Divorce

1. Divorce in the United Kingdom

1.1 A divorce obtained in a court of civil jurisdiction in any part of the United Kingdom, the Channel Islands or the Isle of Man may be accepted, provided that the final certificate (decree absolute) is seen. If the document has been lost the person concerned should be asked to apply for a copy to the local issuing court or the Divorce Registry, First Avenue House, 42-49 High Holborn, London, WC1V 6NP (Tel: 0171- 936 7016).

1.2 Any evidence on the file should be taken into account. If documents have been seen and noted in the past there is no need to ask to see them again.

1.3 Before granting a decree of divorce or judicial separation, a United Kingdom divorce court needs to be satisfied that the marriage it is being asked to dissolve is in fact valid and subsisting. It is not therefore necessary, when considering the validity of a current marriage, to see documentary evidence of a previous marriage where such a marriage has been terminated by a divorce (or decree of nullity in respect of a voidable marriage) granted in the United Kingdom.

1.4 An extra judicial divorce (i.e. one that is granted by a religious body and not by a court of law) such as a Muslim Talaq or Greek Orthodox divorce, which was granted in this country before 1 January 1974, is acceptable only if the parties concerned were, at the date when the proceedings were instituted, domiciled in a country in which such a divorce would be accepted (see DOMICILE).

1.5 Extra-judicial divorces, which have been granted since 1 January 1974 in this country, are not valid.

1.6 A foreign embassy or consulate cannot be regarded as a part of a country outside the British Isles for the purposes of s.45 of the Family Law Act 1986. A divorce obtained at a foreign embassy or consulate in England cannot therefore be regarded as valid in English law. The court case of Radwan -v- Radwan, in which a Talaq divorce was obtained at the United Arab Republic Consulate-General in this country, led to this decision. However, where the hearing has taken place in another country and the embassy has merely acted as a Registry Office in issuing the divorce document, the divorce may be regarded as valid.

1.7 Decree nisi and decree absolute

1.7.1 The decree nisi is the court's decision to grant a divorce provided that nothing comes to light which may alter the judgement. The certificate given as a result of this decision shows the period of time that is to be allowed for this purpose. If nothing comes to light, the decree absolute is issued at the end of the waiting period. The decree nisi is therefore a temporary document only and the decree absolute must always be seen.

2. Divorce overseas

2.1 The law before 1988

2.1.1 The courts ruled in the case of Indyka v Indyka (1966) that a foreign divorce could be recognised by the English courts if one of the parties had a real and substantial connection with the country in which the decree was granted. The Judge

held that when an alteration in English law widens the divorce jurisdiction of the English courts, the correspondingly widened recognition of decrees pronounced abroad applies only after, and not before, the change in English municipal law. Recognition of, in this case, a Czech divorce, pronounced in January 1949, had been sought on the basis that the Czech court's jurisdiction would have been recognised if the Law Reform (Miscellaneous Provisions) Act 1949 had governed the question of jurisdiction. But since that Act had not taken effect until December 1949, and had no retrospective effect, the Czech decree could not be recognised by English law.

2.1.2 It has not been necessary to quote this ruling since the Recognition of Divorces and Legal Separations Act 1971 came into force on 1 January 1972. The 1971 Act provided the first statutory criteria for the recognition of overseas divorces in United Kingdom law. An overseas divorce would be recognised as valid under the 1971 Act if:

- it was obtained by means of judicial or other proceedings in any country outside the United Kingdom; and
- it was valid in that country; and
- either spouse was habitually resident in, or was a national of, that country

2.1.3 The effect of the first of these requirements was that:

- there should have been some formal proceedings, either before a court or another formal body recognised by the state for that purpose (e.g. the Union Council, in Pakistan); and
- the judicial or other body should be impartial as to the outcome of the proceedings (i.e. a meeting of family members to dissolve a customary marriage or hear the pronouncement of a talaq did not satisfy this requirement)

