Disentangling Legal Knots: Intersection of Foreign Law and English Law in Overseas Marriages

Written by Muhammad Zubair Abbasi, Lecturer at School of Law, Oxford Brookes University (mabbasi@brookes.ac.uk)

Introduction:

In a recent judgment *Tousi v Gaydukova* [2024] EWCA Civ 203, the Court of Appeal dealt with the issue of the relevance of foreign law to the remedy available under English law in respect of an overseas ceremony of marriage. Earlier the High Court had held that the foreign law determines not only the validity or invalidity of the ceremony of marriage but also the ramifications of the validity or invalidity of the ceremony. The Court of Appeal disagreed and reiterated the rule that *lex loci celebrationis* is limited to the determination of the validity or invalidity of the ceremony of marriage. Therefore, English law will apply to provide a remedy or relief upon the breakdown of the relationship of the parties to a marriage ceremony that took place abroad.

In this comment, I argue that the judgment of the Court of Appeal conflates the distinction between the formal recognition of the relationship under the foreign law and the relief available thereto. The judgment of the Court of Appeal does not appreciate this distinction along with the distinction between the void marriage and 'non-qualifying ceremony' of marriage, which does not entitle the parties to any remedy or financial relief under the law in England and Wales.

The Facts:

The ceremony of marriage between the parties, an Iranian husband and a Ukrainian wife, took place at the Iranian Embassy in Kyiv on 12 December 1997 in the presence of two official witnesses. The marriage was not registered with

the state authorities in Ukraine. The parties knew about the requirement of the registration of their marriage for its validity, but the husband refused to cooperate with the wife when she attempted to register the marriage. In 2000, the parties moved to the UK for the husband to study for a PhD. The Home Office granted entry clearance to the wife as the spouse of the husband. In 2010, the parties were granted the tenancy of a property in their joint names, but they separated in December 2019. In April 2020, the wife applied for non-molestation and occupation orders. The court granted a non-molestation order *ex parte* but refused an occupation order and observed that the wife could apply for the transfer of the tenancy. Therefore, the wife applied for the transfer of tenancy of the former matrimonial home into her sole name.

The wife made the application under section 53 and Schedule 7 of the Family Law Act 1996 which empowers the court to transfer a tenancy to cohabitants. Paragraph 3 of Schedule 7 of the Act authorises the court to make such orders when cohabitants cease to cohabit. It is a curious aspect of this Act, that it puts a cohabitant applicant in a better position than a married applicant, who must wait until the court terminates their marriage, before their application can be heard. The court granted a transfer of tenancy to the wife by regarding her as a cohabitee because the marriage of the parties was not registered under Ukrainian law and hence it was not recognised under English law, not even as a void marriage.

The husband filed an appeal on the ground that the parties had entered into a marriage which was capable of recognition under English law. The wife argued that the court should regard the unregistered marriage as a 'non-marriage' which does not entitle the parties even to a nullity order under the Matrimonial Causes Act 1973 (MCA). Mostyn J addressed this single point of appeal in his detailed judgment at the High Court Family Division. He rejected the appeal after holding that the marriage ceremony did not qualify even as a void marriage and therefore, the couple were unmarried cohabitants because Ukrainian law did not recognise their marriage ceremony.

In his judgment, Mostyn J criticised the judicial creation of 'non-qualifying ceremony' (NQC) by the Court of Appeal in *AG v Akhter and Others* [2020] EWCA Civ 122 for its direct conflict with that statute [s. 11 of the MCA 1973]' which extends financial relief even to void marriages to protect the rights of spouse. In highlighting the impact of the category of the NQC on the legal recognition of

foreign marriages under English law, he held that foreign law determines not only the validity of a ceremony of marriage, but also the ramifications of the validity or invalidity of the ceremony.

Ruling and Comments:

Earlier, Mostyn J had observed that it is "well established under our rules of private international law that the formal validity of a marriage celebrated overseas (*forma*) is governed by the *lex loci celebrationis*" [para 65]. He held that "If the foreign law not only determines the question of validity, but also determines the ramifications of invalidity (if found), then in my judgment that corollary should also be binding, provided that it is not obviously contrary to justice." [para 68]

At the Court of Appeal, Moylan LJ observed, "The effect of the judge's approach … was that the relief available under the foreign law should determine … the relief available under English law." [para 29]. This, according to Moylan LJ was wrong because "the relief available, or not available, is determined by the law governing the dissolution and annulment of marriages, not the law governing the formation of marriages." [para 35]. In this case however the issue was not related to "the dissolution and annulment of marriages" because both Mostyn J and Moylan LJ agreed that the ceremony of marriage of the parties did not "qualify" as a marriage and hence did not require to be dissolved or annulled because it did not have any legal effect at all. Therefore, the main issue in this case was whether Ukrainian law recognised the marriage ceremony that took place at the Iranian embassy in Kyiv. Both judges found that Ukrainian law did not recognise the marriage ceremony, not even as a void marriage and hence did not provide any remedy or relief.

It is important to note that the judges of the Court of Appeal did not appreciate that there is a third stage between the validity of marriage and relief on breakdown of marriage, and it is the stage of legal recognition or non-recognition of a marriage as valid, void or non-marriage. For instance, in *Hudson v Leigh* [2009] EWHC 1306, South African law recognised the ceremony as a void marriage; and in *Asaad v Kurter* [2013] EWHC 3852, the ceremony could be subsequently ratified, but a similar option was not available under Ukrainian law.

Ukrainian law however recognised since 2002 a "so-called in-fact marriage relations" which provided the parties with rights and remedies in respect of property acquired during their cohabitation. Similar provisions are available for the transfer of tenancy but not for the provision of other financial relief under English law.

Moylan LJ highlighted that "there is a fundamental distinction between the law governing the formation of marriages and the law governing the dissolution and annulment of marriages. The remedies or relief which might be available under the latter are distinct from former." [para 73]. This binary distinction however does not cater to the situations where "the law governing the formation of marriages" regards the marriage ceremony as "non-qualifying ceremony" and hence "the law governing the dissolution and annulment of marriages" does not provide any "remedies or relief". In *Hudson v Leigh*, the former category of the law regarded the marriage as void and the latter category provided financial relief. In the case at hand, "the law governing the formation of marriages" regarded the marriage ceremony as "non-marriage" and hence "the law governing the dissolution and annulment of marriages" did not apply and could not provide any remedy or relief.

As the category of "non-qualifying ceremony" which was previously described as "non-marriage" is relatively new under English law, the case law is unclear about their treatment especially in cases involving conflict of laws. Mostyn J argued that the category of "non-qualifying ceremony" would be treated under the foreign law as the governing law both for the determination of such ceremonies and their consequent legal ramifications while Moylan LJ has favoured limiting the foreign law to the question of validity or invalidity of marriage ceremonies. I submit that the tension between these two conflicting views can be resolved by appreciating a third stage between the formation and dissolution/annulment of marriage, which is the legal recognition or non-recognition of the marital relationship by taking into account the possibilities of subsequent ratification or registration of marriages. In this way, the governing law of marriage regulates both the formation of the marriage and its subsequent treatment as legally recognised or not while the remedy or relief is determined under *lex fori* when the relationship breaks down.