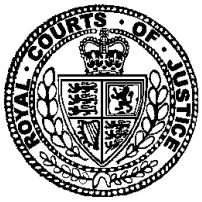

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Case No: RM15D01195

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

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Before:

MRS JUSTICE LIEVEN DBE

- -

Between:

MR SUBTAIN ALI	**Applicant**
- and -	
MS FABIANA ALEXANDRA RODRIGUES BARBOSA	**Respondent**

- -
- -

MS DINAH LOEB (instructed by **Selva & Co Solicitors**) for the **Applicant**
MR GILES PENGELLY (instructed by **Highfield's Solicitors**) for the **Respondent**

- -

Approved Judgment

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS JUSTICE LIEVEN :

1. This is an application made by Mr Subtain Ali, the Respondent/Cross-Applicant, who I will refer to as the husband. The application, according to the application notice, is for an order that the decree absolute pronounced on 27th May 2016; the decree nisi pronounced on 12th April 2016; the order for deemed service of Deputy District Judge Yeshin on 10th February 2016; and the resulting certificate of entitlement to a decree dated 21st March 2016, in cause number RM15D01195, concerning the marriage of Rodrigues Barbosa and Subtain Ali, all be set aside.

2. The facts of the case, in summary, are that the husband and wife married in Scotland on 7th April 2014. The wife is a Portuguese national and the husband is a Pakistani national. The wife, therefore, has EU rights. The wife's petition to divorce the husband was issued on 2nd June 2015 on the pleaded facts of unreasonable behaviour, but the allegations in the petition are disputed. The address for service of the petition given by the wife was Flat 3, 58 Broughton Road, Edinburgh, EH7 4EE, which I will refer to as Broughton Road.

3. The husband accepts he lived at that address from March 2015. It is his case that he left on 28th October 2015. It is the wife's case that the husband either continued to live at the address or had access to it after that date.

4. The Court posted the petition to that address on 19th June 2015 and it was returned to sender. On 29th October, the wife's then solicitors instructed a process server, Robert Carrigan, to serve the petition. Mr Carrigan visited the address on 30th October 2015 and he filed an affidavit of service. According to that affidavit, he said that he attended the address on 30th October. He knocked repeatedly on the door, received no reply and left a calling card addressed to Subtain Ali, which bore Mr Carrigan's name and telephone number. He called again on 31st October, again received no reply. He then said the following in his witness statement; *"On Monday 22nd November 2015, I received a telephone from a male who identified himself as Subtain Ali, who said he'd received my calling card. I stated I had Court papers for him and he arranged for me to deliver the papers on Thursday morning, 5th November 2015."*

5. Mr Carrigan then says that he did attend the property on that day, knocked repeatedly and received no reply. Again he left a calling card, and received no response. The husband disputes that he was the person at the other end of the telephone.

6. On 2nd December 2015, the wife's then solicitors wrote to the Court seeking permission to dispense with service, with the affidavit of Mr Carrigan attached. The Court replied stating that the issue fee had not been paid. A further letter was then sent, accompanied by a cheque. On 7th January 2016, the Court replied saying, "*There's no actual application with the paperwork. Further having established that the respondent does live at the address, they should instruct their agents to leave the papers at the address and apply for deemed service."*

7. I have not seen the application for deemed service. However, the critical matter is that on 23rd February 2016, an order was sent to the parties from the Family Court at Romford with an order from Deputy District Judge Yeshin made on 10th February 2016, saying, "*Having read the affidavit of the process server, it is ordered that the petition was deemed served on the respondent on 8th January 2016."*

8. As I have said, that order was sent by the Court to both sides, although obviously the husband says that he did not receive it. The husband was in Pakistan from 10th January 2016 to 18th February 2016. A certificate of entitlement to a divorce was issued on 21st March 2016 and decrees nisi and absolute were pronounced in the Romford Family Court on, respectively, 12th April and 27th May 2016. That was what I will refer to later as the English decree.

9. On 14th December 2016, the Home Office notified the husband that it was revoking his residence card on the basis that he was no longer a family member of an EEA national. The wife remarried in 2016, following the English decree and has sponsored her second husband's application for leave to remain.

10. The husband petitioned for divorce in Scotland on 27th September 2016, three years and five months after the date of the marriage and at least two years and three months from the date of the separation. On 6th November 2017, the Edinburgh Sherriff Court and Justice of the Peace Court pronounced the decree absolute, which I will refer to as the Scottish decree.

11. It is worth noting at this point that the date of the petition to divorce and indeed the date of both the English and Scottish decrees is highly important to the husband's immigration status because one way in which a former EEA family member can retain a right of residence is if the marriage exceeded three years in length. If the English decree stands, then it would not exceed three years in length. If the Scottish decree stands, it would exceed the three year period.

