Judgment in Case *Emin v Yeldag (Attorney-General and Secretary of State for Foreign and Commonwealth Affairs intervening)*, UK

Proposed citing: *Emin v Yeldag (Attorney-General and secretary of State for Foreign and Commonwealth Affairs intervening)*, 5 October 2001, [2002] 1 FLR 956

Region of the source: UK

Source: available online at http://www.uniset.ca/microstates/20021FLR956.htm (20 February 2019)

Date of the decision: 5 October 2001

Author of the decision: Family Division of the High Court, UK

Summary of the decision: An English court could and should grant recognition to decrees of divorce validly granted in the "Turkish Republic of Northern Cyprus", provided there were no grounds in statute to refuse such recognition.

Cited international law materials: international case law, *Loizidou v Turkey (merits)* of the European Court of Human Rights, ICJ Advisory Opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*

Key words: non-recognised courts, recognition of foreign divorce, divorce, northern Cyprus, non-recognition

EMIN v YELDAG (ATTORNEY-GENERAL AND SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS INTERVENING)

Family Division

[2002] 1 FLR 956

HEARING-DATES: 5 October 2001

5 October 2001

CATCHWORDS:

Divorce — Recognition — Overseas divorce — Northern Cyprus — State not recognised by UK Government — Whether dissolution of marriage valid

HEADNOTE:

The wife's marriage to the husband was dissolved by a court in northern Cyprus, within the Turkish Republic of Northern Cyprus. Because the marriage had been dissolved overseas, the wife, who was a British citizen, required leave to make an application to the English court for ancillary relief under s 13 of the Matrimonial and Family Proceedings Act 1984. On the wife's application for such leave, the only issue was whether the dissolution of the marriage was valid. There was no question that the decree of dissolution, which had been obtained, was in accordance with the law and practice of the Turkish Republic of Northern Cyprus, but B v B (Divorce: Northern Cyprus) was authority for the proposition that a decree of dissolution pronounced by a court within the Turkish Republic of Northern Cyprus could not be recognised by English courts because the British Government did not recognise the Turkish Republic of Northern Cyprus. Counsel for the Attorney-General and the Secretary of State submitted that, although the Government did not recognise the Turkish Republic of Northern Cyprus, a decree pronounced there could be recognised provided it was obtained in accordance with the relevant conditions applicable within the area, and that the relevant statutory provisions for recognition of foreign decrees, under ss 46-54 of the Family Law Act 1986, had been satisfied.

Held — granting leave to make a claim for ancillary relief, provided the applicant satisfied the court that Family Law Act 1986, s 46 had been complied with — an English court could and should grant recognition to decrees of divorce validly granted in the Turkish Republic of Northern Cyprusprovided there were no grounds in statute to refuse such recognition. Recognition was possible because the Republic of Cyprus was one country with two territories, each with their own system of law within s 49(1) of the Family Law Act 1986. The 1986 Act expressly recognised both countries, under s 46(1), and territories, under s 49(1). Validity could be given to decisions of a court of an

unrecognised State only in limited circumstances, but these did include the recognition in England of divorces granted in accordance with the law of a territory or country not recognised by the UK Government. However such recognition must never be inconsistent with the foreign policy or diplomatic stance of the Government, and, therefore, when the court was asked to recognise the validity of the acts of an unrecognised State or its courts, it should, where possible, be assisted by representations on behalf of the Attorney-General.

NOTES:

Statutory provisions considered

Foreign Enlistment Act 1870

Patents Act 1949, s 24

Civil Employment Act 1950

Matrimonial and Family Proceedings Act 1984, ss 12, 13, 15

Family Law Act 1986, ss 45, 46-54, 59

Foreign Corporations Act 1991

Human Rights Act 1998

Constitution of the Republic of Cyprus 1960, Arts 86, 87, 111, 152(2)

Treaty concerning the Establishment of the Republic of Cyprus 1960

Treaty of Guarantee 1960, Arts 1, 2, 86, 87, 111, 152(2)

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

CASES-REF-TO:

Adams v Adams (Attorney-General Intervening) [1971] P 188, [1970] 3 WLR 934, [1970] 3 All ER 572, PDAD

