Appeal No: TH / 05142 / 2000

[2002] UKIAT 04229

STARRED

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 29th May 2002
Date Determination notified:
...13th September 2002.....

Before:

Mr C M G Ockelton (Deputy President)
Dr H H Storey
Mr D J Parkes

Between:

MIRZA WAHEED BAIG
APPELLANT

and

Entry Clearance Officer, Islamabad
RESPONDENT

DETERMINATION AND REASONS

Introduction

1. In this starred determination, we give the views of the Tribunal on the effect, in English law, of a Pakistani Muslim divorce in which there has been no notification to the Chairman of the Union Council. This is not only a difficult issue: it is a current one, because of the perceived trend towards Islamicisation of the law in certain Muslim countries, including Pakistan, which has led courts and commentators in those countries to prefer to move away from a secular gloss on the rules of Islamic law. To our personal knowledge, the present case is one of a number raising similar issues.

2. The Appellant, a citizen of Pakistan, appeals, with leave, against the determination of an Adjudicator, Mr T R Jones, dismissing his appeal

against the decision of the Respondent on 17th July 2000 refusing him entry clearance to the United Kingdom with a view to settlement as the husband of Nigat Parveen Batti, the Sponsor. Before us he is represented by Miss Weston, instructed by Thornhill Ince, and the Respondent is represented by Mr Sheik.

3. Leave to appeal was granted as long ago as July 2001. The hearing of the appeal was unfortunately initially delayed by difficulties relating to the Tribunal's move to new premises in October 2001. It was considered necessary to have this appeal heard by a Tribunal with particular experience. On 30th November 2001, the parties were given notice that this appeal would be heard on Thursday 7th March 2002. On the latter date, the Tribunal convened and it rapidly became apparent that, unfortunately, the parties were not yet in a position to deal with the difficulties of this appeal and, in particular, were not yet aware of the leading English judgments on the subject. The appeal was accordingly adjourned then, and re-listed to be heard on 29th May 2002. We now have the benefit of a brief skeleton argument on behalf of the Appellant, but unfortunately it does not deal with the decision of the House of Lords in Quazi v Quazi [1980] AC 744, nor does it contain any argument on the detailed provisions of the Islamic law, on which, perhaps understandably, it simply refers generally to the expert evidence. We heard the appeal on 29th May. We reserved our determination, but we are certain that the representatives of both parties were clearly aware both that we had in mind materials of which they were not yet entirely familiar, and also that we proposed to dismiss this appeal for reasons which, essentially, were put to Miss Weston in the course of the hearing. We have deferred writing this determination in case, in that context, either party wished to make further submissions to us or to ask for the hearing to be resumed. There have been no such submissions.

The Facts

4. The Appellant claims that he is entitled to entry clearance because he is the husband of the sponsor. The relevant immigration rules are those in paragraph 281 of HC 395: we are concerned with nothing other than the validity of the marriage. The Appellant has not previously married anybody other than the sponsor. The sponsor, however, is a party to an earlier marriage. On 14th December 1992, she married Arshad Mahmood in Pakistan. There appears to have been no rukhsati. The sponsor returned to England after the marriage and continued her education. Ashad Mahmood instituted divorce proceedings, which we shall have to consider in some detail.

5. The Appellant, Mirza Baig, came to the United Kingdom as a student. As he told the Entry Clearance Officer at his interview in connection with the present application, although he used his student entry clearance, he

"*didn't study at all*". He did, however, meet the sponsor, in December 1998. They went through ceremonies of marriage in August 1999. There was an Islamic ceremony on 8th August, evidenced by a Nikah Nama of that date, in the usual form, save that it is in English. It describes the bride as a divorced teacher, and the "*bridge groom*" as a bachelor student. There was also a Registry Office marriage. The Entry Clearance Officer was unaware of this because, in his interview (Q9), the Appellant denied having undergone a civil marriage ceremony. We have not seen an original certificate, but a photocopy is in the papers before us. It records a marriage on 25th August 1999 at Manchester Register Office between the Appellant and the sponsor. The details are the same as those on the Nikah Nama, except that on this occasion the sponsor is described as a spinster.

