Neutral Citation Number: [2020] EWHC 93 (Fam)

Case No: BS17R01727

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2020

Before:

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between:

MM	**Applicant**
- and –	
NA	**Respondent**

(DECLARATION OF MARITAL STATUS: UNRECOGNISED STATE)

The applicant and the respondent appeared as litigants in person

Mr Deepak Nagpal and **Mr Admas Habteslasie** (instructed by the Attorney General) as Advocate to the Court
(Mr Nagpal appeared alone at the hearing)

Hearing date: 16 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mrs Justice Roberts:

Introduction

1. This is an application for a declaration in relation to the marital status of the parties pursuant to section 55 of the Family Law Act 1986. The families of both MM and NA are of Somali origin. MM is a Dutch national who was born in Holland and has lived in the United Kingdom since 2001. He works at a local hospital. NA was born and raised in Somaliland and was living there prior to her marriage. The couple met in Somaliland in 2012 when MM was visiting and, after a period of courtship, they agreed to marry. On 7 March 2013 MM and NA attended a religious ceremony of marriage in Hargeisa. Later that day they held what they have referred to as a "marriage wedding" which was attended by many family and friends. Some ten days later they attended the local district court in Hargeisa where their marriage was validated and a formal marriage certificate issued. They have lived together as husband and wife ever since and, on 20 January 2016, NA gave birth to their daughter who is now 4 years old.

2. Theirs is a very happy and settled relationship. They regard themselves as husband and wife. However, as a result of the need to complete various forms, an issue arose as to whether their marriage was entitled to formal recognition in this jurisdiction. Whilst they were both happy to undergo a further civil ceremony of marriage in a local register office, this option was not open to them as the registrar took the view that they may already be married to one another[1]. Thus it was that they applied to the court for a formal declaration as to whether or not their marriage was at its inception a valid marriage which subsisted as at the date of their application. Whilst NA is the respondent to these proceedings, there is no issue between these parties. They simply wish to secure declaratory relief for the purposes of clarifying their marital status in this jurisdiction where they have settled and made their family home. Because the case raises issues which may be relevant to the wider Somali diaspora living in England & Wales, this judgment will be published on an open (albeit anonymised) basis.

3. Whilst this court is frequently required to determine the validity of an overseas marriage, the position here is complicated by the fact that, at the time this marriage was celebrated, the Republic of Somaliland was not recognised by the United Kingdom as a State.

4. There are thus two fundamental questions which need to be answered before the court can grant the application which is sought.

    (i) Are the parties validly married? If the answer to that question is no, the declaration cannot be granted. If the answer is yes, the court must then move onto the second question.

[1] These concerns were not an obstacle to the grant to NA of a resident's visa in May 2015 when she joined MM in this country the following month. The Home Office was prepared to issue an EEA Family Permit Visa on the basis that she was MM's partner as opposed to his spouse.

(ii) Is the marriage entitled to recognition in England and Wales? If the answer to that question is no, the declaration cannot be granted. If the answer is yes, the declaration can, and should, be granted.

5. Before turning to consider these two questions, I must acknowledge the very considerable assistance which has been provided to the court by the Attorney General through the Government Legal Department. He has appointed Mr Nagpal and Mr Habteslasie as Advocates to the Court and has undertaken the instruction of the single joint expert, Mr Guleid Jama, who has provided the court with his expert opinion on matters arising in relation to family law and practice in Somaliland. Mr Nagpal and Mr Habteslasie have undertaken a significant amount of legal research for the purposes of their presentation to the court, a task which, with all their respective skills and abilities, these litigants in person could not have completed. Mr Nagpal appeared alone to present the legal argument at the hearing. Not only was his advocacy of great assistance to me; he presented a complex legal landscape in terms which MM and NA could follow and understand as their case was explored through a great deal of past legal authority emanating not only from English jurisprudence but also from international law. I am most grateful to him for that endeavour, as I am to Mr Habteslasie.

The first question: are the parties validly married?

6. There are various defects which may make a marriage invalid: see Clarkson & Hill's Conflict of Laws, 5th edition. The question may often be whether the parties complied with the proper formalities for the celebration of the marriage, or whether each was able to marry because of age or a close family connection to one another. The rules about whether or not a marriage is valid fall to be considered in two different ways. There are rules which concern *formal* validity and others which concern *essential* validity, or a party's personal capacity to marry. The former concern the manner in which a ceremony of marriage is undertaken (for example, ensuring the marriage itself is public and proof that it has taken place in accordance with local requirements). The latter relates to whether or not the marriage can take place at all between the two individuals concerned. Under English law formal validity is regulated by the domestic law of the country where the marriage is celebrated. This is often referred to as *lex loci celebrationis*. Essential validity, or capacity, has to be considered in the light of the domiciliary laws of the individual parties at the time of the marriage: see Rule 73 of *The Conflicts of Laws*, Dicey, Morris & Collins (15th edition) (*Dicey*).

7. In order to answer the first question, I have to consider the evidence of the parties themselves together with that of the single joint expert instructed in this matter by the Attorney General.

8. Each of MM and NA have provided written statements in relation to the circumstances surrounding their marriage. MM's family travelled to Hargeisa in Somaliland some three weeks before the wedding. The religious marriage ceremony was performed on 7 March 2013 followed by a "marriage wedding" on the same night attended and witnessed by his mother and sister (both nationals of the Netherlands), close family and friends. The marriage was governed by Islamic law and the formalities were undertaken by a local religious leader who had given public notice of his intention to conduct the marriage some four days earlier. Ten days later, on 17

March 2013, the parties attended at the local district court in Hargeisa to validate or "legalise" the marriage in order to obtain a formal marriage certificate. They were asked to bring with them two witnesses who had to be citizens of Somaliland. Two of NA's cousins were chosen to fulfil this role. Having formally sworn on the Quran that the marriage had taken place and was valid in terms of local requirements, the parties were issued with a formal marriage certificate, a copy of which has been filed with the court and sent to the single joint expert, Mr Jama. It is a formal document which bears the seal of the Hargeisa District Court which records the details of the parties, their witnesses and the fact that the law regulating the marriage is Sharia law. It has been signed by a judge who is identified on the face of the certificate. It is accompanied by a declaration of authenticity and formal registration from the Director General of the Ministry of Justice and Judicial Affairs, counter-signed by the Director General of the Ministry of Foreign Affairs & International Cooperation. On 3 March 2015 the Imam who performed the marriage ceremony on 7 March 2013 attested before a public notary that he was the individual celebrant who had married this couple.