Al-Fin Corporation's Patent, Re [1970] Ch 160, [1969] 2 WLR 1405, [1969] 3 All ER 396, ChD

B v B (Divorce: Northern Cyprus) [2000] 2 FLR 707, FD

Caglar v Billingham (Inspector of Taxes) and Related Appeals [1966] STC 150, SCD

Carl Zeiss Stiftung v Rayner& Keeler Ltd and Others; Rayner & Keeler Ltd and Others v Courts and Others (No 2) [1967] 1 AC 853, [1966] 3 WLR 125, [1966] 2 All ER 536, HL

Cyprus v Turkey (unreported) 10 May 2001

Gur Corporation v Trust Bank of Africa Ltd [1987] QB 599, [1986] 3 WLR 583, [1986] 3 All ER 449, CA

Hesperides Hotels Ltd and Another v Aegean Turkish Holidays Ltd and Another [1978] QB

205, [1977] 3 WLR 656, [1978] 1 All ER 277, CA

James (An Insolvent) (Attorney-General Intervening), Re [1977] Ch 41, [1977] 2 WLR 1, [1977] 1 All ER 364, CA

Jones v United States (1890) 137 US 202, US Sup Ct

Loizidou v Turkey (Application No 15318/89) (1997) 23 EHRR 513, ECHR

Polly Peck International plc v Nadir (No 2) [1992] 4 All ER 769, CA

Reel v Holder [1981] 1 WLR 1226, [1981] 3 All ER 321, CA

Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and Others [1993] QB 54, [1992] 3 WLR 744, [1993] 1 All ER 371, QBD

Spinney's (1948) Ltd, Spinney's Centres SAL and Michel Doumet, Joseph Doumet and Distribution and Agencies SAL v Royal Insurance Co Ltd [1980] 1 Lloyd's Rep 406, QBD

Texas v White (1868) 74 US 700, US Sup Ct

COUNSEL:

Rebecca Littlewood for the applicant; Daniel Bethlehem for the intervenors; The respondent did not appear and was not represented.

PANEL: Sumner J

JUDGMENT BY-1: SUMNER J

JUDGMENT-1:

SUMNER J: Introduction

[1] This is an application of 5 April 2001 issued by the applicant, Ms Zalihe Emin. She seeks leave to make an application for ancillary relief under s 13 of the Matrimonial and Family Proceedings Act 1984 (the 1984 Act). That is necessary because her marriage was dissolved in an overseas country. By s 12 of the 1984 Act an application may be made if the divorce is entitled to be recognised as valid in England and Wales. Leave will be granted under s 13 only if there is a valid dissolution and there are substantial grounds for making such an application.

[2] The jurisdiction to make such an application is governed by s 15 of the 1984 Act. It is dependent on one of the parties either being domiciled in England and Wales at the time of the application, or habitually resident here for a year prior to the application. On the evidence before me I am satisfied that that is true of the applicant.

The issue

[3] The main issue I have to resolve can be stated quite shortly. The applicant's marriage was dissolved in June 2000 by a court in northern Cyprus, otherwise known as the Turkish Republic of Northern Cyprus (TRNC). The British Government does not recognise the TRNC. The issue is whether the lack of recognition affects the validity of the dissolution of the applicant's marriage. The applicant relies upon that decree of divorce for the purposes of her present application.

Background

[4] The applicant was born on 19 September 1968 in Famagusta, Cyprus. The respondent was also born there on 6 December 1966. In 1971 the applicant came to this country. She is a British citizen and holds a British passport.

[5] She returned to Cyprus in 1988. The parties were married in Famagusta in September 1989. In 1990 they both came to this country. There are two children of the marriage, Kezban born on 10 September 1991 and Gulcen born on 4 April 1994.

[6] Whilst here they acquired a property consisting of a flat and shop as an investment. Subsequently in 1997 they purchased a home in joint names in Ilford, Essex. The same year the respondent left the applicant and went to live in Turkey, where he remains. On 7 June 2000 the respondent obtained a final decree of divorce from the Family Court of Gazi Magusa in the TRNC. The applicant has remained in the UK looking after the two children. She is wholly dependent on the rent from the investment property and child support to maintain herself and the children.