12. On 13th October 2015, the wife had written to the Home Office, setting out her name, her Portuguese ID card number, her residence and stating "I was married to Mr Ali," setting out his passport number and the last known address as being the Broughton Road address, and she went on to say, "*I want to cancel my sponsorship. We are already separated from January 2015 and I have already started my divorce proceedings in March/April 2015. Because Subtain Ali currently changes his address and returning letters, our divorce is still in process and taking too long.*" She goes on to say she wants to cancel her sponsorship or any responsibility for Mr Ali.

13. In those circumstances, there are three issues before me. Was the petition or the application in the English proceedings served in accordance with the Family Procedure Rules? Should the Deputy District Judge's order for deemed service be set aside; and if there was a procedural irregularity, can it be rectified.

14. The relevant Family Procedure Rules are as follows. Because the application was served in Scotland, the starting point is FPR 6.43, which concerns where service is to be effected on a party in Scotland. That then refers one back to 6.26(5) "*Any document to be served in proceedings must be sent, or transmitted to, or left at, the party's address for service unless it is to be served personally or the court orders otherwise."*

15. So, the crucial rules for the purpose of this matter are as follows:

"Rule 6.4. Methods of service. An application may be served by any of the following methods –

(a) personal service in accordance with rule 6.7;

(b) first class post, or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A; or

(c) where rule 6.11 applies, document exchange."

"Rule 6.13. (2) Subject to paragraphs (3) to (5) the application must be served on the respondent at his usual or last known address.

(3) Where the applicant has reason to believe that the respondent no longer resides at his usual or last known address, the applicant must take reasonable steps to ascertain the current address of the respondent.

(5) If, under paragraph (4)(b), there is such a place where or a method by which service could be effected, the applicant must make an application under rule 6.19."

"6.16. Deemed service by post or alternative service where no acknowledgment of service filed

(1) Subject to paragraph (2), if –

(a) an application has been served on a respondent by post or other service which provides for delivery on the next business day;

(b) no acknowledgment of service has been returned to the court office; and

(c) the court is satisfied that the respondent has received the application, the court may direct that the application is deemed to be served."

"6.19 Service of the application by an alternative method or at an alternative place

(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may direct that service is effected by an alternative method or at an alternative place.

(2) On an application under this rule, the court may direct that steps already taken to bring the application form to the attention of the respondent by an alternative method or at an alternative place is good service.

> *(3) A direction under this rule must specify –*
>
> *(a) the method or place of service;*
>
> *(b) the date on which the application form is deemed served; and*
>
> *(c) the period for filing an acknowledgment of service or answer."*

16. The husband argues that no service was effective of the FPR. First of all, Ms Roeb on behalf of the husband, argues that the FPR has specific rules for service matrimonial orders.

17. Secondly, there has to be strict compliance of those rules, given the importance of the parties knowing their marital status and, therefore, if there is no service, the Court has no discretion but to set the relevant orders aside.

18. Thirdly, there was no personal service under Rule 6.4 because the husband did not receive the application.

19. Fourthly, the wife could have applied to dispense with service, by applying for substituted service but she did not do so.

20. Fifthly, having chosen to apply for deemed service, the terms of Rule 16.16 were not met. The application was not served by post or other service and, in any event, the Court could not have been satisfied that the respondent had received the application.

21. Sixthly, she said that as far as alternative service is concerned, that plainly was not met either. Ms Roeb in her oral argument argued strongly that the wife had failed to inform the Court that the husband either had moved from Broughton Road or might have done so, and she points to the letter to the Home Office of 13th October where she says it is clear the wife knew that the husband either was not living at Broughton Road or might well have moved.

22. Mr Pengelly, who appears for the wife makes, in essence, three submissions. The wife reasonably believed that the husband continued to live at Broughton Street. She had used the 192.com website to try to ascertain his address and she had also tried to ask him for his address. He says that posting through the letterbox was good service for the purposes of Rule 16.16 and so the terms of the FPR were met.

23. He says that, in any event, if there were any errors, they were errors that only rendered the relevant orders voidable, not void, and he relies on the judgment of the then President Sir James Munby in *M v P* [2019] EWFC 14.

24. The case law in this matter is quite long and complicated, but is set out in considerable detail and with great care by the then President in *M v P* and I will use that judgment as a way to summarise the relevant case law. *M v P* concerned an application to void a decree nisi, where the Queen's Proctor asserted that both decrees were void and nullities by reason of non-compliance with Section 1(2)(d) of the Matrimonial Causes Act 1973. In both cases, the parties had re-married on the basis of the decrees that had been issued. The nature of the errors in that case are set out at

paragraph 18 of the judgment and it is right to say that they were procedural and factual errors, rather than errors of service. The President considered the authorities in great detail in order to decide in what circumstances a decree absolute was voidable, rather than void.