6. The Appellant returned to Pakistan immediately after that ceremony, arriving on 27th August. He then applied for entry clearance as a husband. The application was refused for two reasons set out in the explanatory statement. The first was based on the lack of a civil marriage ceremony. The Entry Clearance Officer can hardly be blamed for basing his reasoning on this matter on the Appellant's clear denial that there had been a civil marriage. It is now, however, clear that there had been such a ceremony. The second reason for the refusal was that the sponsor was not divorced from her first husband and was therefore incapable of marrying the Appellant.

7. Following the Adjudicator's decision, the sponsor commenced divorce proceedings in England in an attempt to settle her marital status for the future. A letter from Platt Halpern, her solicitors for those purposes, is before us. It states that "*On 7th November 2001 we heard from the Court stating that the District Judge was satisfied that the Talaq divorce would be recognised in this country*". We also have the letter from the Court. No reasons are given. In view of the remaining contents of this determination, we are surprised that the District Judge was so readily able to reach the conclusion attributed to him.

8. We will deal at this stage also with an argument put as an alternative by Miss Weston. This is that, whatever be our view of the divorce, the Appellant and the sponsor are validly married according to the law of Pakistan, and that we should accordingly regard them as husband and wife for the purposes of English immigration law. We are quite unable to accept that argument. The marriage upon which the parties rely took place in England. If, at the time it was celebrated, the sponsor was not divorced from her husband by a divorce recognised by English law, her marriage was, by English law actually (as distinct from merely potentially) polyandrous. The marriage must be void for polygamy unless the divorce is recognised. Given, further, that the sponsor is a Muslim domiciled (as

far as we are aware) in England, it is difficult to see that she could ever have capacity to contract a polyandrous marriage.

9. It follows that it is indeed the divorce that concerns us. We begin by setting out the basis of the law in the three relevant jurisdictions.

Islamic Law

10. The basic incidents of the principal forms of Muslim divorce (*talaq*) are not properly open to dispute. We take judicial notice of them, and we note that neither party objected to our doing so. All of them are based on formal pronouncements by the husband. In *talaq al-hasan*, the most approved form of divorce, there is a single pronouncement of divorce, followed by a three-month abstention from intercourse, the *'idda*. During the *'idda* the divorce can be revoked by the husband by words or by conduct (eg co-habitation) but, otherwise, the divorce takes effect at the end of the *'idda*. *Talaq al-hasan*, or proper divorce, follows a more complex procedure. Here the divorce is pronounced three times, in three of the wife's successive monthly cycles. There may be co-habitation between the pronouncements, provided that, at the time of each pronouncement, there has been no intercourse during the period of purity in that cycle. The divorce becomes effective on the third pronouncement, but a period of *'idda* is still necessary before the wife can remarry, so that the paternity of any subsequently-born child will not be in doubt.

11. These two forms are regarded by most Islamic jurists as a *talaq as-sunnat*, that is to say divorce in accordance with the rules of tradition: only a minority of jurists regard *talaq al-hasan* as "innovative". The *talaq al-hasan* is traced to a view of the Prophet that wives should not be treated as chattels, subject to constant divorce and re-acceptance; so a husband who divorces his wife three times loses her.

12. Hardly any jurists, however, doubt that the third form of divorce, the so called triple *talaq*, is *talaq al-bid'at* or innovative divorce. In this form, the husband pronounces *talaq* three times on the same occasion, or at least during the same month. This form is the most prevalent in India and Pakistan. It is regarded as lawful, though sinful, by the Hanafis, but some other schools do not recognise it as effective at all. Where it is effective, it is (because of its triple nature, based on the *talaq al-hasan*) effective immediately, but again the wife cannot remarry until the end of the *'idda*.

The Law of Pakistan

13. In the previous paragraphs we have set out the major forms of divorce in Islamic law and their effect in Islamic law. Pakistan, like a number of other states with substantial Muslim populations, introduced during the second

half of the twentieth century legislation which had the intention or social purpose of ameliorating some of the provisions of Islamic law as it applied to its citizens (see, generally, Norman Anderson, *Law Reform in the Muslim World*, London 1976). Pakistan enacted the Muslim Family Laws Ordinance in 1961. By Section 2, the Ordinance extends to "the whole of Pakistan and applies to all Muslim citizens of Pakistan, wherever they may be". That expression of validity needs to be read subject to two considerations. The first is that, because of its date, the Ordinance applies also in Bangladesh. The second is that it appears to be generally accepted that the provisions of the Ordinance have no effect in the part of Kashmir which is in Pakistan (sometimes called "*Azad Kashmir*", that is "Free Kashmir", by those who hold certain views about its proper governance). Neither of those factors, however, are germane to this appeal, for the Appellant is a citizen of Pakistan, and not from Kashmir.