The proceedings

[7] I have before me two affidavits of the applicant of 5 April and 25 June 2001. She has exhibited a letter to her first affidavit from her solicitor in the TRNC confirming that the decree obtained by the respondent was in accordance with the law and practice of the TRNC. I accept that.

[8] There is also an affidavit from Mr Geoffrey Gillham of 3 August 2001. He is the head of the South European Department of the Foreign and Commonwealth Office, and duly authorised to swear the affidavit on behalf of the Foreign Secretary.

[9] This followed a direction by Munby J on 16 May 2001 that the application be served on the Attorney-General and the Secretary of State for Foreign and Commonwealth Affairs. On 13 June 2001 Charles J directed that the Foreign Secretary was to serve an affidavit expressing Her Majesty's Government's view of the status of the TRNC.

The hearing

[10] The respondent has been served with notice of this application. He has neither appeared nor been represented. The result is that on 5 October 2001 I heard argument from Mr Bethlehem on behalf of the Secretary of State and the Attorney-General. I have also heard argument from Miss Littlewood on behalf of the applicant.

[11] Mr Bethlehem submitted a detailed skeleton argument. It has been of great assistance. Miss Littlewood also presented a helpful skeleton argument. For that and the arguments of counsel I am much indebted. It is to be regretted that the hearing was curtailed by other applications in my list.

[12] Mr Bethlehem very properly made clear the limited nature of his submissions. It was confined to the validity and recognition of the divorce decree pronounced by the court in the TRNC. He did not make submissions on the merits of the application nor the domicile or habitual residence of the applicant or respondent.

The argument

[13] Mr Bethlehem's submission in essence is that the UK Government does not recognise the TRNC. This he says does not bar the court's recognition of the decree of 17 June 2000 pronounced in the TRNC, provided that it satisfies two conditions. The first is that the decree was obtained in accordance with the relevant conditions applicable to that part of Cyprus. The second is that the relevant statutory provisions for recognition of foreign decrees under ss 46-54 of the Family Law Act 1986 (the 1986 Act) are satisfied.

[14] He submits that on a proper construction of those sections a decree pronounced in the TRNC can be recognised in this court. Insofar as the court has decided otherwise in the case of B v B (Divorce: Northern Cyprus) [2000] 2 FLR 707, it is incorrect and should be overruled. He is supported in these submissions by Miss Littlewood.

The statutory framework

[15] Sections 12 and 13 of the 1984 Act are in the following terms:

` 12 Applications for financial relief after overseas divorce etc

(1) Where —

(a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and

(b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,

either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of the Act.

13 Leave of the court required for applications for financial relief

(1) No application for an order for financial relief shall be made under this Part of this Act unless the leave of the court has been obtained in accordance with rules of court; and the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order.'

[16] For the purposes of the present application, the applicant has therefore to satisfy me of two matters. The first is that the decree of 7 June 2000 is entitled to be recognised as valid in England and Wales.

[17] Only if I am satisfied that the decree is valid, do I consider the second matter. That is whether there is substantial ground for making the application for such an order. I turn to the first issue.

Validity

[18] The validity of the decree is governed by the 1986 Act. I refer in particular to ss 45, 46 and 49 which it is accepted are relevant to the present application.

' 45 Recognition in the United Kingdom of overseas divorces, annulments and legal separations

Subject to sections 51 and 52 of the 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 Grounds for recognition

(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.

49 Modifications of Part II in relation to countries comprising territories having different systems of law

(1) In relation to a country comprising territories in which different systems of law are in force in matters of divorce, annulment or legal separation, the provisions of this Part mentioned in subsections (2) to (5) below shall have effect subject to the modifications there specified.

(2) In the case of a divorce, annulment or legal separation the recognition of the validity of which depends on whether the requirements of subsection (1)(b)(i) or (ii) of section 46 of the Act are satisfied, that section and, in the case of a legal separation, section 47(2) of this Act shall have effect as if each territory were a separate country.