The expert evidence and evidence from the Foreign & Commonwealth Office

9. Mr Guleid Jama of Xaqdoon Law Firm based in Hargeisa has provided the court with a report. Mr Jama has an array of impressive legal credentials. I am entirely satisfied that he is qualified to assist the court in relation to these matters in his capacity as an expert witness. As he explains, Somaliland was a British Protectorate before it gained independence on 26 June 1960. It swiftly entered into a union with the Italian colony of Somalia which achieved independence the following month in 1960. The central government of Somalia collapsed in 1991 after a protracted civil war. In that same year, Somaliland declared the restoration of independence from Somalia. As yet, it has not been recognised by the United Kingdom as a State and the UK government has not entered into any formal treaties with Somaliland or the government of Somaliland.

10. I have also been provided with a witness statement from St John Gould who is employed by the Foreign & Commonwealth Office as Head of its East Africa Department, a post he has held since April 2019. As such he has responsibility for policy issues relating to Somaliland. Despite the absence of formal recognition as a State in its own right, Mr Gould has confirmed that the United Kingdom has regular political contact with the government of Somaliland and has entered into signed memoranda of understanding with it. As a result, the United Kingdom government has channels of engagement with the Somaliland judicial system in matters such as technical assistance and counter-terrorism. Mr Gould concludes his written evidence in this way:

> "5. Accordingly, whilst this is a question of judgement, I do not consider the recognition of certain private rights, such as the recognition of a Somaliland marriage, to imply greater political engagement with Somaliland than already takes place. Nor is it likely that the Foreign & Commonwealth Office would object to the recognition of a Somaliland marriage in a UK civil law case on the basis that the United Kingdom does not recognise Somaliland as a State."

11. It was on this basis that the Foreign & Commonwealth Office confirmed in writing to the court through one of its senior lawyers that it did not wish to intervene formally in these proceedings.

12. Returning to the expert evidence of Mr Jama, he has confirmed that:

> "6. After the declaration of independence, Somaliland established a formal judiciary system consisting of district courts, regional courts, appeal courts and Supreme Court. In 2001, a constitution was approved by the public in a referendum. Article 130(5) of the Constitution allows the application of laws that predate the declaration of Somaliland as long as these laws do not infringe fundamental freedoms and human rights and Sharia Law. Since the approval of the constitution, many laws were enacted by the Somaliland Parliament. But many more, including the Somali Civil Code and the Somali Penal Code, are still applicable in Somaliland.
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> 7. There are three systems that are used in Somaliland. These are the customary law, the formal law and the Sharia law. The customary law is a centuries-old system. In the emergence of a dispute, respected elders are assigned to hear the case. The decision of the elders becomes the law of the parties similar to the precedence in the common law system. If the same facts emerge between the same parties or members of the communities of the two parties involved in the earlier decisions, the latter judgment agrees with the previous verdict. It is such precedence [through which] the Somali customary law grows. Customary law is not written. It is oral and kept in the memory of the community members.
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> 8. Sharia is the Islamic law and its sources are the Quran (the Muslim holy book), the Sunna (the narrations of prophet Mohamed), consensus and analogy among others. The order and importance of sources are a controversial matter in the different schools of thought in Sunni Islam. But the Quran and the Sunna are seen as primary sources. Sunna is narrations (Hadith) recounted from the Prophet by his companions. Hadith remained unwritten in the early stages of Islam. It also includes actions made by the Prophet as narrated by his companions."

13. Mr Jama goes on to explain that Somaliland does not have a separate body of family law. In personal matters such as marriage, divorce and inheritance, Sharia law is used to determine disputes. In accordance with the Judiciary Organization Act (No 24/2003), the local district courts exercise jurisdiction in relation to matters of personal law. District and regional courts are courts of first instance, and appeal lies to the regional appeal court located in the area where the lower court of first instance is situated. Because of the absence of any recognised family law system, the requirements in relation to the formation of marriage are based on the religious beliefs of the two parties to a marriage. Under Islamic (Sharia) law, marriage is a contractual agreement which makes the status of marriage binding on both contracting parties. Most marriages in Somaliland are administered by religious leaders who conduct the marriage ceremony in the presence of family members, friends and clan elders. The formalities can also be administered by a judge and it is not uncommon for the wedding celebration to take place after the marriage has been concluded. There are formalities which must be complied with before a marriage will be considered

binding. Both parties must consent; there must be at least two witnesses; and consent must be obtained from the custodian ('*wali'*) of the bride.

14. The marriage itself, according to Mr Jama's evidence, achieves full legal validity on the date of the marriage contract regardless of whether or not there is in existence a formal certificate issued by a court. That certificate, where it has been obtained by the parties, is simply formal evidence of the validity of the marriage. In the case of a marriage administered by a religious leader, as in this case, it can be registered formally with the local district court by submitting an application. The certificate will be signed by a judge and an English copy can be provided by the Ministry of Justice.

15. Having reviewed all the documents supplied to him, Mr Jama has confirmed that the certificate of marriage issued by the Hargeisa District Court is proof of a valid marriage celebrated on 7 March 2013 and one which is recognised as such under Somaliland law.

16. On the basis of this evidence, I have no difficulty in finding that the applicant and the respondent are indeed validly married according to the law of Somaliland. That finding answers the first question and thus I turn now to the second question.

The second question: Is the marriage entitled to recognition under the law of England & Wales?

17. In the normal course of events, a marriage which is valid according to the law of the place where it was celebrated or performed will be entitled to recognition as a valid marriage under English domestic law: see Rule 73 of *Dicey* cited above.

18. The issue which has to be addressed in this case is whether recognition follows in the case of a State which is not recognised by Her Majesty's Government.

19. The decision as to whether or not to recognise a State is the prerogative of the sovereign, acting through her government. Once a decision has been taken it becomes a 'fact of state' and must be acted on by courts accordingly: see *Mohamed v Breish & Others* [2019] EWHC 306 (Comm). In that case Mr Justice Andrew Baker provided a comprehensive analysis of the principle. As is clear from that analysis, there is a distinction between non-recognition of a state and non-recognition of the government of a (recognised) state. In some of the earlier authorities decided before 1980, the distinction was not always maintained. On 25 April 1980 the British Government, through the Lord Privy Seal, Sir Ian Gilmour and by way of response to a Parliamentary question, announced a change of policy and practice pursuant to which recognition would no longer be afforded to governments but only to states: see paras 68 to 75 of *R (on the application of Kibris Türk Hava Yollari CTA Holidays) v Secretary of State for Transport and The Republic of Cyprus* [2009] EWHC 1918 (Admin) per Wyn Williams J.

