RECOGNITION OF A FOREIGN DIVORCE

Quazi v. *Quazi*[1]

I

Students of family law and private international law will be aware of the saga of *Quazi* v. *Quazi*: yet another of those cases involving non-English names which, thanks to legal aid and a liberal jurisdiction in matrimonial causes, fill the English law reports on these subjects.

The husband and wife concerned were two Pakistani subjects, Muslims, not domiciled in England, involved in litigation concerning a house in England. The perils of matrimony are well illustrated by the reports of goings-on in the Family Division, and this case is no exception.

The parties were born in India, where in 1963 they married. It was stated that the husband had divorced the wife —

a. in 1968, in Bangkok (where both husband and wife were then domiciled) by means of *khula* (a consensual form of Muslim divorce) in accordance with the law of Thailand; and

b. in 1974, in Karachi, by means of *talaq* pronounced there by the husband on 30 July, and taking effect by Pakistan law ninety days thereafter, that is to say, on 28 November 1974.

In 1973 the husband had bought a house at Wimbledon — the subject of the claim by the wife, under the English Matrimonial Causes Act 1973 — for £3000. The question of whether the wife was entitled to any relief under the Act of 1973 therefore depended upon the question whether or not she had a right to petition for divorce in an English Court, and this in turn raised the question of recognition of extra-judicial methods of putting an end to marriage.

II

In England, the recognition of foreign divorce and legal separation is regulated by recent legislation. Arising out of the Hague Convention on the Recognition of Decrees of Divorce and Legal Separation of 1970, Parliament in the United Kingdom enacted the Recognition of Divorces and Legal Separation Act 1971: a measure amended by the Domicile and Matrimonial Proceedings Act 1973. Section 6 of the Act of 1971 deals with "existing common law and statutory rules" and covers divorces and legal separations outside England; as amended it retains the old rules on domicile and apparently excludes the "real and substantial connection" test established by *Indyka* v. *Indyka*[2] in 1967: so that in general the courts continue to recognise overseas divorce obtained in, or recognised by, the law of the country of the spouses' domicile.

At the same time, section 2 of the Act of 1971 provides for the recognition in England of overseas divorces and legal separations

[1] [1979] 3 W.L.R. 833; 3 All E.R. 897.
[2] [1969] 1 A.C. 33.

which have been obtained "by means of judicial or other proceedings in any country outside the British Isles, and … are effective under the law of that country." Habitual residence and nationality are, in addition to domicile overseas, now accepted as bases of jurisdiction abroad.

At the trial, Wood J. had to consider whether divorce by *khula* and *talaq* was a "proceeding" within the meaning of section 2 of the Act. It seems that he sought to distinguish an extra-judicial divorce obtained without any official intervention from one in relation to which arbitration or conciliation procedures had been prescribed by law. Under the Pakistan Muslim Family Laws Ordinance 1961, certain notices must be given to, and action be taken by, the chairman of an administrative council: the procedure being designed to bring about a reconciliation between husband and wife. In the case of an extra-judicial divorce obtained without any official intervention, the judge held that grounds for recognition under section 3 of the Act of 1971 did not apply, and that it was necessary to fall back upon the common law rules preserved by section 6 of the Act. He therefore granted the husband (a national of Pakistan) a declaration that the marriage had been dissolved in 1968 or, in the alternative (holding the *talaq* to be a "proceeding") that the *talaq* of 1974 (effected under the Pakistan Ordinance of 1961) had dissolved the marriage.

On appeal, the Court of Appeal[3] took the view that neither the *khula* nor the *talaq* had been the subject of "judicial proceedings" and that they could not be recognised under the Act of 1971. The court was no doubt influenced by that fact that the subject-matter of the proceedings was a house purchased in 1973 for £3000. Ormrod L.J. had a few tart observations on the nature of the case ("This litigation has been going on since December 1974, and has occupied no less than 14 working days in the court below and 7 days in this Court. It has involved five experts in foreign law, three in Thai law, and two in Pakistani law, and a number of English lawyers. It has led to the expenditure, mostly out of the legal aid fund, of very large sums of money and to a disproportionate amount of intellectual effort to resolve one practical question: is there jurisdiction in the English Court to dissolve this marriage… ?"). To the hazards of matrimony can now be added the delights of legal aid. The learned judge also had some nice comments on *R.* v. *Hammersmith Supt. Registrar*[4] and *Russ* v. *Russ*,[5] noting that "no useful purpose will now be served by picking over the bones of [these two cases] in the hope of finding some remnant of principle. In our judgment, we are free to return to the fundamental principle," stated in *Harvey* v. *Farnie*[6] and in *Le Mesurier's* case:[7] a principle summed up by the Court as "status depends primarily on the law of the domicile, and… subject to any statutory restrictions and to the limited discretion of the Court, that status should be recognised by the Courts of [England]." It seemed that the law of Thailand (the then domicile of choice) would only recognise the validity of the *khula* if it was recognised by the parties' national