[19] In the case of B v B (Divorce: Northern Cyprus) [2000] 2 FLR 707 His Honour Judge Compston, sitting as a deputy judge of the High Court, ruled that a decree obtained by a husband in the TRNC could not be recognised. This was because the TRNC was not recognised by the Government of the UK and to rely upon the decree would be contrary to public policy. He relied on s 51(3)(c) of the 1986 Act; that subsection is in these terms:

‘ (3) Subject to section 52 of this Act, recognition by virtue of section 45 of this Act of the validity of an overseas divorce, annulment or legal separation may be refused if —

(a) in the case of a divorce, annulment or legal separation obtained by means of proceedings, it 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; or

(b) in the case of a divorce, annulment or legal separation obtained otherwise than by means of proceedings

(i) there is no official document certifying that the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; or

(ii) where either party to the marriage was domiciled in another country at the relevant date, there is no official document certifying that the divorce, annulment or legal separation is recognised as valid under the law of that other country; or

(c) in either case, recognition of the divorce, annulment or legal separation would be manifestly contrary to public policy.’

[20] Before coming to the issues to which these sections give rise, I turn to the recent history of Cyprus. I do so by reference to the Treaty that established the Republic of Cyprus and subsequent events as set out in the affidavit of Mr Gillham to which I have referred.

History

[21] Cyprus was a former Crown Colony of the UK. Under a Treaty of 1960, called the Treaty concerning the Establishment of the Republic of Cyprus, the Republic of Cyprus was established. The UK, Greece, Turkey, and the Republic of Cyprus were parties to the Treaty. They were also parties to a Treaty of Guarantee signed at the same time.

[22] Under Art 1 of the Treaty of Guarantee 1960, the Republic of Cyprus undertook to

ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution. By Art 2 of the Treaty of Guarantee 1960 the other parties to the treaty recognised and guaranteed the independence, territorial integrity and security of the Republic of Cyprus. The Constitution to which I now refer recognised and balanced the division of the population of the Republic of Cyprus between Greek and Turkish Cypriots.

[23] The Constitution of the Republic of Cyprus 1960 (the Constitution) provided for the official languages of the Republic of Cyprus to be Greek and Turkish. By Art 86 of the Constitution the Greek and Turkish communities were to elect from amongst their own members a communal chamber which had powers reserved to it under the Constitution. These included, under Art 87 of the Constitution, the power to exercise legislative powers solely with regard to a number of matters including all religious matters, all educational, cultural and teaching matters, and personal status.

[24] Under Art 152(2) of the Constitution the judicial power with respect to civil disputes relating to personal status are reserved to the communal chambers. Personal status I am satisfied includes marriage and divorce.

[25] This follows from Art 111 of the Constitution. It provides that no communal chamber should act inconsistently with the provisions of the law of the Greek Orthodox Church or of the church of a religious group in matters of marriage and divorce.

[26] The relevant events following the establishment of the Republic of Cyprus and the adoption of the Constitution are helpfully summarised in paras [3]-[8] of Mr Gillham's affidavit. I gratefully adopt them.

' 3 The Constitution of the Republic of Cyprus of 1960 remains in force. It has been amended 3 times. Two of these amendments relate to electoral law. A third amendment, of 17 June 1989, concerns Article III of the Constitution which refers to matters of personal status of citizens of the Greek community in Cyprus. Copies of the Constitution and the 1989 Amendment are attached hereto as Exhibits "GCG3" and "GCG4" respectively.

4 Following a Greek-inspired coup against the legitimate Government of the Republic of Cyprus in 1974, Turkish military forces intervened in Cyprus on the grounds that intervention was necessary to protect the Turkish Cypriot community. Violence was halted when the United Nations Force in Cyprus (UNFICYP), with the agreement of the parties, established cease-fire lines between the northern and southern parts of the island. These lines do not constitute an international boundary but demarcate a buffer zone between the positions of the Greek Cypriot military forces on the one hand and the Turkish army and Turkish Cypriot forces of the other.

5 On 13 February 1975, the Turkish Cypriot community in northern Cyprus declared the

so-called “Turkish Federated State of Cyprus” (TFSC) in the area north of the buffer zone. The legality of this declaration was not accepted by Her Majesty’s Government. The “TFSC” did not purport to be a state in the international sense and, to the best of my knowledge, was not recognised as such by any other state.