2.1.4 The 1971 Act was amended on 1 January 1974 by the Domicile and Matrimonial Proceedings Act 1973 which provided for:

- recognition of other forms of overseas divorce (e.g. "bare" talaq in Kashmir), which would be recognised if both parties were domiciled in a country which permitted such a divorce; and
- non-recognition of a divorce obtained other than by means of a proceeding in a court of law if both parties had, throughout the year immediately before the institution of the proceedings, been habitually resident in the United Kingdom

2.2 The law since 1988

2.2.1 Part II of the Family Law Act 1986, which came into force on 4 April 1988, provides criteria for the recognition in the United Kingdom of foreign divorces. Under s.46(1) the validity of an overseas divorce obtained by means of proceedings shall be recognised if:

a. the divorce is effective under the law of the country in which it was obtained; and

b. at the date of the commencement of the proceedings either party to the marriage was:

i. habitually resident in the country in which the divorce was obtained; or

ii. domiciled in that country; or

iii. a national of that country.

2.2.2 Under s.46(2) the validity of an overseas divorce obtained otherwise than by means of proceedings (eg a bare Talaq divorce where the husband declares 3 times "I divorce thee") shall be recognised if:

a. the divorce is effective under the law of the country in which it was obtained; and

b. at the date on which it was obtained:

i. each party to the marriage was domiciled in that country; or

ii. either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce is recognised as valid; and

c. neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date; and

d. there is an official document certifying that the divorce is effective under the law of the country in which it is obtained (or where one of the parties was at the date of the divorce domiciled in another country, there shall be an official document certifying that the divorce is recognised as valid under the law of that country).

NB. A party to a marriage shall be treated as domiciled in a country if domiciled in that country either according to the law of that country in family matters or according to the law of the part of the United Kingdom in which the question of recognition arises.

2.2.3 Under s.49 of the 1986 Act, in relation to countries in which several different systems of law are in force (e.g. the USA), certain modifications are made to the conditions for recognition of foreign divorces under s.46:

- In the case of a divorce whose validity depends upon satisfying 2.2.1 b. i. Or ii. Or 2.2.2 b. above each territory or jurisdiction should be treated as if it were a separate country

- In the case of a divorce whose validity depends upon satisfying 2.2.1 b. iii. Above the divorce must be effective throughout the country in which it was obtained

2.2.4 Section 51 provides for the refusal of recognition where recognition would manifestly be contrary to public policy.

2.2.5 Section 52 applies the same criteria for recognition retrospectively to overseas divorces obtained before the date of commencement of Part II of the Family Law Act 1986 but does not affect the validity of any divorce obtained before its coming into force on 4 April 1988 and recognised as valid "by any competent court in the British Islands" under rules of law formerly applicable.

2.3 The fact that a person who has obtained a divorce overseas is later married in this country should not be taken as proof that the divorce is valid. When foreign divorce documents are produced to the Superintendent Registrar before a marriage

licence or certificate is issued, their validity in English law is assumed unless they appear at first sight to be irregular (e.g. clearly invalid in the country of issue or granted only for religious purposes).

2.4 The General Register Office do not feel able to extend their enquiries, since the onus lies on the parties concerned to show that they have the personal capacity to contract the proposed marriage. They are warned that they may have to satisfy another authority of the validity of a previous divorce if at any time it becomes necessary to confirm the validity of the marriage.

2.5 Some guidance on divorce in accordance with other laws and religions is given below. Any difficult foreign divorce cases may be referred to INPD (EOP2) for information or advice.

