

SCOTLAND / JUDGMENT

AF AGAINST AF [2017]

ScotSC 39 (06 July 2017)

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[2017] ScotSC 39, 2019 GWD 13-201 [New search] [Help] SHERIFFDOM OF GLASGOW AND
STRATHKELVIN AT GLASGOW

[2017] SC GLA 39 F396/14 JUDGMENT OF SHERIFF ALAN D MILLER In the cause AF Pursuer
Against AF Defender Glasgow, 27 March 2017

Introduction

[1] The purpose of the preliminary proof which I heard on 20 and 22 March 2017 was to determine whether the court recognises that the parties to this action of divorce are in fact already divorced. The defender (the wife of the pursuer) asserts the validity of a decree of divorce issued pursuant to the judgment of the High Court in Islamabad, Pakistan, dated 25 June 2013. The pursuer does not dispute that the defender obtained decree of divorce, but asks the court to refuse to recognise it in terms of section 51 of the Family Law Act 1986, on the grounds of lack of opportunity to participate in the proceedings.

Legal Framework

- [2] Part II of the 1986 Act makes provision for the recognition in the United Kingdom of divorces and other matrimonial decrees granted elsewhere. Section 46(1) says “The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognised if—
- (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and

- (b) at the relevant date either party to the marriage—
- (i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or (ii) was domiciled in that country; or (iii) was a national of that country.”
- [3] That is not the end of the matter, however, because section 51(3) states that recognition of validity may be refused if the divorce or other decree was obtained “(i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or (ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given.”
- [4] There are other provisions in UK law for recognition of foreign divorces etc. These are contained in the European Council Regulation no. 2201/2003 of 27 November 2003. Although of course the Regulation applies only to mutual recognition of judgments within the EU area, there is clear utility in having regard to case law on the Council Regulation when considering recognition under the 1986 Act. I am indebted to Mr Justice Mostyn for his discussion in the case of *X v Y*
- [2015] EWHC 1462 (Fam) , and adopt his helpful analysis in terms of which there are 2 points that a party who opposes recognition must prove, and a further point that he or she must be able to counter if raised. Paraphrasing somewhat, these are:
1. That the decree was obtained in default of any appearance in the proceedings by the opposing party;
 2. That the opposing party did not receive intimation at such a time and in such a way as to enable him or her to defend the action. Exceptionally, this can be argued even where service has been effected in a way that is formally valid within the requirements of the relevant jurisdiction, but in a way that, when assessed against UK requirements for service, has not actually enabled the opposing party to arrange to defend the action;
 3. Finally, irrespective of these matters the judgment may yet be recognised if it is determined that the opposing party has in fact accepted it unequivocally. Accordingly, if put in issue by the party supporting recognition, the opposing party must be prepared to persuade the court otherwise. But mere failure to commence proceedings to challenge the judgment, for instance, would not suffice to demonstrate unequivocal acceptance. Factual Background
- [5] I will turn shortly to the credibility and reliability of the evidence given in this proof by the parties and by their son OM. I do, however, accept without question the uncontradicted oral evidence given by Mr Abid Hussain Mirza, advocate, Islamabad as to the procedural history of the defender’s divorce case in Pakistan and the requirements of the law in Pakistan. (But I do not accept his assertion that once intimation was put in the newspaper, the pursuer’s relatives would certainly have read it.) In addition, certain important facts are within the knowledge of the court because they relate to the history of this case and related

proceedings, and some matters were not disputed by parties.

[6] Accordingly, before I turn to the remainder of the oral evidence I find in fact that:

1. The parties were married in Pakistan on 28 April 1984. The defender's birth name was RS.
2. When the defender came to the UK in 2001, she changed her name to AF.
3. The pursuer seeks asylum in the United Kingdom. He has been in the UK since at least 2007. His claim remains outstanding. He has had no current passport since his Pakistani passport expired in 2008. The defender is aware of his situation.
4. In February 2013, the defender raised an action in this court against the pursuer, in which she sought interdict with a power of arrest and an exclusion order on account of her husband's behaviour. Interim orders were granted and further procedure took place until 18 September 2015 when the court continued consideration sine die of the pursuer's motion to dismiss the action, pending the outcome of the preliminary proof then assigned in this action.
5. The pursuer moved out of the family home once interim orders were granted.
6. At around the beginning of February 2013, the defender approached the Islamic Shari'a Council for Great Britain to seek khula. The Council wrote to the pursuer at his up-to-date address, which the defender knew and had supplied. On 26 May 2013, the pursuer replied to a second letter from the Council; in his letter he stated "I do not have any wife named by [sic] AF".
7. In February 2013, the defender travelled to Pakistan, where she raised divorce proceedings in Islamabad on the basis of khula. Service was made on the pursuer in accordance with the requirements of the Civil Code of Pakistan, in that papers were posted to the address noted on the parties' marriage certificate of 1984 as being the address of the pursuer's family. In the absence of any response, papers were posted to the same address on a further 2 occasions. As there was still no response, intimation was made by a notice in a daily newspaper, to which again there was no response.
8. There was no means available to check whether or not postal service had in fact been effected on any member of the pursuer's family.
9. In an affidavit sworn on 22 February 2013 for the purpose of her interdict action, the defender stated "On or around 10 th February 2013 I required to travel to Pakistan as my father had become seriously ill." The affidavit went on to state she had returned to Scotland on 20 February 2013. The affidavit made no reference to divorce proceedings.
10. The pursuer would not have been able to travel to Islamabad in person but, if aware of the proceedings, could have instructed an advocate from the UK or could have granted a power of attorney to ensure he was represented.

11. On 25 June 2013, in the Family Court of Islamabad, Judge Rabia Malik issued an ex-parte judgment granting the defender decree of divorce.
12. Thereafter, in accordance with normal legal requirements, the court judgment was passed to the Arbitration Council. After the expiry of a period of 90 days, the defender received a certificate of divorce.
13. In March 2014, the pursuer raised the present action, seeking divorce on the grounds of the defender's unreasonable behaviour together with financial orders. Article 2 of the initial writ included the following standard averment: "The pursuer is not aware of any other proceedings continuing in Scotland or elsewhere in relation to the marriage or having any effect on the validity thereof".
14. In May 2014 the defender's then solicitors lodged defences on her behalf. Answer 2 of the defences simply stated "Admitted". Elsewhere in the defences, the defender disputed that the parties had ever married.
15. The pursuer's solicitor instructed an expert in Pakistani law to report on the validity of the parties' marriage. The report by Mr Nasim Sabir Chaudahry was dated 12 September 2014 and was lodged as production 5/9 on 21 August 2015. The report includes reference to the defender's divorce case and noted that the defender had "verified all contents of plait with her signature", and had personally appeared before the family judge on 18 June 2013.
16. After sundry procedure in this action, an options hearing took place on 23 June 2015. In the record lodged at the bar of the court, the defender's position remained as above. Shortly thereafter the court assigned a preliminary proof on the question of whether the parties were married. Thereafter the defender's agents withdrew from acting.
17. The defender appeared in person at a peremptory diet on 3 November 2015. As recorded in the interlocutor of that date, she stated to the court that the parties were married but had been granted a divorce in the High Court in Pakistan in 2013. This was the first occasion on which she had brought the existence of such a decree of divorce to this court's notice. The sheriff directed the defender to produce documentary evidence of the divorce. On 9 November 2015, she lodged a copy of the judgment of Judge Malik.
18. On 16 November 2015, and again on 19 January 2016, the court allowed the defender time to lodge a minute of amendment. In fact, it was the pursuer who lodged a minute of amendment, on 21 March 2016, which introduced a crave for non-recognition of the divorce decree obtained by the defender, together with associated averments and pleas in law. The defender did not lodge answers and the record was closed of new on 24 May 2016.
19. In December 2015, the defender approached the Registrar's office in Bearsden to ask whether her divorce certificate could be accepted as valid. Following further correspondence, on 9 June 2016 the head of registration process branch at the National Records of Scotland wrote to the defender, in reply to her letter of 6 June 2016, and stated that provided the registrar saw original or certified copies of documents, on the basis of the

divorce document and other information supplied he was happy that her divorce met the requirements of the Family Law Act 1986. The correspondence lodged as productions 6/4/2 and 6/4/3 contains no reference to the pursuer's challenge to the validity of the divorce decree.

