CB (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080**.**

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 9 September 2008

Before

Senior Immigration Judge Allen

Between

CB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms I Cannell, Solicitor with Nabas Legal Consultancy
For the Respondent: Mr J Gulvin, Home Office Presenting Officer

DETERMINATION AND REASONS

There is no exception in immigration cases to the rule of private international law that the validity of a marriage is governed by the lex loci celebrationis and on the authority of Apt v Apt [1948] P 83 there is no reason in public policy to deny recognition to a proxy marriage.

1. The appellant is a national of Brazil. He appealed to an Immigration Judge against the Secretary of State's decision of 20 February 2008 refusing to issue a residence card.

2. The appellant claimed to have entered into a lawful marriage with Ms Aneta Kowalczyk in Brazil on 10 March 2007. It was a marriage by proxy with neither of the parties attending. The Immigration Judge had before him an expert report which among other things stated that marriage by proxy has been valid under Brazilian law since the Brazilian Civil Code of 1916 (Article 201), and is still valid by reason of Article 1542 of the Brazilian Civil Code of 2002. The Immigration Judge was satisfied

from the factual and expert evidence including a copy of the original Brazilian marriage certificate, that the appellant and Ms Kowalczyk had contracted a marriage by proxy which was recognised as lawful in Brazil.

3. The Immigration Judge went on to note that marriages by proxy which take place in the United Kingdom are not recognised under the law of England and Wales. He said however that the United Kingdom recognises marriages as if they are valid under the domestic law of the country in which they take place, provided they have been executed properly. He commented that the validity of any given marriage is not governed by the law of either party's domicile. The relevance of domicile was whether or not the parties had the capacity to enter into the proposed marriage under the law of the country in which they were domiciled. He noted the responses by the appellant and his wife to domicile questionnaires and concluded that at the time of their marriage they were both domiciled in the United Kingdom. [In fact, the correct finding should have been that they are domiciled in England and Wales, but that is not a material error]. This indeed was a conclusion to which the Secretary of State had already come.

4. The Immigration Judge went on to consider capacity to marry of those domiciled in the United Kingdom. This is governed by section 11 of the Matrimonial Causes Act 1973. There are four requirements: that both parties are over the age of 18, neither is lawfully married, the parties are not inter-marrying, and the parties are respectively male and female. By implication he found that the appellant and his wife met these four criteria and that as a consequence there was nothing in the law of their country of domicile to prevent them from contracting a valid marriage by proxy in Brazil. He accepted therefore that they were legitimately married and that the appellant was therefore Ms Kowalczyk's family member. She is a citizen of Poland and it seems not to be contested that at all material times she has been a qualified person within regulation 6 of the Immigration (European Economic Area) Regulations 2006.

5. The Immigration Judge went on to consider the application of the recent decision of the European Court of Justice in Metock C-127/08 and concluded that in the light of that judgment, whether the appellant entered the United Kingdom before or after his wife was an irrelevant consideration, and that the words "accompany" and "join" in Article 3(1) of Directive 2004/38 had to be read in a way non-restrictive of a Union citizen's rights. He concluded that the appellant was entitled to a residence card and the appeal fell to be allowed.

6. The Secretary of State sought reconsideration of this decision, arguing that there was a material error of law in the finding that the proxy marriage in Brazil was to be recognised in the United Kingdom, on the basis that the Immigration Judge had accepted that the United Kingdom was the country of domicile and the United Kingdom did not recognise marriage by proxy. It was said that consideration of a valid marriage had to take into account the legislation of the country of domicile. Reference was made to the IDIs chapter 8 (Annex D2) concerning the proper test for and regulations relating to domicile. A Senior Immigration Judge ordered reconsideration.

7. The hearing before me took place on 9 September 2008. Ms I Cannell of Nabas Legal Consultancy, appeared on behalf of the appellant. Mr J Gulvin appeared on behalf of the Secretary of State.

8. Ms Cannell relied upon the reply that she had put in and the attached authorities and also argued that the decision of the Secretary of State breached Articles 8 and 12 of the European Human Rights Convention.