2.6 Talaq divorce

2.6.1 In traditional Islamic law a bare talaq divorce is the pronouncement by the husband taking the form of a triple declaration: "I divorce thee". This has the effect of dissolving the marriage instantly. However, the Muslim Family Laws Ordinance 1961 (MFLO) lays down formal requirements for the recognition of divorces in all parts of Bangladesh and Pakistan except Azad Kashmir. Under the MFLO, when a man pronounces talaq in any form, he must give the Chairman of the Union Council of the ward notice in writing of the pronouncement and he must also give a copy of the notice to his wife. After this, a period of 90 days (or the end of her pregnancy if his wife is then pregnant) must elapse before the divorce becomes effective. There is a process for reconciliation between the parties which may be attempted during this period.

2.6.2 The MFLO has not been formally extended to Azad Kashmir, and the only form of divorce that may be recognised in Azad Kashmir is the traditional bare form.

2.6.3 A talaq divorce performed in accordance with the requirements of s.7 of the MFLO is capable of recognition under s.46(1) of the 1986 Act (Quazi -v- Quazi [1979] 3 All ER 897, HL). A bare talaq, which has been held by the Court of Appeal in Chaudhary v Chaudhary [1985] Fam 19 not to constitute judicial or other proceedings, is capable of recognition under s.46(2) of the 1986 Act.

2.6.4 The scope for recognition of the 2 types of divorce is thus as follows:

Recognition of full Talaqs performed overseas

i. A full talaq under the MFLO performed wholly in Pakistan (excluding Azad Kashmir or Bangladesh) will be recognised if either spouse was:

- habitually resident, or domiciled in that country, or
- a national of that country

Recognition of bare talaqs pronounced overseas

ii. A bare talaq pronounced in Azad Kashmir will only be recognised if:

- both spouses were still domiciled in Azad Kashmir at the time of pronouncement (or one was, and the other spouse was domiciled in another foreign country that recognised bare talaq divorce), and

- neither spouse had been habitually resident in the United Kingdom throughout the year immediately preceding the pronouncement of divorce, and
- there is:

    i. an official document certifying that the divorce is effective under the law of the country in which it is obtained, or

    ii. (where one of the parties was at the date of the divorce domiciled in another country) an official document certifying that the divorce is recognised as valid under the law of that country

2.6.5 Where the couple are from Azad Kashmir and the husband has become domiciled in this country while his wife is still domiciled in Azad Kashmir, the only way he can effect a divorce that would be recognised under United Kingdom law is through the courts in this country. It should be noted that, before 1 January 1974, the wife was regarded as being domiciled where her husband was domiciled (see DOMICILE).

2.6.6 For guidance on the validity of talaq divorces obtained in the UK, see paragraphs 1.4-1.6 above.

Trans-national (Talaq) divorce

2.6.7 There are instances purporting to be full Talaq divorces where the proceedings are started in this country with the man pronouncing Talaq 3 times here, but then completed overseas (e.g. in Pakistan) by the man writing to notify the Union Council Chairman and his wife there. It was held by the House of Lords in Re Fatima [1986] 2 All ER 32 that such trans-national divorces were not capable of recognition under the Recognition of Divorces and Legal Separations Act 1971 and they would not be recognised under the Family Law Act 1986. To be capable of recognition under ss.45 and 46 of the 1986 Act an overseas divorce must be instituted and obtained in the same country outside the British Isles. This view was reinforced in the case of Berkovits v Grindberg [1995] 1 FLR 477 which involved a Jewish "Get" divorce where the proceedings took place partly in the UK (where the Get was written) and partly in Israel (where the Get was pronounced).

3. Divorces in accordance with different laws

3.1 Brazilian divorce

3.1.1 Before 1977, Brazilians who married in Brazil could not obtain a divorce. The nearest thing was a provision for legal separation known as a "desquite", which cannot be accepted as evidence of the termination of a marriage. It was common practice for a couple, one or both of whom had obtained a desquite, to go to Bolivia to marry because Bolivia was prepared to accept a desquite as a divorce, but the marriage would not be valid in Brazil.

3.1.2 Since 1977, it has been possible to convert a desquite into a divorce, which will only be given after 3 years' legal separation.