20. The defender lodged a minute of amendment on 21 June 2016. This minute introduced into her pleadings, for the first time, averments regarding the divorce in Islamabad, and a plea of *res judicata*. Evidence
- [7] As previously ordered by the court, the defender led at proof. She gave evidence and also called the parties' adult son OM. The pursuer gave evidence on his own behalf. The fundamental issue in dispute was whether the pursuer had had any knowledge of the defender's divorce action. There were 4 strands to this issue: - What discussions, if any, had the parties had before February 2013 on the subject of divorce? - Did the pursuer receive notice of the defender's divorce proceedings? - Did the pursuer say anything after February 2013 that indicated knowledge of the divorce proceedings? - What was the extent of his knowledge?
- [8] In assessing the evidence, I have to express significant reservations as to the credibility and reliability of both the defender and the pursuer.
- [9] The defender gave a confused account of the timeline, repeatedly saying that she only raised proceedings in Pakistan after the pursuer rebuffed her attempt to obtain *khula* from the Shari'a Council, or alternately after the Council's first letter went unanswered. The best explanation she could give for doing so was that it was important to her to have a religious divorce. She did not explain why she had not engaged in further communication with the Shari'a Council. She evaded the question of whether all reasonable steps had been taken to inform the pursuer of her divorce case. She said the pursuer had phoned her and her family every day and night with threats of violence, although the police records lodged at 6/4/5 reveal only 2 reported incidents during the period of February to June 2013. No other records were produced despite her claim that "everything was recorded". It seems she did not take the opportunity of these supposedly daily calls even to mention to the pursuer that she had raised divorce proceedings.
- [10] My reservations about OM's evidence are slight when compared to those concerning his parents' evidence. He had clearly been much affected by the difficulties in his parents' relationship, but very fairly accepted that his mother had not wanted to burden him with the whole drama. He did speak clearly and credibly, as the defender had, to the pursuer repeatedly saying to her "I married you in Pakistan, you'll have to get a divorce there", but that was while the parties were still living together. He also described phone calls from his father at times during 2013, mostly late at night when his father was drunk, during which the pursuer would say, for instance, that he knew the law of Pakistan like the back of his hand, that he would see the defender there, and that he would take everything from her. What was not at all clear from his evidence, however, was whether any of these calls were

made between February to June 2013, and whether the pursuer's comments demonstrated actual knowledge of divorce proceedings rather than drunken bragging.

- [11] The pursuer was emphatic that he first heard of his wife's divorce when someone at his solicitor's office told him what the expert report said, and that he had never received notice of the action. That is consistent with his actings in entering no appearance in the defender's action but subsequently raising a divorce action with several financial claims in this court. Beyond that, though, even allowing for the fact that his evidence was given through the assistance of an interpreter, a number of his answers were distinctly unsatisfactory. In contradiction of his pleadings, he claimed he had arrived in the UK before the defender, in 1999, and that it was a lie to say parties had ever been separated before 2013. He said the question of divorce had never been raised before he brought this action in 2014, and dismissed the defender's approach to the Shari'a Council: "My wife was called RS, so how could I divorce a person named AF?". Irrespective of the police information, he denied making any contact with the defender or OM after February 2013.
- [12] It is also relevant to assessment of the pursuer's credibility to note the following assertions which appear somewhat inconsistent with his case on record for financial orders: - "I have a property in Glasgow, a business also, 2 lands, 3 cars and I had invested money in my son's business" - "I've got businesses in Pakistan and here also" - "I've got shops, property, a plaza, I get rent from it" (in reply to a question about his ongoing business interests in Pakistan).
- [13] Finally, I should add that any evidence about the address of the pursuer's family was very tentative. The pursuer stated, uncontradicted, that his mother was still alive but had moved some time ago. The defender produced no further evidence indicative of the pursuer having received intimation of her divorce action.
- [14] In assessing the oral evidence, I must also take into account the findings set out earlier. Perhaps the central point to note is that the defender made no mention whatever of her 2013 divorce action in proceedings in this court between the parties until November 2015. Nor did the pursuer, but for his part that is clearly consistent with being unaware of the action, at least until his solicitor received the expert report. The defender's position can only be described as a wilful and sustained attempt to mislead this court. Considering that and the whole of the oral evidence, I add the following findings in fact to those set out above:
21. While the parties were residing together before February 2013, the pursuer repeatedly taunted the defender that she would have to go to Pakistan if she wanted a divorce.
 22. The pursuer did not receive notice of the defender's divorce action at any point during February to June 2013.
 23. The pursuer was aware of the defender's request to the Shari'a Council for khula but chose to obstruct it.
 24. On occasions during 2013, the pursuer spoke with the defender or with OM.