9. Mr Gulvin put in a copy of Mark v Mark [2005] UKHL 42. He argued that for immigration purposes it was contended on behalf of the Secretary of State that the importance of domicile was that it was accepted as being a status which determined the ability to marry and under what law a person's marriage should be considered. The appellant and his wife were both found to be domiciled in the United Kingdom, and therefore they had no capacity to marry by proxy or to have their proxy marriage regarded as valid in the United Kingdom. It was irrelevant that the marriage was seen as valid in Brazil. There were two ways in which it could be determined whether a marriage was valid, either by way of assessing the *lex loci celebrationis* or domicile. For immigration purposes it was argued that it was proper to consider domicile. The appropriateness in other forms of law of the *lex loci celebrationis* did not translate into immigration, if a couple, as in this case, had made the United Kingdom their domicile of choice in that then it was only right that their capacity to marry should be judged under that regime. It was therefore a question of whether the United Kingdom would accept a proxy marriage and not a question of recognition of the validity of the marriage in Brazil. The couple were not in Brazil.

10. Mr Gulvin referred to a decision put in by Ms Cannell of Wilkinson v Kitzinger and Others [2006] EWHC 2022 at paragraphs 15 and 16. With regard to that he argued that for immigration purposes as a matter of policy it was of importance that if a couple had a domicile of choice in the United Kingdom, the validity of their marriage was to be governed by the laws of the state of choice and therefore the Immigration Judge had materially erred. He referred to paragraphs 38 and 39 in Mark v Mark. This confirmed that capacity to marry was determined by domicile. If there were policy considerations, it was such a consideration that the validity of marriage for immigration purposes was determined by domicile.

11. By way of reply Ms Cannell agreed that capacity to marry was regulated by domicile but argued that the position was different as between capacity and validity. With regard to capacity, she referred to section 11 of the Matrimonial Causes Act of 1973. The couple had the capacity to marry and all the criteria set out there were met. There was no provision of the Act which excluded a marriage celebrated abroad on the basis of a proxy. She also referred to paragraph 3.1 of the relevant IDIs which said that proxy marriages were valid and also to section 2.

12. She also referred to paragraph 15 of Wilkinson v Kitzinger. In addition there was a reference at paragraph 17-067 in Dicey and Morris (13th edition) where it was said that in order to ensure certainty a marriage should always be upheld when each party had by the law of his or her antenuptial domicile the capacity to marry the other. The marriage should not be seen as invalid for immigration purposes, and if it were so argued there would be a conflict between private international law and the United Kingdom common law and also it would be in breach of Articles 8 and 12 of the Convention on Human Rights. She argued that the Secretary of State's guidance corroborated the Immigration Judge's decision and the Immigration Judge put forward on behalf of the appellant. By way of reply Mr Gulvin remarked that the IDIs were being redrafted to reflect the views that he had expressed above.

13. I reserved my determination.

14. The interesting issue in this case is whether a proxy marriage contracted in Brazil and valid under Brazilian law, between two parties both of whom were domiciled in the United Kingdom at the relevant time is valid under the United Kingdom law.

15. I start with the guidance in Dicey and Morris in the relevant parts of Rule 66. This says the following:

> "Rule 66 – a marriage is formally valid when (and only when) any one of the following conditions as to the form of celebration is complied with (that is to say):
>
> (1) if the marriage is celebrated in accordance with the form required or (*semble)* recognised as sufficient by the law of the country where the marriage was celebrated;
>
> (2) if the marriage is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible;
>
> or
>
> ..."

16. Dicey and Morris go on to comment that until the middle of the nineteenth century English courts seldom drew any distinction between the formal validity of a marriage and the capacity of the parties to marry. They held that in both respects validity of a marriage depended on the *lex loci celebrationis*. From 1858 onwards, however, it seems as a consequence of a decision in Brook v Brook (1858) 3 Sm & G 481, the courts began to distinguish between capacity and form, holding that capacity is governed by the law of the domicile. Form is still in general governed by the *lex loci celebrationis*, although there are statutory exceptions.

17. Dicey and Morris go on to say that a marriage celebrated in the mode, or according to the rights or ceremonies required by the law of the country where the marriage takes place, is (as far as formal requisites go) valid. The English courts give effect to the principle that the form of a contract is governed by the law of the place where the contract is made and the local form always suffices. It was said in Berthiaune v Dastous [1930] AC 79, 83:

> "If a marriage is good by the laws of the country where it is effected, it is good the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses."