3.1.3 Any case involving a desquite or a desquite converted into a divorce should be referred to INPD(L).

3.2 Cypriot divorce

3.2.1 Under the law of Cyprus, a marriage between 2 members of the Greek Orthodox Church, which is solemnised in accordance with the rites of that church, can only be dissolved by a competent tribunal of the Greek Orthodox Church, no matter where it is. Even so, such a divorce can only be recognised if the conditions at 2.2.1 a. and b. are met.

3.3 Ghanaian divorce

3.3.1 The Customary Marriage and Divorce (Registration) Law 1985 provided for the proper registration of divorces in Ghana, and was retroactive. All Ghanaians, whether living in or outside of Ghana, can now obtain certificates of divorce and they should be requested from applicants whenever marital status is important.

3.3.2 However, under the Customary Marriage and Divorce (Registration)(Amendment) Law 1991, registration is no longer mandatory. Where the relevant certificates are not available, we should expect to receive a statutory declaration by the heads of the families concerned (or two people representing the legal interests of the parties) confirming the date, place and type (e.g. tribal custom) of the marriage and/or divorce.

3.4 Philippines divorce

3.4.1 Divorce is not generally permitted in Philippines law. With the one exception in 3.4.2 below, the only circumstances where a divorce, where one of the parties is a Filipino citizen, will be recognised is where:

- the other spouse is a foreigner; and
- the couple are validly married; and
- a valid divorce was obtained abroad by the foreign spouse

3.4.2 Separate arrangements are made for Muslims living the Philippines. The Code of Muslim Personal Laws 1977 provides that where both parties to a marriage are Muslims, a divorce can be obtained at the Sheria court.

3.4.3 In all other cases, a marriage can otherwise only be terminated if the marriage is declared void or is annulled (in either case a court order must be obtained), or if one of the parties dies.

3.5 Turkish divorce

3.5.1 Divorces in Turkey are governed by the Turkish Civil Code 1926. Divorces can only be obtained from a court, and no other form of divorce can be recognised as valid in Turkish law. In pronouncing the divorce, a judge may decree that the respondent cannot remarry for a period of 1-2 years. The divorcee may be prohibited from remarrying for up to 300 days (the same may also apply to a widow or a woman whose marriage has been annulled).

3.6 USA Divorce

3.6.1 Divorce is governed by State rather than by Federal law, and the provisions of s.49 of the Family Law Act 1986 therefore apply. See paragraph 2.2.3 above.

3.7 Zimbabwe divorce

3.7.1 The Southern Rhodesia (Marriages, Matrimonial Causes and Adoptions) Order 1972, which came into force on 12 December 1972, and was retroactive to the illegal declaration of independence (idi), provided that marriages, divorces and annulments performed or granted in Southern Rhodesia since idi should not be regarded as invalid merely because the officials or authorities concerned were appointed by, or were acting for, the illegal regime.

3.7.2 The Southern Rhodesia (Matrimonial Jurisdiction) Order 1970, which came into force on 16 November 1970, gave limited relief to people who had not been able to obtain a divorce in Southern Rhodesia that was valid in United Kingdom law. Its general effect was to give the same jurisdiction to the courts of each part of the United Kingdom to entertain proceedings for divorce or nullity of marriage of a person domiciled or resident in Southern Rhodesia as if that person had been domiciled or resident in that part of this country, whether England and Wales, or Scotland, or Northern Ireland.

3.7.3 The Order required that a person should have completed 6 months' residence in the part of the United Kingdom concerned before proceedings could be instituted here. If the person was resident in Southern Rhodesia on or after 11 November 1965, and then lived in some other country before becoming resident in the United Kingdom, the residence in the other country would be disregarded in calculating any period of residence required under United Kingdom law. This took into account the fact that some of the people who left Southern Rhodesia after idi might well have spent some time in other countries before deciding to come here. Both these Orders were repealed by Schedule 3 to the Zimbabwe Act 1979.