined by the law of that place. It seems to me that this is the assumption underlying the decision in McCabe . Decision
- [57] Returning to the present case, the pursuer has chosen - understandably perhaps, since she is implicated - not to aver that her marriage was and is a fraud as regards the matters of form bearing to be evidenced by the "certificate". The only ground of action advanced to me is that formal validity is determined by the lex loci celebrationis ; that since the marriage took place partly in Scotland its validity must be tested by the requirements of Scots law; and that, because the pursuer was not present at the marriage ceremony, the marriage does not satisfy the Scots law requirements for formal validity.
- [58] I am not persuaded that the pursuer's marriage took place partly in Scotland . In my opinion the better view, on the hypothesis that I have been asked to accept about a ceremony in Pakistan , is that the marriage took place wholly in Pakistan . Even if the marriage did not take place exclusively in Pakistan , I should be reluctant to declare void a marriage which, on the submissions for the pursuer, is valid by the laws of Pakistan .
- [59] No submission was made to me that the pursuer does not have a cause of action in Pakistan . In the circumstances it seems to me appropriate that the pursuer should seek her remedy elsewhere and I shall dismiss the action. If there be policy implications, these are matters to be addressed by the legislature. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2011/2011CSOH101.html>

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Prepared on 23 October 2026 · Esheria