

British family law: a case-study on religious belief and divorce

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Case-study in British Family Law: Religious Beliefs and Divorce Cuthbert is seeking a remedy in the law of nullity for two reasons. Firstly, his religious beliefs may not permit divorce and secondly, he can petition immediately whereas divorce proceedings cannot be commenced until the parties have been married for one year (s. 3 MCA 1973).

On what grounds can Cuthbert base a petition? 1. s. 12(c) MCA 1973 - that he did not validly consent to the marriage ... in consequence of duress. Cuthbert was frightened of losing his job in embarrassing circumstances. Is this sufficient to have the marriage annulled? According to the test in *Szechter*, such social and economic pressure would be insufficient, as there must be threats of immediate danger to 'life, limb or liberty'. However, in *Hirani* the Court of Appeal took a more expansive view and formulated the test as being whether the threat was such as to destroy the reality of consent, and overbear the will of the individual. This is a subjective test so a court would take into consideration Cuthbert's timidity when assessing whether his will was indeed overcome by Nadia's threats.

However, the 'overborne will' test may be criticised as psychologically simplistic - Cuthbert's will was not literally destroyed, as he made a conscious and rational decision to go through with the marriage, as the lesser of two evils. The Law Commission have argued that what the courts have been doing in the cases on duress is to distinguish legitimate from illegitimate threats. So the question would be whether Nadia's threats should be regarded as impermissible coercion. It may be argued that her threat of exposure has vitiated Cuthbert's consent. 2. s. 12(c) MCA 1973 - Cuthbert did not validly consent to the marriage ... 'otherwise'.

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Cuthbert could argue that the marriage was for immigration purposes only, that it was a “ sham”, they never intended to cohabit and so there was no true consent to marriage. It seems that English law takes the view that in the absence of fear or duress, mental reservations about the purpose of a marriage will not affect the validity of the marriage. It is clear that Cuthbert and Nadia did intend to acquire marital status, albeit for a limited purpose, and so the marriage is unimpeachable (see *Messina v Smith*). 3. s. 12(a) MCA 1973 - the marriage is voidable because Cuthbert was incapable of consummating it. Note there is nothing in the statute to prevent Cuthbert from relying on his own incapacity. It is irrelevant that Cuthbert and Nadia had sexual intercourse prior to the wedding ceremony.

The authorities make it clear that the incapacity must be incurable, and it may be due to physical or psychological causes (see *G v G* and *Singh v Singh*). However, it would seem that Cuthbert’s failure on the wedding night was no more than ‘ bridegroom’s nerves’ and this would not be sufficient to establish incapacity. 4. s. 12(b) MCA 1973 - Cuthbert could petition on the ground that the marriage has not been consummated due to Nadia’s wilful refusal. In the case of *Horton v Horton* , wilful refusal was defined as a ‘ settled and definite decision come to without just excuse’. Has Nadia a ‘ just excuse’? ‘ Loss of ardour’ has been treated as a ‘ just excuse’ (in *Potter v Potter*) - is this implied in Nadia’s statement that she no longer ‘ fancies’ Cuthbert? Nadia could, in addition, mount a defence on the basis of their agreement to have nothing more to do with one another after the ceremony. However, they did spend the wedding night together so a court is unlikely to be persuaded by this argument. 5. s. 12(f) MCA 1973 - was Nadia pregnant

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at the time of the marriage by someone other than Cuthbert? This is an issue on the facts and under s. 20 FLRA 1969 the court could direct scientific (i. e. DNA or blood) tests which could eliminate the possibility that Cuthbert is the father.

Even if Cuthbert were to prove one of the grounds in s. 12 MCA 1973, could Nadia rely on the bar of approbation in s. 13(1) MCA 1973? If this bar is satisfied the court cannot grant a decree. The fact that intercourse was attempted on the wedding night is relevant to the issue of whether Cuthbert conducted himself in such a way as to lead Nadia to believe he would not avoid the marriage, but it is questionable whether Cuthbert knew at that time that he had grounds for annulment (s. 13(1)(a)). Furthermore Nadia may have difficulty in establishing that it would be unjust if a decree were granted (s. 13(1)(b)). This is because Cuthbert will in time be able to terminate the marriage by divorce (s. 1(2)(e) MCA 1973), and Nadia will have the same rights to apply for financial support following a decree of nullity as after a decree of divorce. Assuming Cuthbert to be the father of her child, a decree of nullity would not alter its status as legitimate if the child is born before the marriage is annulled (s. 16 MCA 1973).

In conclusion if Cuthbert is indeed the father of Nadia's child, his best bet would seem to be to argue the marriage is voidable for duress under s. 12(c). If the court is not satisfied that he was forced into the marriage with Nadia, then he will have no alternative but to petition for divorce in due course.