6 On 15 November 1983, the Turkish Cypriot community in northern Cyprus purported to declare independence and established the so-called “TRNC” . In resolution 541 (1983) of 18 November 1983, the United Nations Security Council considered that the declaration of independence of the “TRNC” was incompatible with the Treaty of Establishment and the Treaty of Guarantee and was legally invalid. In paragraph 7 of this resolution, the Security Council called upon all states “not to recognise any Cypriot State other than the Republic of Cyprus” . The Security Council reiterated its call upon all states not to recognise the TRNC in resolution 550 (1984) of 11 May 1984. As stated above, Her Majesty’s Government does not recognise any Cypriot state other than the Republic of Cyprus. Copies of resolution 541 (1983) and resolution 550 (1984) are attached hereto as Exhibits “GCG5” and “GCG6” .

7 Since 1974, the Government of the Republic of Cyprus has been in a position to exercise jurisdiction de facto in the southern part of the island only. De facto authority in the northern part of the island has been exercised by those purporting to act in the name of the TRNC.

8 Her Majesty’s Government does not maintain diplomatic relations or have government-to-government dealings with any entity on the island of Cyprus other than the Government of the Republic of Cyprus. Her Majesty’s Government does, however, have regard to the interests of the Turkish Cypriot community. For this reason, it has maintained contacts with the leaders of the Turkish Cypriot community since the establishment of the Republic of Cyprus in 1960. Functional contacts between United Kingdom agencies and persons and agencies in the TRNC are also maintained.’

Recognition of the TRNC — the principle

[27] The issue of interpretation is dependent on whether the TRNC is to be regarded as a country for the purposes of s 46 of the 1986 Act, or a country in which different systems of law are in force, within s 49(1). But if the TRNC is a country or the Republic of Cyprus is a country with different territories, the question is whether it is fatal to the validity of the decree that the TRNC is not recognised by the UK Government. It recognises only the Republic of Cyprus.

[28] Before I come to the proper construction of those sections, there is a major preliminary point which the applicant must surmount. There is a long and well-established principle that English courts cannot give effect to the acts of an unrecognised State. There is said, however, to be an exception namely that English courts may accept the acts of an unrecognised State where it affects private rights. The principle is not in dispute. The nature and extent of any exception upon which the applicant must rely is not so clear.

[29] The 1986 Act makes no distinction between countries or territories that are recognised and those which are not recognised. I must, therefore, determine whether, in accordance with modern jurisprudence, the acts of courts of the TRNC in granting decrees of divorce can be recognised by the courts of England and Wales.

[30] This is of importance as a significant number of Turkish Cypriots live in the UK. They need to know whether divorces granted by the courts of the TRNC will or will not be recognised in this country.

[31] The principle is clear. Lord Reid, in his speech in Carl Zeiss Stiftung v Rayner & Keeler Ltd and Others; Rayner & Keeler Ltd and Others v Courts and Others [1967] 1 AC 853, 903, said:

' … the courts of this country are no more entitled to hold that a sovereign, still recognised by our Government, has ceased in fact to be sovereign de jure, than they are entitled to hold that a government not yet recognised has acquired sovereign status.'

[32] That position has long been recognised both here and in other common law countries. Thus in 1890, the Supreme Court of the US summarised the law as follows:

' Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, subjects and citizens of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances … It is equally well settled in England.' (Jones v United States (1890) 137 US 202; 34 Law Ed 691, 696)

The exception

[33] The same court has also accepted an exception. It is well described in another of its decisions after the Civil War. It recognised:

' … acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property real and personal, and providing remedies for injuries to person and estate … ' (Texas v White (1868) 74 US 700; 19 Law Ed 227, 240)

[34] Dr Mann, in Foreign Affairs in English Courts (1986) to which Mr Bethlehem has drawn my attention, accepted that Lord Denning MR had asserted the existence of that

exception, and that Lord Wilberforce may not have been entirely adverse to it. However he refuted such an encroachment here (see pp 37-41). He referred to a number of cases in the Supreme Court of the US including those I have cited. He went on:

` Dogmatically the international problem is quite different from that so elegantly and liberally solved by the Supreme Court of the United States in a series of decisions which are one of the court's finest contributions … If one allows to the unrecognised State an undefined but strictly limited right of internationally effective legal activity, this runs counter to the policy of non-recognition, which, after all, merely means that marriages and divorces, for example, which take place during the period of non-recognition will have retroactive international effectiveness only after recognition … This is not a field in which there is room for a double standard. To remain consistent English courts should in regard to unrecognised States, reject the doctrine of necessity both for their own constitutional law as well as internationally. Hardship suffered by an individual is unlikely to occur very often and will only be temporary.

[35] The reference to Lord Wilberforce is to his speech in Carl Zeiss Stiftung v Rayner & Keeler Ltd and Others; Rayner & Keeler Ltd and Others v Courts and Others (No 2) [1967] 1 AC 853 where he said:

` My Lords, if the consequences of non-recognition of the East German "government" were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found.' (at 954B)

[36] He went on to recognise glimmerings of the idea that non-recognition was not pressed to its ultimate logical limit in the US, citing a number of decisions. He concluded:

` No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total invalidity of all laws and acts flowing from unrecognised governments. In view of the conclusion I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law in any future case whether and to what extent it can be invoked.' (ibid, F-G)

[37] Lord Denning MR's judgment is to be found in Hesperides Hotels Ltd and Another v Aegean Turkish Holidays Ltd and Another [1978] QB 205. The case concerned hotels in northern Cyprus taken over after the Turkish invasion. The owners issued proceedings against the London representatives of the TRNC.

[38] In his decision Lord Denning MR reviewed earlier decisions. He considered whether the executive was concerned with the external consequences of recognition as against

other States, and whether the courts were concerned with the internal consequences in relation to individuals.

[39] He cited Lord Wilberforce's speech in Carl Zeiss Stiftung v Rayner & Keeler Ltd and Others; Rayner & Keeler Ltd and Others v Courts and Others [1967] 1 AC 853 and quoted from a supportive article by Professor Lipstein in 1950. Finally be quoted his own judgment Re James (An Insolvent) (Attorney-General Intervening) [1977] Ch 41, 62, where he said:

' When a lawful sovereign is ousted for the time being by a usurper, the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory: and, as he can no longer do it himself, he is held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy … '

[40] In the same case Scarman LJ had said:

' I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government.' (at 70)

[41] Lord Denning MR concluded in the Hesperides Hotels Ltd case:

' If it were necessary to make a choice between these conflicting doctrines, I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth: and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.' (at 218G)

[42] I have also been referred to the decision of Graham J in Re Al-Fin Corporation's Patent [1970] Ch 160, where he had to consider s 24 of the Patents Act 1949. The material parts of s 24 are:

' (1) If upon application made by a patentee in accordance with this section the court or the comptroller is satisfied that the patentee as such has suffered loss or damage … by reason of hostilities between His Majesty and any foreign state, the court or comptroller may by order extend the term of the patent subject to such restrictions, conditions and provisions, if any, as may be specified in the order … '

[43] In that case the question for the court was whether there were hostilities between the UK Government and North Korea which was not recognised as a separate State. The judge asked the question whether the section had to be read as if the words ' recognised as such by Her Majesty' were included after the words ' any foreign state' in subs (1), or whether it was correct to read the section in a broader sense without the necessity for the qualification of recognition.

[44] Graham J pointed to the Foreign Enlistment Act 1870 where it was clear that the legislature were well aware for the purposes of that Act that a ' foreign state' was not dependent on recognition. He found a similar intention in the re-instatement in the Civil Employment Act 1950. He concluded, at 80, without hesitation that, though any foreign state included a foreign State which had been given Foreign Office recognition, it was not limited thereto:

' It must at any rate include a sufficiently defined area of territory over which a foreign government has effective control. Whether or not the state in question satisfies these conditions is a matter primarily of fact in each case and no doubt there will be difficult cases for decision from time to time, but difficult cases of fact do not prevent the court from coming to a conclusion when the relevant facts are proved before it.'