20. The principle which emerges from the *Kibris* case is that the court cannot take cognizance of a foreign juridical person (or its acts) if to do so would involve the court in acting inconsistently with the foreign policy or diplomatic stance of the Government of the United Kingdom: see para 85 of the judgment of Wyn Williams J and *Carl Zeiss Stiftung v Rainer and Keeler* [1967] 1 AC 853 and *Gur Corporation v Trust Bank of Africa Limited* [1987] 1 QB 599.

21. This is often referred to as the 'one voice' doctrine: in matters relating to the recognition of States, the executive and the courts should speak with 'one voice'. That much is clear from the House of Lords' decision in *Government of the Republic of Spain v SS "Arantzazu Mendi" (The Arantzazu Mendi)* [1939] AC 256. At 264, Lord Atkin said this:

> "Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone."

22. For the purposes of this case, one of the fundamental principles of English law in relation to non-recognition of a State is that the acts of a government of an unrecognised state cannot be recognised by an English court: see *A M Luther v James Sagor & Co* [1921] 1 KB 456 confirmed by Steyn J at first instance in *Gur Corporation v Trust Bank of Africa Limited* (above) at 605C to G. Although the decision of Steyn J was subsequently reversed by the Court of Appeal on the facts, his statement of the legal principles was left undisturbed. One important aspect of his Lordship's judgment was the recognition of an important qualification to the legal principle recognised in *Luther* (above). At 605E, he said this:

> "One qualification of the general principles may be the necessity for English courts to take cognisance of governmental acts of unrecognised states which directly affect family or property rights of individuals. There is no binding English authority supporting such a qualification of the general principles. Lord Wilberforce in *Carl Zeiss Stiftung v Rayner & Keeler Ltd. (No. 2)* [1967] 1 AC 853, 954, regarded it as a possible avenue for future development. See also *Adams v Adams (Attorney-General intervening)* [1971] P 188; *In re James (An Insolvent) (Attorney-General intervening)* [1977] Ch 41; and *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] QB 205, 218A-F. It is manifest, however, that such a development, if recognised, cannot assist the Ciskei in the present case. In the present case the court is not confronted with the necessity of doing justice to individuals who were caught up in a political situation which was not of their making."

The exception to the non-recognition principle: the doctrine of necessity or implied mandate

23. The possible exception identified by Steyn J in *Gur Corporation* (above) was first given judicial sustenance by Lord Wilberforce in *Carl Zeiss (No 2)* (cited above). The facts of that case were complex. For present purposes it is enough to say that the appellants had invited the House of Lords to refuse recognition to various decrees made by the German Democratic Republic ('the GDR'). The British Government had certified through the (then) Foreign Secretary that it did not recognise the GDR as a state and that the USSR remained the *de jure* sovereign of the territory. In these

circumstances, the GDR was held to be a subordinate and dependent body whose acts were entitled to legal recognition (page 953C to G)[2].

24. At 954B to G, Lord Wilberforce said this:

> "My Lords, if the consequences of non-recognition of the East German "government" were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found. As Locke said: "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society", and this must be true of a society – such as we know to exist in East Germany. In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. These ideas began to take shape on the termination of the Civil War (see *US v Insurance Companies* 89 U.S. 99) and have been developed and reformulated, admittedly as no more than dicta, but dicta by judges of high authority, in later cases. …. No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total invalidity of all laws and acts flowing from unrecognised governments. In view of the conclusion I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked."

25. Lord Reid took a similar view at page 907F to 908A albeit that he did not say anything to close down the possible gateway which such an exception might provide in the circumstances outlined by Lord Wilberforce above.

26. The American "glimmerings" to which Lord Wilberforce had referred arose in the aftermath of the Civil War. There the Supreme Court had given effect to "acts necessary to peace and good order among citizens, such as, for example, acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate": *Texas v White* 74 US (7 Wall.)

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[2] I have not burdened the text of my judgment with the reasoning of the House of Lords. In essence, as Lord Reid explained at 905D to 906D, the GDR had been set up by the USSR and derived its authority from that government. Since the British Government had certified that the USSR remained *de jure* sovereign and had not voluntarily transferred its sovereignty to the GDR, the GDR did not become a sovereign state at its inception. At all times it remained an organisation subordinate to the USSR. Because it was impossible for any *de jure* sovereign governing authority to disclaim responsibility for acts done by subordinate bodies which it has set up and which have not attempted to usurp its sovereignty, the courts in England could not treat as nullities acts done by or on behalf of the GDR.

700, 733 (1868). In other words, an exception was made for acts, amongst others, which we would recognise now as essential components of domestic family law.

27. Some eleven years after the decision in *Carl Zeiss (No 2)*, Lord Denning MR revisited the issue in *Hesperides Hotels Ltd and Another v Aegean Turkish Holidays Ltd and Another* [1978] 1QB 205. In that case, two companies registered under the law of the Republic of Cyprus which owned hotels in Kyrenia issued proceedings in London when their hotels were occupied by troops from Turkey three years after they invaded the north of the island in 1974. They claimed damages and an injunction to restrain the defendants (which included a London representative of the "Turkish Federated State of Cyprus") from encouraging or assisting trespass to the hotels by circulating brochures and inviting tourists to book holidays in the hotels. The British Government issued a certificate which stated that it did not recognise the administration established under the name "Turkish Federated State of Cyprus". The court admitted evidence which asserted that in that part of Cyprus which was under effective Turkish Cypriot control there was in operation a system of law under which the acts in relation to possession and use of the plaintiffs' hotels were lawful and thus not actionable in the English courts. An injunction was granted at first instance but set aside on appeal by Roskill and Scarman LJJ and Lord Denning MR. The Court of Appeal agreed that the claim could not proceed because of the principle that the English courts did not have jurisdiction to entertain an action for relief against trespass to immovable property situate outside the jurisdiction. The argument that the nature of the action was a conspiracy to trespass by persons resident within the jurisdiction was, in effect, no more than a disguise[3].