14. Section 7 of the Ordinance is as follows:

> "*Talaq*.
>
> (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.
>
> (2) Whoever contravenes the provisions of sub-section(1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.
>
> (3) Save as provided in sub-section (5), a *talaq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.
>
> (4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.
>
> (5) If the wife be pregnant at the time *talaq* is pronounced, *talaq* shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.
>
> (6) Nothing shall debar a wife whose marriage has been terminated by *talaq* effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

15. It can readily be seen that, as well as imposing requirements as to notice, the Ordinance attempts to make even an irrevocable *talaq al-bid'at* revocable by, essentially, taking the period of *'idda* into the *talaq*. As well as the reference to "*talaq* in any form whatsoever" in s 7(1), it is to be noted that s 3 of the Ordinance provides that the provisions of the Ordinance have effect "notwithstanding any law, custom or usage".

<u>English Law</u>

16. The recognition of foreign divorces is governed in English law by s 46 of the Family Law Act 1986, which came into force on 4th April 1988. Sections 45 and 46 are as follows:

> "45. Subject to sections 51 and 52 of this Act, the validity of a divorce, annulment or legal separation obtained in a country outside the British Islands (in this Part referred to as an overseas divorce, annulment or legal separation) shall be recognised in the United Kingdom if, and only if, it is entitled to recognition
>
> (a) by virtue of sections 46 to 49 of this Act, or
>
> (b) by virtue of any enactment other than this Part.
>
> 46. (1) 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.
>
> (2) The validity of an overseas divorce, annulment or legal separation obtained otherwise than 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;
>
> (b) at the relevant date
>
> (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, annulment or legal separation is recognised as valid; and
>
> (iii) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date.
>
> (3) In this section "the relevant date" means
>
> (a) in the case of an overseas divorce, annulment or legal separation obtained by means of proceedings, the date of the commencement of the proceedings;
>
> (b) in the case of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings, the date on which it was obtained. …
>
> (5) For the purpose of this section, a party to a marriage shall be treated as domiciled in a country if he was 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."

17. Before 1988, the position was governed by the Recognition of Divorces and Legal Separations Act 1971, under which one crucial question was whether a divorce had been "obtained by means of judicial or other proceedings" abroad. It is that phrase which had to be interpreted in some of the cases to which we shall in due course make reference. The authority of those cases is preserved by s 54(1), which provides that, in this Part of the 1986 Act:

> "'Proceedings' means judicial or other proceedings."

So far as concerns s 45, it is common ground that there is no other enactment that might give validity to the sponsor's divorce.

18. We are concerned, therefore, with s 46: and it is right to draw attention first to s 46(2)(c). Section 46 draws a distinction between a divorce "obtained by means of proceedings" and a divorce "obtained otherwise than by means of proceedings". A divorce "obtained otherwise than by means of proceedings" cannot be valid if either party to the marriage was habitually resident in the United Kingdom during the period of one year immediately preceding the date the divorce was obtained. This particular provision is of great importance in immigration cases, because, in an immigration context, it very frequently happens that one of the parties to the claimed divorce was so resident. That is clearly the position in the present case, where the sponsor has at all material times been habitually resident in the United Kingdom. In the present case, as in the majority of immigration cases, the divorce can therefore only be entitled to recognition in English law if it was "obtained by means of proceedings".

19. Before looking in detail at the meaning of that phrase, we must emphasise that the status of the parties to a claimed divorce in English law does not depend on their own views as to their status: nor, indeed, are their views relevant to their status. In case, however, it be suggested that the sponsor was, at the time of her marriage to the Appellant, misled as to the efficacy of the divorce from her previous husband, we must set out a passage from the determination of the Adjudicator (who heard oral evidence from the sponsor) relating to her description of herself as a "spinster" when she took part in the civil ceremony of marriage in August 1999.

> "21. The sponsor, during an address to me that she was determined personally to give, let slip matters which lead me to find that she did not believe that she was legally free from an encumbrance that would render the marriage a nullity. She had told the registrar that she was a spinster. I am satisfied that the sponsor is an educated and intelligent woman. She knew well that she was telling a lie. Furthermore, I find that it had a purpose – she did not want to reveal her previous marriage because she did not believe that she was legally free of it."