[45] Perhaps unusually, I was also referred to the Special Commissioner's decision in Caglar v Billingham (Inspector of Taxes) and Related Appeals [1966] STC 150. Its relevance lies in the fact that the appellants were employed in the London office of the TRNC. They were assessed for income tax but claimed they were exempt as official agents for a foreign State.

[46] The appellants were represented by Mr Beloff QC and the respondents by Mr Henderson QC. A substantial number of cases were referred to in the course of elaborate arguments from counsel. The Special Commissioners found against the appellants.

[47] On the issue of recognition, they referred in their judgment to Re Al-Fin Corporation's Patent [1970] Ch 160, Hesperides Hotels Ltd and Another v Aegean Turkish Holidays Ltd and Another [1978] QB 205, Spinney's (1948) Ltd, Spinney's Centres SAL and Michel Doumet, Joseph Doumet and Distributors and Agencies SAL v Royal Insurance Co Ltd [1980] 1 Lloyd's Rep 406, Reel v Holder [1981] 1 WLR 1226, Polly Peck International plc v Nadir (No 2) [1992] 4 All ER 769, Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and Others [1993] QB 54 and other decisions. They concluded, at para [121]:

' The principle we extract from these authorities is that the courts may acknowledge the existence of an unrecognised foreign government in the context of the enforcement of laws relating to commercial obligations or matters of private law between individuals or matters of routine administration such as the registration of births, marriages or deaths. This principle is in line with that adopted in the Foreign Corporations Act 1991. However, the courts will not acknowledge the existence of an unrecognised state if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of this

country.’

The European Court of Human Rights

[48] The interaction of the Human Rights Act 1998 and recognition of divorce decrees in the instant case calls for a far longer investigation than has been possible in this hearing. It may be sufficient if I highlight the valuable guidance that is to be found in two decisions. They lend considerable support to conclusions I have independently reached.

[49] In general terms the Human Rights Act 1998 imposes a duty to ensure that UK legislation is compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention). Courts must act in a manner compatible with the Convention. Decisions of the European Court of Human Rights (the ECHR) establish the nature and extent of those human rights. Where the decisions directly affect a case at first instance, they will be followed.

[50] In Loizidou v Turkey (1997) 23 EHRR 513 the ECHR was concerned with a Greek Cypriot’s claim to property in northern Cyprus. The Turkish forces prevented her return to it. The decision does not directly relate to the issue before me but the majority decision, at 527, considered a relevant point in international law:

‘ 44 In this respect it is evident from international practice and the various, strongly worded resolutions referred to above that the international community does not regard the TRNC as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus — itself, bound to respect international standards in the field of the protection of human and minority rights …

45 The court confines itself to the above conclusion and does not consider it desirable, let alone necessary in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the TRNC. It notes, however, that international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, “the effects of which can be ignored only to the detriment of the inhabitants of the territory” .’ (Advisory Report ICJ Reports (1971) p 16)

[51] In the case of Cyprus v Turkey (unreported) 10 May 2001, the court considered a claim relating to a missing person and their relatives, the property of displaced persons, rights to elections, and living conditions for Greek Cypriots in northern Cyprus. The Government of Turkey did not appear. Again there is no point of direct relevance, but I refer to one significant passage bearing on my decision:

‘ 96 It is to be noted that the International Court’s Advisory Opinion, read in conjunction with the pleadings and the explanation given by some of that court’s members, shows

clearly that, in situations similar to those arising in the present case, the obligation to disregard acts of de facto entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and, in the very interests of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third states or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.

…

98 For the Court, the conclusion to be drawn is that it cannot simply disregard the judicial organ set up by the TRNC insofar as the relationship at issue in the present case are concerned. It is in the very interests of the inhabitants of the TRNC, including Greek Cypriots, to be able to seek the protection of such organs; and if the TRNC authorities had not established them, this could rightly be considered to run counter to the Convention. Accordingly, the inhabitants of the territory may be required to exhaust these remedies, unless their inexistence or ineffectiveness can be proved, a point to be examined on a case-by-case basis.'

[52] It would be a matter of concern were the courts of the UK not to accept the reasoning and approach of the ECHR. In particular their view on international law and the need to make life tolerable for those within the TRNC is of great importance. I accept them.