[3] [1979] 3 W.L.R. 402.
[4] [1917] K.B. 634.
[5] [1963] P. 315.
[6] [1882] 8 App. Cas. 43.
[7] [1895] A.C. 517.

law — and on this, there was no evidence of recognition in Pakistan. Thai law was proved by production of a copy of an English translation of the Thai Act on Conflict of Laws BE 2481: an Act which seemed to the Court "quite clear and easy to understand, in contrast to the evidence of the experts," and one familiar to Singapore students of conflict of laws.

An appeal by the husband to the House of Lords[8] was successful, the House considering in particular the validity of the divorce by *talaq.* Lord Diplock observed that the argument (for the wife) that the words "or other proceedings" in section 2 of the Act were to be construed as "other quasi-judicial, or similar" proceedings was "based on a regrettably common misunderstanding" of the *ejusdem generis* rule. The divorce proceedings in Pakistan were conducted under a Pakistan Ordinance of 1961 which required pronouncement of the *talaq* to be notified to a public authority, who was required to set up an arbitration council for the purposes of conciliation, and to invite each spouse to send a representative. These were held to be "other proceedings" within section 2 of the Act, and the *talaq* was therefore recognised as valid: so putting an end to litigation whose expenses must have been ten, twenty or even thirty times the value of the subject-matter of the case. It is a rich state, that can acord to give legal aid on such a scale, on such an issue, to non-citizens.

III

Are there any lessons to be drawn from this case, lessons of relevance within Singapore? On what principles would a Singapore Court act, in similar circumstances? In this context, we can found our consideration upon two significant points —

a. Section 79 of the Women's Charter (derived from section 22 of the English Matrimonial Causes Act of 1875, which contained a reference to "the ecclesiastical Courts") requires a Singapore Court to "act and give relief on principles which in the opinion of the Court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings;"

b. Islam is recognized by the law of Singapore,[9] which provides that a *kathi* may only register a divorce where he is satisfied that both parties have consented to it; a *kathi* cannot register a divorce by three *talaq,* and where an application is made to register such a divorce, or where the *kathi* is not satisfied that both parties have consented to registration of a divorce, he must refer the matter to the Shariah Court.

The English courts apply the English Act of 1971 (as amended) which was designed to enable the United Kingdom to ratify the Hague Convention of 1970 on the recognition of divorces and legal separations: a convention giving shape to an international consensus of the law and practice relating to such recognition. Contemporary English law therefore seeks to effect a kind of marriage between the principles of English conflict of laws rules on the one hand, and international consensus on conflict of laws on the other: a marriage made the more restless by reason of the ease with which jurisdiction is assumed by

[8] *The Times,* Law Report 22 November 1979.
[9] Administration of Muslim Law Act (Cap. 42).

the English courts, and a similar ease (it seems) in obtaining legal aid. There is much to be said, it seems, for the narrower grounds of jurisdiction existing under the law of Singapore.[10] Dragged along by international practice, English law has extended the basis of recognition of divorces obtained outside the British Isles from domicile to nationality and habitual residence; the move towards a realistic "personal law", to be observed in *Indyka,* has been arrested by legislation interpreted in a vigorous fashion by judges still, in their heart of hearts, more at home with the concept of domicile than with any other.

Yet the reservations imposed by public policy and the requirements of natural justice paradoxically permit a greater freedom of recognition. Is it possible for the Singapore courts to adopt similar principles? Whether a Singapore court would act on the contemporary principles of habitual residence and nationality is a nice point. Section 3(4) of the Women's Charter creates a presumption that a person who is a citizen of Singapore is domiciled in Singapore, and to this extent equates domicile with nationality. "Habitual residence" is said to be tantamount to domicile, except that the element of *animus* necessary to constitute domicile is lacking:[11] but the distinction must be a fine one, at times.