25. During these conversations, he spoke in general terms about divorce, and bragged about his knowledge of Pakistani law in an attempt to intimidate the defender.

26. The pursuer had no knowledge of the defender's action for divorce in Islamabad until his solicitor made him aware of the terms of the expert report dated 12 September 2014.

Application of the Legal Tests

[15] The submission which the defender's solicitor made, that this is not a situation where her client had deliberately concealed her divorce action, is unfortunately fatally undermined by her client's behaviour in both this action and her own previous action raised in this court. I accept that the pursuer's response to the Shari'a Council was obtuse and, probably, deliberately unhelpful. I accept that it was important for the defender to obtain a religious divorce. But she gave no explanation for raising proceedings in Islamabad at the same time as approaching the Shari'a Council. Thereafter, it was simply not good enough to allow service to be made locally on an address recorded in the marriage certificate of 1984, or via a local newspaper, when she knew well where he was living in the UK, and on her own account (which I do not accept) was receiving daily phone calls from him. Further, in these proceedings she instructed her current solicitor (who, I should add, is entirely blameless) to make an averment that was wholly false, and waited 18 months to correct her falsehood.

[16] In that context, there is no answer to the submission by the pursuer's solicitor that the tests for refusal of recognition are met. On the first test, it is unarguable that the decree was obtained in default of any appearance by the pursuer. On the second test, although the legal requirements for service in Pakistan were met, in fact the pursuer received no intimation of the proceedings, and in fact only became aware of them more than 1 year after the date of the court's judgment. Yet throughout the period when the action was live in Islamabad, the defender was aware of the pursuer's whereabouts, and was involved in litigation with him in this court. Both parties were legally represented, so that it would have been very straightforward for the defender, for instance, to make her solicitor aware of the proceedings she had raised in Islamabad and to instruct her solicitor to communicate their existence to the pursuer's solicitor.

[17] On the evidence, there appears to be a highly significant difference between the requirements for effective intimation of court proceedings applicable to the defender's action in Pakistan and those applicable to consistorial actions in Scotland. The normal methods of service in Scotland require not simply that the party wishing to serve documents sends them to the other party, but also that some proof of receipt by the other party is obtained and produced to the court. Whether that proof comprises a recorded delivery slip, a sheriff officer's report, or an endorsement of acceptance of service by the other party's solicitor, the effect is the same. The court will only permit service without proof of such receipt – such as by advertisement or by service on the walls of court – when the party wishing to serve can demonstrate to the court that the other party's whereabouts are unknown and that all reasonable steps have been taken to trace them, but without result.

- [18] The lack of evidence of actual service becomes all the more important given that the pursuer was, as the defender knew, in the United Kingdom and unable to travel to Pakistan. It becomes more significant still when I take into account the ease with which the defender could, by other means, have ensured that the divorce proceedings were brought to the pursuer's attention in time to allow him to arrange to defend them. For these reasons, although service was effected in a manner that was formally valid in terms of the law of Pakistan, I hold exceptionally that the defender failed to intimate the proceedings efficaciously upon the pursuer.
- [19] As regards the third test, the defender's solicitor did argue (somewhat faintly) that the pursuer could be said to have accepted the judgment of the court in Islamabad in that he had taken no steps to appeal it or to seek to have it reduced. But that cannot stand in the face of the fact that he had raised this action of divorce several months before he became aware of the divorce decree from Islamabad, and that he amended to crave its non-recognition before the pursuer had even formally introduced it into her pleadings.
- [20] I should say here that I note the terms of the correspondence between the defender and the registrar service. I do not of course know what enquiries the staff of National Records of Scotland undertook. But in particular in the letter of 9 June 2016, I see nothing to indicate awareness that the validity of the defender's divorce was by then subject to legal challenge in this action. The obvious inference is that the defender did not disclose the position fully. It may well be that a rather different answer would have been forthcoming if she had done so.

Conclusion

- [21] For these reasons I have no doubt that the judgment granted in Islamabad in June 2013 was obtained without such steps having been taken for giving notice of the proceedings to the pursuer as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken. Accordingly, in terms of section 51(3) of the 1986 Act I refuse to recognise the decree of divorce granted in Islamabad as valid.
- [22] Parties will no doubt wish to address the question of expenses in relation to the preliminary proof. In addition, it will now be necessary to determine further procedure, and parties may well wish to adjust further. I will therefore assign a hearing after service to determine these matters. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
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