20. As we have said, the parties' opinion as to their status, even if those opinions have been honestly held, are not relevant. What is relevant is the question whether the claimed divorce was "obtained by means of proceedings".

21. It appears to us that there are three clear elements to that phrase. The first is that the divorce must have been obtained. That is a reference to the provisions of paragraph (a) of each the first two subsections of s 46: the divorce must have been effective under the law of the country in which it was obtained. That is question of the effect of the foreign law, in this case the law of Pakistan; and in an English court it is a matter of fact, not of law. The second requirement is that there have been "proceedings". "Proceedings" is a term of art in English law, and the interpretation of it is a matter of English law. We are bound by any relevant judicial authority on the meaning of this word in the statute. The third requirement is that the divorce be "obtained by means of" the proceedings. It is not sufficient that there be both an effective divorce and some associated proceedings. The proceedings must have been the way by means of which the divorce was obtained. In other words, one must be able to say that if the proceedings had not taken place, the divorce would not have been obtained.

The Divorce

22. In the present case, it is said that the divorce was a *talaq al-hasan*, obtained by pronouncement on 1st September 1993, 23rd October 1993 and 1st January 1994. We are content to take the details from Dr Werner Menski's expert report, dated 15th December 2000.

> "8. In the present case, Mr Mahmood divorced Ms Nighat Parveen (Mirza) by a certain form of *talaq*, as evidenced in his three deeds of divorce dated 1st September 1993, 23rd October 1993, and finally 1st January 1994 respectively, which are part of the case file. All these three Deeds of Divorce are executed on Pakistani stamped paper to the value of Rs 10 each. It is not immediately obvious why this legal action should have been taken three times, so it will be helpful if I analyse these three documents in some more detail.
>
> 9. The Divorce Deed of 1st September 1993 states and confirms that the Muslim marriage between the spouses had been contracted in Rawalpindi on 14th December 1992. Mr Mahmood also declares that a dower (*mahr*) of 500 Rupees had been fixed and paid to Ms Nighat Parveen. This would have become her absolute property and we are not concerned with this aspect of the matter here. Mr Mahmood then proceeds to state that 'all efforts to normalise the relation had completely failed', which is probably a coded reference to the fact that this marriage had remained unconsummated. Hence, as the document proves, a single *talaq* was pronounced in front of two adult Muslim witnesses, who duly signed the document, and it is stated that after the waiting period fixed under law, the

iddat period, Nighat Parveen would be free to marry any other person. This is not yet a final Muslim divorce, it is only a first pronouncement, a warning, so to say, and the divorce remains revocable at this stage.

10. The second Divorce Deed, dated 23rd October 1993, still falls within the *iddat* period of approximately three months and also still documents a state of affairs where the divorce remains revocable. Indeed, it is the husband's second pronouncement of *talaq*, as clearly indicated in the document itself, which contains otherwise the same wording as the first document and is made before the same two adult Muslim male witnesses, who have again duly signed. This document shows that the Entry Clearance Officer in Islamabad was totally misguided and simply wrong in law when concluding that Mr Mahmood had pronounced a 'bare *talaq*', since that would have to be done in the form of the 'triple *talaq*', with instant effect and no further need for additional documentary evidence. What we find here is not three identical forms of divorce document, but a clear progression from the first to the second, and finally the third pronouncement of *talaq*, which alone seals the fate of the marriage.

11. The third Divorce Deed, dated 1st January 1994, is a textbook example of the third and final Muslim *talaq*, given by a husband at the expiry of the *iddat* period, in fact four months after the first pronouncement. This document reiterates that the first *talaq* was given on 1st September 1993, the second on 23rd October 1993, and that the third and final divorce pronouncement is now made through this document. As of that date, Ms Nighat Parveen was therefore irrevocably and legally divorced under the Muslim law of Pakistan.

12. This document mentions specifically that Mr Mahmood would henceforth have no further concern or connection whatsoever with his former wife and also restates the final phrase that appeared in the earlier two notices, namely that she 'is free to marry any other person at the expiry of period fixed under the law and completion of legal formalities and service of notice to the Councilor [sic] concerned'."

There was no notification to the Chairman of the Union Council under the Muslim Family Laws Ordinance.