Within the area of Islamic law, Singapore is moving towards controlling the man's right to have four wives. Under the Administration of Muslim Law Act, the interests of a wife are more tenderly regarded than they were — so pursuing a policy originating with the Prophet himself, whose early reforms improved the lot of women. Polygamy is indeed permitted, but subject to such rigorous control that there seem to be fewer cases of permission to marry a second wife being granted, every year. Also it is possible for a Muslim to marry a non-Muslim under the monogamous regime of the Women's Charter. In all these reforms, I detect a movement towards monogamy as a norm, indeed a rule for all. Our courts would be reluctant, I suggest, to deny recognition to, say, the Pakistani Ordinance, which appears to be pursuing a policy in accord with that of the lawmakers within Singapore.

The only recent, relevant case in Singapore is that of *Sivarajan* v. *Sivarajan*.[12] In a commentary prompted by that case, Kenneth Wee has written,[13] "the recognition of foreign divorces is an open question in Singapore. But in the last analysis our judges hold the key to the answer which may be orthodox or creative according to the dictates of the judicial conscience. Moreover, section 79 (of the Women's Charter) may be so interpreted as to import automatically a whole lot of English family law statutes...." Kenneth Wee favoured legislation as the best solution, and obviously, if we can have an Act on the lines of the English Act, as amended, most of our troubles in this area of law would be likely to fly away, or at least to hover at a reasonable remove.

[10] Supreme Court of Judicature Act ss. 16 and 17; Women's Charter, ss. 80 and 126.
[11] *Cruse* v. *Chittum* [1974] 2 All E.R. 940.
[12] [1972] 2 M.LJ. 231.
[13] "The Recognition of Foreign Divorce Decrees: Creativity and Orthodoxy" (1974) 16 Mal. L.R. 142 at 150.

In the meantime, I suggest that a Singapore court duly seised of a case in accordance with our local rules relating to jurisdiction can go some considerable way towards a general adoption of the English rules — apart from recognition of a *talaq* under the laws of such Islamic states as Pakistan. Setting aside section 79, an additional foundation of recognition can be seen in aspects of comity and reciprocity: and such foundations can, in this area of law, carry considerably more substance than in many others.

Kenneth Wee has suggested one reservation in relation to section 79. The section is limited to proceedings under Part IX of the Women's Charter, *i.e.*, divorce, nullity, judicial separation and restitution of conjugal rights, and he therefore suggests (since English statutes on family law are not imported into Singapore) that "section 79 should be interpreted to import only those English principles which are equally applicable in questions other than those arising under Part IX of the Charter." Yet section 79 is subject to the reservation that English principles are applied "as nearly as may be." It does seem possible to wear the cloak of English principles of recognition, suitably adopted, until such time as local legislation spells out the basic principles evolved by case law and international practice. Indeed, if I sought to define the general principles a Singapore court would now apply to recognition here, I would adopt a personal interpretation of English practice, as follows —

> A Singapore court will recognize a divorce obtained outside Singapore, whether by means of judicial or extra-judicial proceedings —
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> a. by a person domiciled in, or being a citizen of that country, in accordance with the law of that country, or
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> b. by persons domiciled in that country, or recognized as valid by the domicile or domiciles of such persons,
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> where due notice of the proceedings was served on the other party, and that other party was given an adequate and effective opportunity to present his or her case to the appropriate authority: subject always to the following reservations —
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> i. the overriding interests of Singapore public policy;
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> ii. there can be no recognition of a foreign decree if there was no subsisting marriage according to Singapore law;
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> iii. there can be no recognition of any such judicial or extra-judicial divorce where the husband was domiciled in Singapore at the time of the relevant proceedings.

Admittedly, this proposed rule has not been the subject of argument: but we can seek to justify it on the grounds of action permissible under section 79 of the Charter, which seeks to marry English practice to the Singapore statute law. In this situation, the statute must be dominant. The statute, and past practice, recognize domicile as the natural foundation for jurisdiction and recognition. The principle of reciprocity implicit in the English decisions has received a statutory recognition not inconsistent with our own law (which in section 126 has adopted the English statutory principle of 1949). "Natural justice" is certainly part of the law of Singapore, as is the concept of public policy; and *Sivarajan* justifies non-recognition of a divorce obtained outside Singapore by a husband domiciled in Singapore.

In the meantime — until, that is to say, we have worked out our own principles — perhaps *Quazi* v. *Quazi* can take us a little further on the road to certainty, and towards an end of the limping marriage.

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