28. In relation to the non-recognition/'one voice' doctrine, Lord Denning went further than his fellow Court of Appeal judges. Having identified that the case involved some important points on the conflict of laws in that the British Government did not recognise the administration established under the name of the 'Turkish Federated State of Cyprus', he referred to *Carl Zeiss (No 2)* and the doctrine that no juridical existence can be attributed to an unrecognised government in these terms (at 217G to 218G):

> "That doctrine is said to be based on the need for the executive and the courts to speak with one voice. If the executive do not recognise the usurping government, nor should the courts: see *Government of the Republic of Spain v SS Arantzazu Mendi (The Arantzazu Mendi)* [1939] AC 256, 264, by Lord Atkin. But there are those who do not subscribe to that view. They say that there is no need for the executive and the judiciary to speak in unison. The executive is concerned with the *external* consequences of recognition, vis-à-vis other states. The courts are concerned with the *internal* consequences of it, vis-à-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it – in its impact on individuals – as justice and common sense require: provided always that there are no considerations of public policy against it. The most authoritative statement is that of Lord Wilberforce in *Carl Zeiss Stiftung v Rayner & Keeler Ltd. (No. 2)* [1967] 1 AC 853, 954, where he said:

[3] The House of Lords subsequently reversed the decision of the Court of Appeal in part on the basis that the claim could properly proceed in relation to the contents of the hotels: [1979] AC 508.

> "… where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned … the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question."

That view is supported by an article by Professor K. Lipstein in (1950) 35 Tr.Gro.Soc., 157 which he concludes by saying, at p. 188:

> "The regulations of foreign authorities which have not been recognised may be applied as the law of the foreign country if they are in fact enforced in that country, notwithstanding that the authorities have not been recognised by Great Britain."

In the recent case about the illegal regime in Rhodesia I was myself ready to apply the principles stated by Lord Wilberforce. I said *In re James (An Insolvent) (Attorney-General intervening)* [1977] Ch 41, 62:

> "When a lawful sovereign is ousted for the time being by a usurper, the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory: and, as he can no longer do it himself, he is held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy …"

And Scarman LJ said that he agreed with much of this, adding at p. 70:

> "I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government."

The choice

If it were necessary to make a choice between these conflicting doctrines, I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth: and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not."

29. Those remarks were obiter and not part of the decision of the Court of Appeal but they nonetheless provide some support for the possibility of an exception to the underlying principle of 'one voice' in relation to marriage. There is nothing in the speeches delivered by the House of Lords which disturbs, or disapproves, these remarks. Whether the underlying rationale of Lord Denning is based on implied mandate or the doctrine of necessity, marriage is clearly cited as a possible basis or rationale for engaging an exception to the doctrine of 'one voice'.

30. Indeed the exception, whether based upon necessity or an implied mandate, has been cited with apparent approval in a number of subsequent authorities. *Gur Corporation v Trust Bank of Africa Ltd* [1987] 1 QB 599 was a case which concerned the non-recognition by the British Government of the territory of Ciskei as an independent state following a declaration to that effect made by the Republic of South Africa in 1981. A Panamanian company had entered into a contract with the Ciskei Department of Public Works to build a hospital and schools in that territory. The defendant was an English bank which had underwritten a guarantee. When the bank was sued, it sought to join Ciskei as a party to the English proceedings. The Court of Appeal held that the lack of recognition of Ciskei as an independent State meant that it had no locus standi as a party to English court proceedings. It was not open to the courts to hold that at the relevant time it was in law capable of an executive, legal or administrative act. In reviewing the legal principles engaged in the case, Lord Donaldson MR said this at 622D to G:

> "Lord Wilberforce [in the *Carl Zeiss* case] … reserved for further consideration whether the non-recognition of a government or, I think, a state, would necessarily lead to the English courts treating all its legislative activities as being a nullity or whether, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, it might not be possible to take cognizance of the actual facts or realities found to exist in the territory in question and he instanced private rights, or acts of everyday occurrence or perfunctory acts of administration. I see great force in this reservation, since it is one thing to treat a state or government as being "without law", but quite another to treat the inhabitants of its territory as "outlaws" who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day to day activities having legal consequences."

31. In similar vein, there is further support for an exception to the non-recognition principle by the Special Commissioners in 1996. The issue in *Caglar v Billingham (Inspector of Taxes)* [1996] STC (SDC) 150 was whether or not employees of the Turkish Republic of North Cyprus (TRNC) were entitled to an exemption as official agents of a foreign state in circumstances where the British Government had withheld formal recognition to the TRNC. Having considered *Gur Corporation v Trust Bank of Africa Ltd*, at paragraph 121 the judgment continues thus:

> "The principle we extract from these authorities is that the courts may acknowledge the existence of an unrecognised foreign government in the context of the enforcement of laws relating to commercial obligations or matters of private law between individuals or matters of routine administration such as the registration of births, marriages or deaths. This principle is in line with that adopted by the Foreign Corporations Act 1991. However, the courts will not acknowledge the existence of an unrecognised state if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of this country."

32. Once again, that eminently clear statement of principle extracted from judgments flowing from the Court of Appeal and the House of Lords was itself obiter in the context of a case which turned on statutory construction. Nevertheless it was imported by Sumner J some six years later into a case which itself concerned recognition of a divorce granted under the purported laws of the TRNC.

33. In *Emin v Yeldag* [2002] 1 FLR 956 the applicant wife was born in Cyprus but acquired British citizenship prior to her marriage to a Cypriot national. Their marriage was subsequently dissolved by a court in Northern Cyprus, otherwise known as the TRNC. She applied in this jurisdiction for permission to make an application for ancillary relief (as it was then known) pursuant to section 13 of the Matrimonial and Family Proceedings Act 1984. In circumstances where the British Government did not recognise the TRNC, the issue for the court was whether the overseas divorce was valid and entitled to recognition by the English court. His Lordship dealt with the principle and the apparent exception in the case of private rights from paragraph 27 of his judgment. Having reviewed the authorities which I have set out above, Sumner J went on to consider the view expressed by the well-known international jurist, Dr F A Mann in his book entitled *Foreign Affairs in English Courts*, a publication to which Mr Nagpal has also drawn my attention. I have the relevant passage in its original form. Sumner J sets out an extract in paragraph 34 of his judgment.

> "Dogmatically the international problem is quite different from that so elegantly and liberally solved by the Supreme Court of the United States in a series of decisions which are one of the Court's finest contributions. As their reasoning makes clear, the basic fact was that the States continued in existence, though, through unrecognised governments, they denied their adherence to the Union. In the international situation now under discussion there does not exist a State and the international community in general and Britain in particular does not wish the existing organism to exercise any internationally effective action; this is the very essence of non-recognition. If one allows to the unrecognised State an undefined but strictly limited right of internationally effective legal activity, this runs counter to the policy of non-recognition, which, after all, merely means that marriages and divorces, for example, which take place during the period of non-recognition will have retroactive international effectiveness only after recognition. Moreover regard must be had to the attitude which the lawful, still recognised sovereign is likely to take. Will he not legitimately take offence at the limited recognition which the application of the doctrine of necessity implies, when it is allowed to prevail during a period of non-recognition (as opposed to the period after the elimination of the problem, as in the United States)? In answering this question English courts should not forget that they cannot very well require the lawful sovereign of a foreign country to accept concessions which the English sovereign himself is not prepared to make within his own realm. This is not a field in which there is room for a double standard. To remain consistent English courts should, in regard to unrecognised States, reject the doctrine of necessity both for their own constitutional law as well as internationally. Hardship suffered by an individual is unlikely to occur very often and will only be temporary."