23. Miss Weston submits first, that the divorce was effective under the law of Pakistan, and secondly that the process used to obtain the divorce amounts to "proceedings". This is, as we pointed out at the hearing, a somewhat dangerous strategy. If she succeeds in demonstrating that a t*alaq* is effective in Pakistan without compliance with the Muslim Family Laws Ordinance, but fails to persuade us that the t*alaq* amounts to "proceedings", the result would be that no Pakistani *talaq* could be accepted as effective in English law if either party was habitually resident in the United Kingdom during the period of one year before the divorce. The reason is that, if the *talaq* were effective under Pakistani law without "proceedings", no additional proceedings (for example, notification to the Chairman of the Union Council) could be the "means" by which the divorce became effective. A Pakistani *talaq* would therefore not be

"obtained by means of proceedings", and could be effective, if at all, only under s 46(2), which has the residence requirement to which we have referred. It follows that the arguments raised in this case may have a considerable impact on a very large number of Pakistani divorces in an immigration context.

24. We have before us expert evidence in the form of a number of written reports. We were referred to four cases: Quazi v Quazi [1980] AC 744; Chaudhary v Chaudhary [1984] 3 All ER 1017; El Fadl v El Fadl [2000] 1 FCR 685; and Rab (12345), a Tribunal decision, which was provided to us only in an unauthorised "summary" of the decision, apparently derived from the Electronic Immigration Network (EIN). We have read the whole of the Tribunal determination.

Authorities

25. In Quazi v Quazi the parties were at all material times nationals of Pakistan, and it appears to have been accepted (see the speech of Lord Diplock at page 805 F) that *if* the procedure requirements of the Muslim Family Laws Ordinance were complied with the divorce would be effective under the law of Pakistan. The question was whether those procedural requirements amounted to "proceedings" by means of which the divorce was obtained. The Court of Appeal had taken a restrictive view of the phrase "judicial or other proceedings", ruling that "other" proceedings, to be effective in this context, must be quasi-judicial. The House of Lords rejected that interpretation. There was nothing in the phrase suggesting that proceedings should be quasi-judicial. All the speeches indicate that the husband's compliance with the requirements of the Ordinance amounted to "proceedings" for these purposes. Lord Diplock said this (at 808-9):

> "The pronouncement of the *talaq* was required by law to be notified to a public authority, the Chairman of the Union Council; he in turn was required by law to constitute an arbitration council for the purposes of conciliation and to invite each spouse to nominate a representative. These are 'proceedings'; none the less so because in the event neither spouse elects to take advantage of the opportunity for conciliation which the arbitration council presents. They are proceedings that are not merely officially recognised but are also enforced by penal sanctions under the Muslim Family Laws Ordinance 1961. Without such proceedings the divorce by *talaq* never becomes effective. The proceedings come first, the divorce follows them 90 days after they have been commenced."

Lord Fraser of Tullybelton said (at 814):

> "If they are to be proceedings at all, they must of course have some regular definite form, but anything that can properly be regarded as proceedings will qualify so long as it is legally effective";

and at 817:

> "I am of the opinion that the *talaq* and the notice to the civil judge, a copy of which has to be sent to the respondent, taken together are 'proceedings'."

Lord Fraser specifically reserved the question whether "a bare talaq pronounced in some country where, unlike Pakistan, it would be effective without any further procedure, should be recognised".

27. Lord Scarman stated at 823 that:

> "The only requirement is a proceeding, or proceedings (for there is no magic in the singular or the plural), officially recognised resulting in a divorce which is effective under the country's law."

In indicating what would amount to "proceedings", Lord Scarman appears to have taken a view somewhat wider than his brethren. He indicated (at 824B and 825F) that the process adopted, including notification to the Chairman of the Union Council, amounted to "proceedings", because they were *"acts officially recognised by the law of Pakistan as leading to an effective divorce*".

28. Quazi v Quazi is binding on us insofar as it assists in the interpretation of the term "proceedings". It holds that the procedure of notification to the Chairman of the Union Council under the Ordinance is "proceedings" for our purposes. It is not binding on the question whether the divorce in such a case is "obtained by means of" those proceedings. This is for two reasons. First, the question of the effectiveness in Pakistan of the *talaq* without notification is a matter of fact, not of law; and, secondly, the need for notification to make the divorce effective was apparently conceded.