25. I will not repeat all his detailed analysis for obvious reasons, but highlight various passages. At paragraph 47 of the judgment, he starts an analysis of the case law and I have carefully read the entirety of that analysis. It seems to me there are a few key cases in this matter.

26. The first is that of *Everritt v Everitt* [1948] 2 All ER 545, which is referred to in paragraph 49 of *M v P*. That was a case where the decree nisi, followed by a decree absolute had been made, although it subsequently transpired that the respondent husband had never been served with the petition. The then president Lord Merriman said at page 546:

> "It is well settled that a judgment obtained against a party in his absence owing to his not having been served with the process is not merely voidable for irregularity but is void as a nullity: see *Craig v Kanssen* [1943] KB 256, and the cases there cited. Manifestly, this general principle applies with full force to a judgment affecting the status of the party: *Marsh v Marsh* [1945] AC 271"

27. Then *Wiseman v Wiseman* was a case where the husband had been granted a decree nisi and a decree absolute, having previously obtained an order for substituted service on the wife of his petition, relying on evidence which was insufficiently candid. The Court of Appeal held that in the absence of fraud the decrees were voidable, not void, and that the court had jurisdiction to set aside the decrees and order a retrial even though the husband had remarried and had a child. The importance of *Wiseman v Wiseman* for these purposes is that it did concern an issue of service and, in particular, substituted service, and the Court of Appeal held that the decree was voidable not void, albeit they ultimate exercised their discretion to set it aside.

28. To some degree that case places a caveat or a nuance on *Everitt v Everitt* and any suggestion that an issue surrounding service or non-service automatically renders the ultimate decree void.

29. The next case I need to refer to is *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336 because in that case the decrees were held to be void because the husband had falsely stated that the signature was that of his wife. Therefore it is clear that any form of fraud or deliberate misrepresentation will render the decree void.

30. In *Batchelor v Batchelor* [1984] FLR 188 the decree was held to be voidable not void because there had been a procedural error but not one of such seriousness as to render the further decisions void.

31. Then finally I should note the judgment of Mr Justice Holman in *Manchanda v Manchanda* [1995] 2 FLR 590, in which the following passage is relevant, 977 to 978. Mr Justice Holman said:

> "Mr Scott submits that if failure to serve on a petitioner an application by a respondent to make the decree absolute (as required by r 2.50) renders the decree absolute null and void, then so must a failure to serve the decree nisi itself. He submits that it is, in the phrase used in *Walker v Walker* … 'an affront to the rules of natural justice'.
>
> I do not agree. Certainly there was a serious irregularity since r 10.16(1) of the Family Proceedings Rules 1991 requires that 'a copy of every decree shall be sent by the proper officer to every party to the cause' …
>
> If the court had failed to send to the respondent or (once they were on the record) his solicitors both the certificate of entitlement to a decree and the decree nisi, then, in my view, the decree absolute would necessarily be void and bound to be set aside. But the failure alone to send the decree nisi, although serious, is, in my judgment, on the other side of the line."

32. Lord Justice Munby, the President's conclusions on this matter or critical conclusions for these purposes are first of all paragraph 94 of *M v P*.

> "It can be seen that the cases where the consequence of what had happened was that the decree was a nullity and void fall into four categories:
>
> i) Two cases where the court had no jurisdiction to entertain the proceedings at all (*Nissim v Nissim* and *Butler v Butler*).
>
> ii) Two cases where the court was persuaded to accept jurisdiction by fraud (*Moynihan v Moynihan* and *Rapisarda v Colladon*).
>
> iii) Two cases where the petition had not been served and the principle in *Craig v Kanssen* [1943] KB 256 was applied (*Everitt v Everitt* and *Ali Ebrahim v Ali Ebrahim*).
>
> iv) Two cases where there had been non-compliance with what is now section 9(2) of the Matrimonial Causes Act 1973 (*Woolfenden v Woolfenden* and *Manchanda v Manchanda*)."

33. He then, at paragraph 99 onwards, discusses the differences between void and voidable and says at 100:

> "That apart, there are, I think, three general conclusions to be drawn from this survey of the jurisprudence:
>
> i) First, a general lack of appetite to find that the consequence of 'irregularity' – I use the word in a loose general sense and not as a term of art – is that a decree is void rather than voidable…

> ii) Secondly, a general recognition that only if the decree is held to be voidable, and not void, will the court be able to do justice to all those whose interests are affected and having regard to the particular circumstances of the case.
>
> iii) Thirdly, recognition of the public interest, where matters of personal status are concerned, in not disturbing the apparent status quo flowing from the decree and the certainty which normally attaches to it…"