34. In terms of outcome, Sumner J decided that the decree of divorce granted by the TRNC was entitled to recognition by the English court. The legal basis for such recognition afforded to this and all decrees of divorce granted in that Republic was that the Republic of Cyprus was one country with two territories, each with its own system of law within section 46(1) of the Family Law Act 1986. That Act expressly recognised both countries under section 46(1) and territories under section 49(1). His Lordship stressed that validity could be given to decisions of a court in an unrecognised State but only in limited circumstances. Since divorce fell within the

category of private or family rights which clearly informed the views already expressed by Lord Reid and Lord Wilberforce in the *Carl Zeiss* case and by Lord Denning MR in the *Hesperides Hotels* case, Sumner J felt able to reject the views of Dr Mann. At paragraph 62 he said this:

> "[62] Despite Dr Mann's argument to the contrary, there is, I am satisfied, an exception. Its correct description whether as a doctrine of necessity or an implied mandate is not important. Its formulation I do not need to express in terms as broad as that I have cited from the Special Commissioners' case, though I do not dissent from their judgment. It does, however, extend to the recognition here of decrees of divorce granted in accordance with the law of a territory or country not recognised by the UK Government.
>
> [63] It is recognised in the decisions to which I have referred both here and in the US. It is accepted to be part of present international law by the ECHR.
>
> [64] To ignore it would be to leave the courts of this country out of step with a well-recognised jurisprudence. There are no good reasons for this and compelling arguments to the contrary.
>
> [65] But the validity given to such decisions of a court of an unrecognised State must, however, be limited in scope. It must never be inconsistent with the foreign policy or diplomatic stance of the UK Government."

35. In reaching this conclusion, Sumner J took a different course from an earlier decision reached by His Honour Judge Compston in *B v B (Divorce: Northern Cyprus)* [2000] 2 FLR 707. In that case the judge, sitting as a deputy judge of the High Court, decided that a decree of divorce granted to a husband in the TRNC was not entitled to recognition. Sumner J disagreed with that decision whilst noting that his fellow judge did not have the benefit of detailed argument and submissions on behalf of the Attorney General and Secretary of State for Foreign and Commonwealth Affairs as he had in *Emin*.

36. The decision and reasoning in *Emin*, espousing as it does the formulation of principle set out by the Special Commissioners in *Caglar v Billingham* if not its breadth, thus provides this court with a jurisprudential foundation for a conclusion that a valid marriage performed in, and in accordance with the law of, Somaliland could still be recognised under English law even though Somaliland may not be officially recognised by the UK Government as a sovereign State in its own right. In my judgment the fact that I am here dealing with a marriage as opposed to a divorce makes little substantive difference to that foundation. If an English court in appropriate circumstances is entitled to recognise as valid the legal steps taken in a foreign court of an unrecognised State to dissolve a marriage, it must follow that it has a similar entitlement to recognise as valid the legal steps taken to create a valid marriage.

The Namibia exception

37. In terms of wider international jurisprudence, there is further support to be found in what has come to be known as *'the Namibia exception'*. In 1971 the International Court of Justice published its advisory opinion in *Legal Consequences for States of*

the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) of 21 June 1971. This is often cited as 'The Namibia Advisory Opinion' and its focus was on the obligations imposed on States as a result of South Africa's continuing illegal occupation of Namibia in the face of the United Nations Security Council Resolution. The ICJ concluded that the resolution required UN Member States to abstain from entering into economic and other forms of commercial relationship with South Africa where those concerned Namibia.

38. However, at paragraph 125 of its advisory opinion, the ICJ made an important exception to its ruling. This exception appears to have been its response to various arguments made in the course of the proceedings. For example, the representative of the Netherlands had pointed out to the ICJ that the non-recognition of South Africa's illegal rule in Namibia "does not exclude taking into account the fact of exercise of powers in so far as that taking into account is necessary in order to do justice to the legitimate interest of the individual [who] is, in fact, subjected to that power" (Pleadings, vol.II, page 130). In similar terms, the representative of the United States submitted that "[i]t would, for example, be a violation of the rights of individuals if a foreign State refused to recognise the right of Namibians to marry in accordance with the laws in force … or would consider their children to be illegitimate…" (Pleadings, vol. II, page 503). The ICJ framed its exception in these terms:

> "125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."

39. Sumner J made no reference to the Namibia exception in *Emin v Yeldag* although it may well be said that he embraced its spirit in what he said in paragraphs 62 and 63, which I have set out above.

40. The exception has nonetheless been cited and approved by the European Court of Human Rights (ECtHR) in subsequent cases: see *Loizidou v Turkey* [1997] 23 EHRR 513 at paragraphs 44 to 45*, Cyprus v Turkey* (unreported) 10 May 2001 at paragraphs 93 to 98, and *Demopoulous v Turkey* [2010] 50 EHRR SE14 at paragraphs 94 to 98. In what to my mind is a telling passage of the ECtHR judgment in *Cyprus v Turkey*, the court said this:

> "96. It is to be noted that the International Court's Advisory Opinion, read in conjunction with the pleadings and the explanations given by some of the court's members, shows clearly that, in situations similar to those arising in the present case, the obligation to disregard acts of *de facto* entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or international institutions, especially courts, including this one. To hold otherwise would amount to stripping the

> inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.

41. Hong Kong has also adopted and applied the Namibia exception in a decision of the Court of Final Appeal: see *Chen Li Hung v Ting Lei Miao* [2000] 3 HKCFAR 9. That case concerned the recognition of a court order relied on by trustees in bankruptcy appointed by a Taiwanese court to recover the assets of a bankrupt individual in Hong Kong notwithstanding that the government of China did not recognise the *de facto* authority in Taiwan.

42. Having cited Lord Wilberforce's remarks in the *Carl Zeiss* case (set out in full at paragraph 24 of my judgment, above), Bokhary PJ reviewed the subsequent authorities where it had been cited with approval. At page 20C he said:

> "All of these statements, including Lord Wilberforce's, are admittedly *obiter*, but they constitute *dicta* of the most carefully considered kind, and I find them wholly persuasive."