29. We turn now to Chaudhary v Chaudhary. That is a decision of the Court of Appeal. A *talaq al-bid'at* was pronounced in Kashmir. As we have indicated, and as the Court of Appeal also held, the 1961 Ordinance does not run in Kashmir. The evidence was that the divorce was valid and effective in Kashmir to dissolve the marriage. The principal question for the Court of Appeal was whether the *talaq* had, in these circumstances, been obtained by "proceedings". (There was a second issue relating to whether recognition should be denied on grounds of public policy, which we do not need to mention further.)

30. The Court of Appeal held, as a matter of statutory construction, that the phrase "obtained by means of [judicial or other] proceedings" must be intended to separate two classes of divorces, both of which are effective in the overseas country. If it had not been so, there would have been no purpose in the requirement at all: the Act would simply have provided

that a divorce effective abroad was effective here. This consideration is stated most clearly by Cumming-Bruce LJ at 1028f:

> "The criterion 'judicial or other proceedings' must be given a construction which restricts recognition to a narrower category of divorces than all divorces obtained by any means whatsoever which are effective by the law of the country in which the divorce was obtained."

He went on to say, in commenting on the apparently wider dicta by Lord Scarman in Quazi v Quazi:

> "There is nothing to be found in the speeches of the House of Lords which is inconsistent with this conclusion. On the contrary, all their Lordships focused their analysis on the question whether the procedure required by the Pakistan Ordinance of 1961 impressed the characteristic of 'proceedings' on the means by which the divorce in that case was obtained. If a bare *talaq* had been enough, the ratio decidendi of all the speeches was quite unnecessary. The answer may be that the House confined itself to the legal effect of the facts in the case before it. *Talaq* followed by compliance with the requirements was enough to constitute 'other proceedings', so that it was unnecessary to look for a wider criterion by considering the effect of a bare *talaq*. There is force in the point, and it gains strength from the express words of Lord Fraser. Nonetheless, if divorce obtained by any means effective by the law of the country where it was obtained was sufficient, the reasoning in all the speeches was quite unnecessary. And I do not understand the dictum of Lord Scarman in Quazi v Quazi … which led Bush J in Zaal v Zaal (1983) 4 FLR 284 at 288 to a contrary view, as an expression of the view that any act or acts legally effective in the country where the divorce was obtained constitute proceedings. Lord Scarman was considering the acts done by way of compliance with the 1961 Pakistan Ordinance."

31. What, then, are "proceedings"? Cumming-Bruce LJ said (at 1028j) that the pronouncement of a *talaq* that is "bare" (that is to say, not accompanied by the procedure under the Ordinance) is not obtaining a divorce by means of "any proceeding".

> "It is pronounced. Pronouncement of *talaq* three times finally terminates the marriage in Kashmir, Dubai, and probably in other unsophisticated peasant, desert or jungle communities which respect classical Muslim religious tradition. Certainly by that tradition the pronouncement is a solemn religious act. It might doubtfully be described as a ceremony, though the absence of any formality of any kind renders the ceremony singularly unceremonious. It can fairly be described as a 'procedure' laid down by divine authority in the inspired text of the Koran. But neither respect for the divine origin of the procedure nor respect for the long enduring tradition which over the centuries had rendered the bare *talaq* effective as terminating a marriage by the law of Muslim countries necessarily or sensibly should convert the procedure into a proceeding within the intent of [the Act]."

32. Oliver LJ said (at 1030-1031):

> "'Proceedings' must, in my judgement, at least bear in the statute a meaning which the word would have in normal speech where, as it seems to me, no-one would