18. As regard marriages by proxy, it was said in Apt v Apt [1947] P 127

> "The celebration of marriage by proxy is a matter of the form of the ceremony or proceeding, and not an essential of the marriage; that there is nothing abhorrent

to Christian ideas in the adoption of that form; and that, in the absence of legislation to the contrary, there is no doctrine of public policy which entitles me to hold that the ceremony, valid where it was performed, is not effective in this country to constitute a valid marriage."

19. This reasoning from the first instance decision of Lord Merriman P, was upheld by the Court of Appeal at [1948] P 83. Cohen LJ, who delivered the judgment of the Court of Appeal, having held that it was not contrary to public policy in England and Wales to recognise a marriage by proxy which had taken outside England and Wales, said (at 88-89):

> "We are unable to see any reason in public policy which would require the English courts, if they recognised the validity of proxy marriages celebrated outside the United Kingdom, to deny to a person domiciled in this country the right of so celebrating a marriage, provided, of course, that he or she has in other respects the capacity to marry and does not infringe any provision of English law."

20. More recently this view was confirmed by Sachs J in Ponticelli v Ponticelli [1958] 2 WLR 439.

21. This weight of authority in my view makes the position abundantly clear. Capacity to marry is regulated by domicile but there is no suggestion here that the appellant and his wife lacked capacity to marry. It is equally clear that the validity of the marriage is governed by the *lex loci celebrationis* which is Brazilian law and it is common ground that Brazilian law recognises proxy marriages. The position is in no sense undermined by what is said at paragraph 3.1 of the Immigration Directorate's Instructions chapter 8 section 1 (referred to by Mr Gulvin) concerned with the recognition of marriage and divorce where one finds the following:

> "3.1 Proxy marriages
>
> Where the law of the country requires a ceremony, and a ceremony takes place with the participation of a proxy in that country, then the country where the marriage is celebrated is the country in which the ceremony occurred, not the country from which the proxy was appointed by the sponsor. Thus, such a marriage would be invalid."

22. Ms Cannell also referred to the second paragraph of those Instructions which say the following:

> "2. Marriage Overseas
>
> The recognition of any marriage which has taken place overseas is governed by the following:
>
> - Is the type of marriage one recognised in the country in which it took place?
> - Was the actual marriage properly executed so as to satisfy the requirements of the law of the country in which it took place?

- Was there anything in the law of either party's country of domicile that restricted his freedom to enter into the marriage?

If the answers to the above questions are respectively, 'Yes', 'Yes', and 'No' then the marriage is valid whether or not it is polygamous."

23. The respective answers in this case do indeed appear to be "Yes", "Yes" and "No" and therefore (clearly there is no issue of polygamy in this case) according to those criteria also the marriage is valid.

24. Mr Gulvin's argument is essentially that whatever may be said in other contexts about the rules governing validity of marriage, in the immigration context it is the domicile rather than the *lex loci celebrationis* that should determine this, since, if a couple have chosen as in this case to be domiciled in the United Kingdom, their capacity to be married should be judged in accordance with United Kingdom law, and United Kingdom law does not permit marriage by proxy. Mr Gulvin did not cite any authority for this proposition and I have been unable to find anything in Mark v Mark to support his argument. The issue in that case, as identified by Baroness Hale at paragraph 15, is whether a person can be either habitually resident or domiciled in England and Wales if her presence in the United Kingdom is a criminal offence under the Immigration Act 1971. The paragraphs to which Mr Gulvin specifically referred, paragraphs 38 and 39, refer to the fact that domicile governs a person's capacity to marry or make a will relating to moveable property and note its relevance with regard to other matters, and the comment is made that this list shows the particular importance of domicile as a connecting factor in family law. Paragraph 39 refers to the ability of an adult to acquire a domicile of choice by the combination of coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely, and examples of this are provided.

25. I do not see here however any basis for the argument that different rules should be applied to the legal framework governing validity of marriage as between immigration law on the one hand and the rest of domestic law on the other hand. In my view the position is clear; the validity of a marriage is governed in this jurisdiction by the *lex loci celebrationis* and not the domicile of the parties. Accordingly I conclude that the Immigration Judge correctly decided that, since the *lex loci celebrationis* in this case, Brazilian law, recognises proxy marriages, the marriage of the appellant and his wife is indeed valid under English law and as a consequence the relevant requirements of the EEA Regulations are met. His decision allowing this appeal in all respects is therefore maintained.

Signed Date

Senior Immigration Judge Allen