43. Bokhary PJ drew further support from the statement formulated by the famous Dutch jurist and scholar, Hugo Grotius (1583 – 1645) whose work entitled "De Jure Belli ac Pacis" has often been cited as a very significant contribution to the development of early international law. On page 18 of his judgment at I to J, his Lordship set out Grotius's statement of principle from Book 1, Chapter IV, Section XV of that work:

> "We have spoken of him who possesses, or has possessed, the right of governing. It remains to speak of the usurper of power, not after he has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts."

44. He continued with the answer to the question of law posed at the start of his judgment (page 21A to E):

> *"The answer to the question of law*
>
> Turning now to answer the question of law which I posed at the beginning of this judgment, I would answer it thus. In certain circumstances our courts will give effect to the orders of non-recognized courts. By the expression "non-recognized courts" I mean to cover courts sitting in foreign states the governments of which our sovereign does not recognize as well as courts sitting in territory under the *de jure* sovereignty of our sovereign but presently under the *de facto* albeit unlawful control of a usurper government. Our courts will give effect to the orders of non-recognized courts where:
>
> (i) The rights covered by those orders are private rights;

(ii) Giving effect to such orders accords with the interests of justice, the dictates of common sense and the needs of law and order; and

(iii) Giving them effect would not be inimical to the sovereign's interests or otherwise contrary to public policy.

That is the principle; and none of it involves recognizing any unrecognized entity. It goes purely and simply to protecting private rights."

45. In a detailed and careful judgment delivered by Lord Cooke of Thorndon NPJ in the same Hong Kong case, his Lordship agreed with this analysis. In terms of the reach of the principle, and its impact on the case before the court, his Lordship said, at page 25G to H:

> "Viewing the case from a different perspective, the issue is essentially between the Taiwan creditors on the one hand and Mr Ting, Madam Chen and Mr Chan on the other. It is not an issue with which national politics have any natural connection. They should not be allowed to obtrude into or overshadow a question of the private rights and day-to-day affairs of ordinary people. The ordinary principles of private international law should be applied without importing extraneous high-level public controversy."

46. Whilst I recognise that the decision in *Chen Li Hung v Ting Lei Miao* can be distinguished from the present case on the basis that it concerned the recognition of a foreign court order, those passages of the judgment which I have set out above, together with the court's approach and reasoning, nevertheless provide, in my judgment, a solid basis in international law for provisional recognition of this Somaliland marriage notwithstanding that it is not recognised as a sovereign State by the UK Government.

47. It is important to establish in this context that there are limits to the Namibia exception as was recognised in a slightly different context by Sumner J in *Emin v Yeldag* (above). It is not the engagement of *any* private right or rights which will bring a case within the exception. That was reconfirmed in 2010 by the Court of Appeal in the *Kibris* case (cited above at paragraphs 19 and 20).

48. At first instance, Wyn Williams J had considered Sumner J's decision in *Emin* which he found to be entirely consistent with the Namibia case (para 88). However, he declined to extend the principle so as to give validity to the acts of the TRNC as they related to international air travel. At paragraph 89, he said that these "are not properly described as laws which regulate the day to day affairs of the people who reside in the TRNC either as described by Lord Denning MR, or Sumner J or in the Namibia case." He concluded,

> "90. ….This court is obliged to refuse to give effect to the validity of acts carried out in a territory which is unrecognised unless the acts in question can properly be regarded as regulating the day to day affairs of the people within the territory in question and can properly be regarded as essentially private in character….. I cannot categorise the acts of the TRNC which are relevant to international aviation as acts which regulate the day to day

> affairs of the people who live within the area controlled by the Government of the TRNC; the acts are essentially public in nature."

49. That aspect of his judgment at first instance and the observations made by Wyn Williams J on the limits of the Namibia exception were specifically endorsed by the Court of Appeal. In contrast, private rights, acts of everyday occurrence, routine acts of administration, day to day activities having legal consequences were all held by the Court of Appeal to fall within its embrace as an exception to the non-recognition principle: see paragraph 79 per Richards LJ.

50. In accordance with his role as Advocate to the Court, Mr Nagpal has quite properly taken me to two decisions in which the court has not accorded recognition to an overseas divorce granted in an unrecognised state. I have already referred to one of these decisions earlier in my judgment: *B v B* (above) considered by Sumner J in *Emin*. In that case, as I have said, Sumner J simply disagreed with the earlier decision of the deputy High Court Judge.

51. The second case to which I need to refer is an earlier case: *Adams v Adams (Attorney-General Intervening)* [1971] P 188. It concerned a decree of divorce granted in Southern Rhodesia's High Court, a state which was not recognised by the UK Government. The wife in that case wished to remarry but could not obtain a marriage licence because the Registrar-General did not recognise her Rhodesian divorce. She issued proceedings seeking a declaration. Sir Jocelyn Simon P delivered the judgment of the court. He concluded that, whilst personally qualified to sit as a High Court judge in the Rhodesian courts, the Southern Rhodesian judge who pronounced the decree had not been appointed by a *de jure* Governor nor had he taken an oath of allegiance in terms prescribed under Rhodesia's lawfully recognised constitution. In essence, his Lordship found that it would be a constitutional anomaly for the English court to recognise the validity of the acts of the *de facto* Southern Rhodesian judge whilst the executive acts of those appointing him (which must include his very appointment) were refused recognition by the British government. On the basis of that technicality alone, the wife's decree was not effective to dissolve her marriage.

52. The more interesting aspect of the (then) President's analysis in *Adams* is his subsequent consideration of whether or not the decree might be 'rescued' as an effective pronouncement under the doctrine of necessity.

53. For these purposes his Lordship returned to consider a case heard on appeal in the Privy Council some two years earlier. It, too, arose in the context of the "Declaration of Independence" by certain ministers in Southern Rhodesia, a colony under whose constitution judges of the High Court were appointed by the Governor on the advice of the Prime Minister. In 1965 the Prime Minister of Southern Rhodesia and his colleagues issued a Declaration of Independence declaring that Southern Rhodesia was no longer a Crown Colony. The Governor declared the Declaration to be unconstitutional. The Prime Minister and his colleagues disregarded their dismissal from office and adopted a new Constitution. The central issue in the case was the lawfulness or otherwise of the Emergency Powers Regulations made by the self-declared government of Southern Rhodesia including the detention without trial of several individuals by the acting Minister of Justice in the rebel regime including one, Mr Madzimbamuto. The case was brought on appeal by his wife: *Stella*

Madzimbamuto v Desmond William Lardner-Burke & Frederick Philip George [1969] 1 AC 645 ('*Madzimbamuto's* case').