> ordinarily refer to a private act conducted entirely by parties inter se or by one party alone, as a proceeding, even though the party performing it may give it an additional solemnity or even an efficacy by performing it in the presence of other persons whose only involvement is that they witness its performance. The word would not, in my judgement, ordinarily be used as being synonymous with 'procedure' or 'ritual'. Thus, for instance, the formalities which are required by law to be observed in the execution by a testator of a valid will under the provisions of the Wills Act 1837 would not, I should have thought, be normally referred to as 'proceedings' although the testator would be properly described as having gone through the correct procedure. On the other hand, the word does not, I think, necessarily connote publicity; for instance, business transacted at a meeting of a board of directors of a company is universally and properly described as 'proceedings of the directors'. In the context, however, of a solemn change of status, it does seem to me that the word must import a degree of formality and at least the involvement of some agency, of or recognised by the state having a function that is more than simply probative, although Quazi v Quazi clearly shows that it need have no power of veto. [That is a reference to the recognition in Quazi v Quazi of the fact that the parties have no obligation to submit to conciliation, nor can the state prevent the divorce taking effect 90 days after notification to the Chairman of the Union Council.]
>
> … The essentials of the bare *talaq* are, as I understand it, merely the private recital of a verbal formula in front of witnesses who may or may not have been specially assembled by the husband for the purpose and whose only qualification is that, presumably, they can see and hear. It may be, as it was in this case, pronounced in the temple. It may be, as it was here, reinforced by a written document containing such information, accurate or inaccurate, as the husband cares to insert in it. But what brings about the divorce is the pronouncement before witnesses and that alone. Thus in its essential elements it lacks any formality other than ritual performance; it lacks any necessary element of publicity; it lacks the invocation of the assistance or involvement of any organ of, or recognised by, the state in any capacity at all, even if merely that of registering or recording what has been done. Thus, though the public consequences are very different, the essential procedure differs very little from any other private act such as the execution of a will and is akin to the purely consensual type of divorce recognised in some states of the Far East.
>
> In my judgement, … such an act cannot properly be described as a 'proceeding' in any ordinary sense of the word, still less a 'proceeding' in what must, for the reasons given above, be the restrictive sense of the word as used in the Act."

33. We should say that all the members of the Court held that the meaning of the words in question in what was then the 1971 Act had not been affected by the passing of the Domicile and Matrimonial Proceedings Act 1973. As we have indicated, the phrase under consideration is effectively preserved by the definitions section of the 1986 Act.

34. El Fadl v El Fadl is a decision of Hughes J. In this case, the claimed divorce was in Lebanon. Hughes J recognised (at 700d-f) that:

> "The test is therefore whether the divorce depends for its validity, at least in part, on what can properly be termed 'proceedings'. In this case, not one but both sides

> submit that the proper conclusion is that it does so depend. On the evidence that I have I accept that submission. Although the Sharia Court has no judicial decision to make whether there is to be divorce or no, what occurred before it with the assembly of the court, judge and clerk, and the duty to record into the register, having taken formal declarations, is properly described as 'proceedings' and the local law explicitly requires such proceedings as an integral part of the divorce process. Since both spouses were at the material time domiciled in, and, indeed, nationals of the Lebanon, it follows that this proceedings divorce qualifies for recognition under s 46(1)."

35. That, as it appears to us, is a clear application of the principles of Chaudhary v Chaudhary in determining whether the divorce in question was "obtained by means of proceedings". There is a later passage in Hughes J's judgment which, with the greatest of respect, is difficult to understand. At 701f, the Judge indicated that it was a "plain and indisputable fact" that the divorce in the case before him would be effective even if it were not obtained by means of proceedings. But at 696h, having considered the relevant evidence, the learned Judge had said that it was not necessary to make a formal finding as to where the wife was habitually resident at the relevant times. These two elements of the judgment are inconsistent. We refer again to s 46(2)(c). The place of habitual residence of the parties at the relevant time is crucial. It was not essential for Hughes J's decision of the instant case, because he reached the view that the divorce in question was obtained by means of proceedings. But it cannot be right to say that the answer would necessarily have been the same if the divorce had not been obtained by means of proceedings.

36. The final authority upon which Miss Weston relied was Rab. That is not a case that gives us any great assistance. The summary obtained from EIN is headed "*Recognition of Foreign Marriage and Divorce*", and then, on the next line, *"Recognition of Talak Divorce"*, and on the next again *"Recognition of Talak divorce – the effect of the Muslim Family Law Ordinance 1961 – whether a failure to constitute an Arbitration Council or a failure to bring about recognition is inconsequential for the purpose of the Ordinance – whether the Family Law Act 1986 is retrospective."* The decision is stated as "*As the parties were domiciled in Bangladesh at the relevant date of the Talak divorce in 1975, the divorce would be recognised as valid under the Family Law Act 1986, s 46(1) since it was effective under Bangladesh law*."

37. That is a simple misstatement of the effect of the determination. The summary provided by EIN is misleading. In Rab, not only were the parties to the original marriage domiciled in Bangladesh; they were resident there; and, further, the husband had complied with the provisions of the Ordinance (which, as we have explained, runs in Bangladesh too). The summary that the divorce would be recognised "*since it was effective under Bangladesh law*" does, to say the least, little justice to the Chairman of the Tribunal in Rab. What the decision in fact says is:

> "This divorce is governed by s 46(1) of the Family Law Act 1986 (a divorce obtained by means of proceedings: Quazi v Quazi [1980] AC 744) and is therefore recognised in this country if it is effective in Bangladesh (which it is) and at the relevant date either party was habitually resident, domiciled or a national of Bangladesh."