34. Then at paragraph 101, he says:

> "Putting the issue in its wider context, Mr Murray helpfully took me to the discussion, in the eighth edition of *De Smith's Judicial Review* … of current thinking about the distinction in public law (that is, public law as the expression would be understood by administrative lawyers, rather than as it might be understood by family lawyers) between acts or decisions which are void and those which are voidable. It is reassuring to see that family lawyers are not the only ones who struggle with the distinction, for the authors observe that "Behind the simple dichotomy … lurk terminological and conceptual problems of excruciating complexity" and go on to cite (para 4-070) a dispute within the Academy where the view of one corner is denounced by the other as "a tissue of pseudo-conceptualism behind which lurks what is in reality a pragmatic conclusion." Grateful though I am to Mr Murray, it is neither necessary nor appropriate for me to chart these difficult waters, though I note the view of the authors that in the public law context the distinction has been "eroded" by the courts, which "have become increasingly impatient with the distinction."

35. In my view, for the purposes of this case, the following principles can be extracted.

i) The Court has a lack of appetite to find that the decree is void; see *M v P* at paragraph100 (i);

ii) The Court has a concern to try to recognise what is the apparent status quo flowing from the degree and the certainty which normally attaches to the decree.

iii) That must be in part because where one party has changed their position on the basis of the decree and, in particular, of course on the facts, the most likely way is going to be by remarrying, then efforts should be made to uphold that change of position in law.

iv) There is a trend in divorce law, and as can be seen from paragraph 101 of *M v P*, and in public law administrative law, to move away from technical distinctions of void and voidable and look perhaps more rigorously at prejudice and change of position.

v) There plainly remains a category of case where a decree or an order will simply be void, see *M v P* paragraph 94, but in my view, the most obvious examples of that is where there is simply no jurisdiction to make the order or where there is fraud

36. In my view what the case law shows is that when it comes to failures related to service, it is appropriate to look at the nature of what went wrong and where the prejudice, if any, lies. It follows from the judgment in *Wiseman v Wiseman* that not all errors related to service necessarily render the decree simply void. In my view it cannot be the case that any failure to serve, in strict accord with rules, renders a decree void because to reach that conclusion would create obvious injustice, particularly in the case where one of the parties may be seeking to avoid service, for whatever reason. Further there is nothing on the face of the rules that would force the Court into the conclusion that an error in respect of service necessarily rendered the ultimate decree void. In other words, the principle of the outcome being void is not one dictated by the Rules themselves, let alone the statute.

37. Applying those principles to the facts of this case, first of all the wife put on the application the last known address and she had no reason to know, as at 28th October 2015, that the husband had left Broughton Road. As I have recorded, she checked the address by using an appropriate website, 192.com, to try to ascertain his address. The evidence suggests she tried to find from him whether he had moved, so this is not a case where there was any fraud or, in my view, any failure to take reasonable steps to find the husband's location. Therefore there were no grounds for the wife not to put on the application the Broughton Road address.

38. Secondly, the process server tried to serve personally and spoke to a man who identified himself as the husband and said would meet him at the address. The process server had no reason to believe that was not the husband, so the process server was, in my view, fully entitled to believe that the husband was still living at the address.

39. Thirdly, there is some evidence to suggest that the husband was seeking to avoid service. I make no findings of fact on this, not having hard any oral evidence, but given the fact that the marriage had broken down and the husband was in the UK on a spousal visa possibly simply reliant on EEA rights as a spouse, he therefore necessarily had a precarious immigration status. In those circumstances it it is surprising that he did not take steps either to pick up his mail or to arrange forwarding of mail unless he was seeking to avoid service.

40. In those circumstances, I do not think that the Deputy District Judge Yeshin made any error of law in making the order for substituted service under Rule 6.16.

41. To the degree that there were any procedural errors in that order and, as I understand it, the errors that Ms Roeb relies on are that the application was not served by post or other service, but rather left at the property by the process server and that she says that the District Judge could not be satisfied that the respondent had received the application; in my view, any such error does not render either the order or the subsequent decrees and orders void.

42. In respect of any prejudice to the husband, it is not being suggested that if he had received the application in October 2015, he would have had any grounds to resist the divorce. He is, of course, prejudiced by the fact that if the English decree absolute stands, the marriage did not subsist for three years, which is important as I have said in immigration law, but the issue there is not whether he was prejudiced by the failure to serve. As far as I can see, there is no prejudice from the failure to serve.

43. On the other hand, the prejudice to the wife is extreme because she has remarried and, as I understand the timing, if the English decree is set aside, then her second marriage would have been made at a time when the first marriage persisted. That would be a very serious impact on her, her second husband and the child.

44. For the reasons I have set out above, I find that any failure to fully comply with the rules rendered the various orders voidable not void and I decline to exercise my discretion to order them to be set aside.

This transcript has been approved by Mrs Justice Lieven