54. Lord Reid delivered the judgment of the majority of the members of the Privy Council. He analysed the issue in this way (page 726D to 727A):-

> "The last question involves the doctrine of "necessity" and requires more detailed consideration. The argument is that, when a usurper is in control of a territory, loyal subjects of the lawful Sovereign who reside in that territory should recognise, obey and give effects to the commands of the usurper in so far as that is necessary in order to preserve law and order and the fabric of civilised society. Under pressure of necessity the lawful Sovereign and his forces may be justified in taking action which infringes the ordinary rights of his subjects but that is a different matter. Here in question is whether or how far Her Majesty's subjects and in particular Her Majesty's judges in Southern Rhodesia are entitled to recognise or give effect to laws or executive acts or decisions made by the unlawful regime at present in control of Southern Rhodesia.
>
> There is no English authority directly relevant but much attention was paid to a series of decisions of the Supreme Court of the United States as to the position in the states which attempted to secede during the American Civil War. Those authorities must be used with caution by reason of the very different constitutional position in the United States. It was held that during the rebellion the seceding states continued to exist as states, but that, by reason of their having adhered to the Confederacy, members of their executives and legislatures had ceased to have any legislative authority. But they had continued to make laws and carry out executive functions and the inhabitants of those states could not avoid carrying on their ordinary activities on the footing that these laws and executive acts were valid. So after the end of the war a wide variety of questions arose as to the legal effect of transactions arising out of that state of affairs."

55. At page 729B in *Madzimbamuto's* case, Lord Reid left open the question of whether there was a general principle which depended on an implied mandate from the lawful Sovereign which recognised the need to preserve law and order in the territory controlled by a usurper. He found it unnecessary to answer that question because, even if such a principle was engaged, it could not override the legal right of the United Kingdom Parliament to legislate in relation to territory which remained lawfully under the sovereignty of the Queen in Parliament. Since Parliament had specifically passed the Southern Rhodesia Act 1965 and had thereby authorised the Southern Rhodesia (Constitution) Order in Council the same year, there could not be said to be a legal vacuum in Southern Rhodesia. The clear and unequivocal effect of the Order in Council was that no laws could be made by the legislative body set up following the Declaration of Independence and the United Kingdom Parliament retained exclusive power to legislate for Rhodesia and had removed from Rhodesia the power to legislate for itself.

56. Lord Pearce delivered a powerful dissenting opinion. He was clear about the existence of a principle that acts done by those actually in control without lawful authority could be recognised as valid and acted upon by the courts provided that (i) they concerned, and were reasonably required for, the ordinary orderly running of the unrecognised state in question; and provided that (ii) they did not interfere with or

impair the rights of the citizens of that state under the terms of its lawful constitution; and (iii) they were not intended to, and did not, run contrary to the policy of the lawful Sovereign: see page 732E to F. His Lordship found, contrary to the majority, that the principle of necessity or implied mandate was indeed engaged.

57. Thus, to return to the rationale underpinning the President's judgment in *Adams*, he considered the dissenting view of Lord Pearce in *Madzimbamuto's* case and, in particular, the following passage which he cited at page 209C to D:

> "Lord Pearce, at p. 737, referred the doctrine to:
>
> > ' … the reasonable and humane desire of preserving law and order and avoiding chaos which would work great hardship on the citizens of all races and which would incidentally damage that part of the realm to the detriment of whoever is ultimately successful …. For this reason it is clearly desirable to keep the courts out of the main area of dispute, so that, whatever be the political battle, and whatever be the sanctions or other pressures employed to end the rebellion, the courts can carry on their peaceful tasks of protecting the fabric of society and maintaining law and order.'"

58. Whilst accepting that Lord Pearce's opinion was 'a powerful judgment' (page 210A), the President extracted from the views of the majority of the Privy Council members the proposition that the legal right of the Parliament of the United Kingdom to legislate in relation to the affairs of Rhodesia (including the 'so called' independent state of Southern Rhodesia) could not be overridden by any general principle which depended on notions of 'necessity' or implied mandate. The President was also persuaded that the majority view was correct because of the manner in which the court was able to distinguish the line of authority concerning the doctrine of necessity emanating from the United States after the Civil War. In particular, his Lordship emphasised that the decisions in that line of cases (where the doctrine of necessity was accepted) were concerned with the legal effect upon the civil rights and claims of individual citizens after the civil war of acts done during it. None of them involved cases where courts were called upon, during the rebellion, to rule on the legality of the governments of the rebellious states. By contrast, in *Madzimbamuto's* case, the Parliament of the United Kingdom had passed primary and secondary legislation in 1965 to make specific provision as to what could and could not be undertaken as a legal and/or executive act. That was not something which the United States Congress could have done so as to provide what the legal position was to be in the seceding states during the war.

59. As a more general principle, the President took the view in *Adams* that the doctrine of "necessity" was intimately connected with concepts of public policy, a field into which the courts "are rightly chary of intrusion" (page 211E). In circumstances where there was a sovereign legislature continuously in session, the President's view was that decisions in relation to the extent to which recognition should be accorded to executive, judicial or legislative acts of organs of government which are not officially recognised should be left to the Queen through her Parliament.

60. Five years after the *Adams* case, the Court of Appeal considered a further aspect of the situation created by the non-recognition of the illegal regime in Southern Rhodesia. The issue in *Re James (An Insolvent)(Attorney General Intervening)*

[1977] 1 Ch 41 was whether a bankruptcy order made in the High Court of Rhodesia in 1974 had been made by a British court. The view of the majority was that it had not. In that case Lord Denning delivered a powerful dissenting judgment in which he found that *Adams* had been wrongly decided. Scarman LJ said this of his dissenting judgment:

> "The basis of the judgment of Lord Denning MR, as I understand it, is that justice requires a reconciliation at least to the extent that the courts in England will recognise the judicial acts of the courts in Rhodesia so that the normal tasks of maintaining law and order in the colony – tasks which in law must certainly continue to be the responsibility of the British Crown – may be effectively accomplished. He invokes the doctrine of recognition of the de facto, and the doctrine of implied mandate or necessity. I agree with much of the thinking that lies behind his judgment. I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government. But it is a fallacy to conclude that, because in certain circumstances our courts would recognise as valid the judicial acts of an unlawful court or a de facto judge, therefore the court thus recognised is a British court. In my judgment these doctrines do not solve the question raised by this appeal." (page 70F to H)

61. Because of the view which he took in relation to a point on statutory construction of the relevant Bankruptcy Act, Scarman LJ did not feel it necessary to revisit the President's reasoning in *Adams.* Geoffrey Lane LJ found himself "in unhappy disagreement" with aspects of the President's judgment in *Adams* but restricted his criticism of that judgment to his analysis of the capacity or role of a judge appointed after the Declaration of Independence.