That is a perfectly correct statement of the applicable law. The EIN summary which is not a summary, is also not correct.

"Proceedings"

38. We return now to the facts of this case and to the questions we are asked to decide. We begin with the one which is clearly governed solely by English law which is whether the acts which are said to have effected the divorce in this case amount to "proceedings" within the meaning of the Act. On this we are bound by Chaudhary v Chaudhary. Miss Weston's submission was that the *talaq al-hasan* used in the present case was distinguishable from the "bare" *talaq*, or *talaq al-bid'at*, used in Chaudhary v Chaudhary. We do not reject her submission that it may be possible to distinguish the two types of divorce. We must, however, apply to the acts used in this case the test laid down in Chaudhary v Chaudhary in order to determine whether there were "proceedings". As in Chaudhary v Chaudhary, there is written documentation, but unlike in Chaudhary v Chaudhary, the proceedings do not appear to have taken place in the mosque. Neither the place of pronouncement, nor the written document, however, are essential requirements of the *talaq al-hasan*.

39. Dr Menski, in a letter dated 8th February 2001, is at pains to indicate that the sponsor was *"a party to the divorce proceedings"*, in that the terms of the documentation evidencing the *talaq* give an indication that the husband took into account the possibility of reconciliation with the sponsor. That too is not, as we understand Dr Menski's letters, an essential part of the *talaq al-hasan*. What is essential to the *talaq al-hasan* is the pronouncement in three successive months, and the consequence that the *talaq* (even without the intervention of secular legislation such as the Ordinance) cannot take effect as a divorce (disregarding the *'idda*) until a considerable period after the first pronouncement of *talaq*. But the *talaq* is still an entirely personal act. It lacks any formality other than the ritual performance. It lacks the invocation or assistance of any organ of the state. It does not even require an organ of the state to act as a registrar or recorder of what has happened (in contrast with the situation in El Fadl v El Fadl).

40. Our decision is that the *talaq al-hasan* pronounced by the sponsor's husband in Pakistan did not itself amount to "proceedings".

Other issues

41. As we have already said, even if the Appellant had established that the *talaq al-hasan* was, or included, "proceedings", he would still have needed to establish that the divorce was effective in Pakistan and that it was obtained by the proceedings. On the issue of the divorce's effect in Pakistan, there are a number of reports from Dr Menski and there is certain other material before us. The burden of that material is, we apprehend, intended to demonstrate that the notification to the Chairman of the Union Council under the Ordinance is not required in order to make a divorce effective in Pakistan. If that is right, no Pakistani divorce, as it seems to us, could be "obtained by proceedings", and therein lies the danger not only to the Appellant and the sponsor, but to many other individuals similarly placed.

42. But in view of the decision we have made about the lack of "proceedings", the effectiveness or otherwise of the divorce under Pakistani law cannot assist the Appellant in this case, because the sponsor (one of the parties to the claimed divorce) was habitually resident in the United Kingdom at all material times, and so the divorce cannot be effective unless it was obtained by means of "proceedings". We therefore do not need to decide whether the divorce was effective under Pakistani law and, if so, precisely by what means it became effective. In the circumstances, bearing in mind particularly the limited assistance we have had from the parties' representatives before us, we prefer not to decide these issues.

Conclusions

43. The *talaq al-hasan* by which the sponsor's husband purported to divorce her in 1993 is not recognised in the United Kingdom. In English law, the sponsor is still married to Arshad Mahmood. Her purported marriage to the Appellant in the mosque in Manchester on 8th August 1999 is void for lack of the formalities necessary for a marriage in England. Her purported marriage to him at the Manchester Record Office on 25th August 1999 is void for bigamy (or, precisely, polyandry). The Appellant is not the sponsor's husband and has no claim under the Immigration Rules to be admitted as such.

44. It is no doubt open to the sponsor to seek a divorce from Arshad Mahmood in this country. A District Judge who is shown this determination may be persuaded to take a view different from that taken by the District Judge in Manchester whose opinion we have already mentioned.

45. For the foregoing reasons, the Appellant's appeal is dismissed.

C M G OCKELTON
DEPUTY PRESIDENT