62. How did Sumner J navigate his way around the decision in *Adams* when, some thirty years later, he recognised the decree of divorce made in the unrecognised state of TRNC ?

63. The answer is that he did it in two very short paragraphs in this way:

> "[56] The President, Sir Jocelyn Simon, referred to the doctrine of necessity and implied mandate. He did not rule it out but held that it did not apply in relation to a judge who was appointed de facto rather than de jure when Parliament had laid down how he was to be appointed. It created a constitutional anomaly for his acts to be recognised while the executive acts of those appointing him were refused recognition by the executive here.
>
> [57] I am satisfied that the same considerations do not arise here. There is no question of the court and the executive acting contrary to one another when the Attorney-General supports the decision at which I have arrived."

64. I have set out the arguments and Lord Reid's analysis in *Madzimbamuto's* case in greater detail for the purposes of the present case because it seems to me that, to the extent they informed the President's conclusion in *Adams*, the case can indeed be distinguished from the facts of this case.

65. First, there is no question in this case of the UK Government having specifically reserved to itself the right to determine what legal or executive acts can or cannot be undertaken by the legal and executive authorities in Somaliland. It has simply withheld formal recognition as an independent State to this self-declared territory in the Horn of Africa.

66. Secondly, there is a wealth of authority from the highest courts in this jurisdiction confirming the existence of an exception to the non-recognition principle in the case of private and family rights. Over fifty years ago, Lord Wilberforce and Lord Reid confirmed its existence as an exception to the general rule in the *Carl Zeiss* case. Just over ten years later, Lord Denning considered that marriages and divorces fell within the exception in the *Hesperides Hotels* case. A decade later, Lord Donaldson said that he saw "great force" in the exception in *Gur Corporation*. Some ten years later the Special Commissioners confirmed that the exception could apply in cases involving matters of private law including the registration of births, marriages and death. In the field of English family law, Sumner J confirmed that recognition could be afforded to a foreign decree of divorce pronounced in an unrecognised State. There has been no subsequent challenge to that decision nor any obiter statement in a subsequent case which suggests that his Lordship's view was wrong and/or that he was not entitled to grant the declaratory relief which flowed from his decision in *Emin*. The only historical challenge came some thirty years earlier in the *Adams* case. Perhaps it is not without significance that *Adams* was decided in the same year that the International Court of Justice in the Hague, the principal judicial organ of the United Nations of which the United Kingdom is a member, handed down its decision in the Namibia case which gave its name to the *Namibia* exception.

67. Thirdly, I am satisfied that marriage and its creation as a legal status falls within the category of 'private rights' which the exception has embraced in the authorities to which I have referred above. Regardless of the fact that Mr Jama in his evidence has described the formalities required under Sharia law as a contractual agreement and the certificate issued by the Hargeisa District Court as valid proof from the administrative authority of an effective marriage, I take the view that these acts can properly be regarded as essentially private in character regulating, as they do, the day to day affairs of the people and individuals resident within the territory in question: see the *Kibris* case, above.

68. Fourthly, in my judgment a refusal to recognise the validity of this marriage would represent something of a legal anomaly. Given the development of English jurisprudence on this issue over the last fifty years, the English courts would be significantly out of step with other jurisdictions in terms of private international law were recognition of this marriage to be refused. In circumstances where I can see no good, far less compelling, reason to refuse recognition, I am quite satisfied that the applicant in this case is entitled to the declaratory relief which he seeks.

69. I have reached that conclusion having taken full account of the evidence I have received on behalf of the UK Government from the Foreign & Commonwealth Office (FCO). That is an important safety valve to the exception to the non-recognition principle. As far as issues of policy are concerned, in this case I have the reassurance of the FCO through Mr St John Gould (who has been specifically authorised to provide it), that the Government would be unlikely to object to the recognition of a Somaliland marriage on the basis that it does not recognise Somaliland as a State. Mr

Gould's own judgment (informed as it is by his role as Head of the relevant Government Department) is that the recognition of private rights in this way would not be contrary to public policy by implying greater political engagement with Somaliland than that which already takes place through diplomatic channels. Thus the 'one voice' doctrine is maintained. The FCO had advance notice of how the case was going to be argued before me but has chosen not to intervene.

70. Accordingly, I propose to grant the declaration which is sought in this case: these parties, MM and NA, are validly married to one another. Their marriage was valid and subsisting as at the date of their application to this court and it is entitled to formal recognition according to the law of England & Wales.

Human Rights considerations

71. By way of postscript to my judgment, I heard submissions from Mr Nagpal in relation to whether or not it was necessary in this case to consider the implications of Human Rights legislation. Because I have decided that the considerable weight of domestic and international authority, coupled with the various citations in respect of the *Namibia* exception and the approval it has attracted from English appellate courts, is a sufficient foundation for granting the relief which has been sought, what follows is strictly obiter.

72. Convention rights are to be interpreted in harmony with general principles of international law. That much is clear from the decision in *Neulinger v Switzerland* [2012] 54 EHRR 31. However, before any breach can be established, there must first be a finding that there has been a disproportionate interference with a relevant right. Articles 8 (respect for private and family life) and 12 (the right to marry and found a family) are the likely contenders as the relevant rights which may be engaged were recognition to have been refused in this case. Member States are entitled to prescribe the formalities required for marriage in individual States: see *X v Federal Republic of Germany* [No 6167/73] and *Hamer v United Kingdom* [7114/75], [1982] 4 EHRR 139 at pars 60 to 61. Further, the ability to register a marriage falls within Article 8: see *Orlandi v Italy* [2018] 26431/12; 26742/12; 44057/12 and 60088/12. These cases concerned same sex couples who had married outside Italy and who found themselves unable to register those marriages in Italy. Whilst they succeeded in establishing a violation of Article 8, the critical point in the case was their inability to secure any form of legal recognition of their status in Italy.

73. I agree with Mr Nagpal that these parties would have a simple remedy were I to have refused to recognise their marriage as valid under English law. They could simply have presented themselves to a local Registrar together with the appropriate declaration of non-validity and married in a civil ceremony. In these circumstances, it is difficult to see how their Article 8 rights would have been infringed.

74. For these reasons, I need say no more in this case about Convention rights.

Order accordingly