[53] Though the passages I have quoted may not be directly binding on me, they are highly persuasive. They strongly reinforce my conclusions on the recognition of valid decrees of divorce from the TRNC to which I shall come.

[54] That is not the end of the matter. There are two cases to which I should refer. The first might appear to reach a contrary conclusion. It is Adams v Adams (Attorney-General Intervening) [1971] P 188. In that case a wife sought a declaration that a decree of divorce granted in 1970 by a judge in Southern Rhodesia appointed in 1968 was valid. The wife was refused her declaration.

[55] Southern Rhodesia was a colony under whose constitution judges of the High Court were appointed by the Governor on the advice of the Prime Minister. In 1965 the Prime Minister of Southern Rhodesia and his colleagues issued a Declaration of Independence declaring that Southern Rhodesia was no longer a Crown Colony. The Governor declared the Declaration of Independence as unconstitutional. The Prime Minister and his colleagues disregarded their dismissal from office and adopted a new Constitution.

[56] The President, Sir Jocelyn Simon, referred to the doctrine of necessity and implied

mandate. He did not rule it out but held that it did not apply in relation to a judge who was appointed de facto rather than de jure when Parliament had laid down how he was to be appointed. It created a constitutional anomaly for his acts to be recognised while the executive acts of those appointing him were refused recognition by the executive here.

[57] I am satisfied that the same considerations do not arise here. There is no question of the court and the executive acting contrary to one another when the Attorney-General supports the decision at which I have arrived.

[58] In the second case of B v B (Divorce: Northern Cyprus) [2000] 2 FLR 707 to which I have already referred, His Honour Judge Compston was concerned with a wife seeking to persuade the court that a divorce granted by a court in the TRNC was not valid; her husband argued that it was, as it was granted by the legitimate courts of northern Cyprus. In reaching his conclusion, he did not have the benefit of the detailed submissions on behalf of the Attorney-General and the Foreign Secretary which have so greatly helped me.

[59] The judge held that, because the TRNC was not recognised by Britain, a divorce obtained there could not be recognised. He accepted that certain decisions of the courts of the TRNC could be recognised, but he did not put decisions relating to divorce in that category. He accepted, however, that sometimes this might depend on whether the parties to the decision were in agreement.

[60] His decision rests in essence upon recognition. I am in no doubt that if he had had the range of argument and authorities before him that has been presented to me, he would have reached a different decision. I am not bound by his decision which is of persuasive authority. Without further elaboration, for the reasons which appear in this judgment, I respectfully disagree with his conclusion.

Conclusion

[61] I recognise the important principle that the courts and the Government should not be at variance in the recognition of a foreign State. As Sir John Donaldson MR said in Gur Corporation v Trust Bank of Africa Ltd [1987] QB 599, 620:

‘ … the basic public policy constraint [is] that the courts cannot take cognizance of a foreign juridical person, if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of this country.’

[62] Despite Dr Mann’s arguments to the contrary, there is, I am satisfied, an exception. Its correct description whether as a doctrine of necessity or an implied mandate is not important. Its formulation I do not need to express in terms as broad as that I have cited

from the Special Commissioners' case, though I do not dissent from their judgment. It does, however, extend to the recognition here of decrees of divorce granted in accordance with the law of a territory or country not recognised by the UK Government.

[63] It is recognised in the decisions to which I have referred both here and in the US. It is accepted to be part of present international law by the ECHR.

[64] To ignore it would be to leave the courts of this country out of step with a well-recognised jurisprudence. There are no good reasons for this and compelling arguments to the contrary.

[65] But the validity given to such decisions of a court of an unrecognised State must, however, be limited in scope. It must never be inconsistent with the foreign policy or diplomatic stance of the UK Government.

[66] Thus where the court is asked to recognise the validity of the acts of an unrecognised State or its courts, it should where possible be assisted by representations on behalf of the Attorney-General. I have not been asked to make a declaration. I note, however, that under s 59 of the 1986 Act, where a party does seek a declaration under the Act, the court can of its own motion or on the application of any party to the proceedings direct that all necessary papers in the matter be sent to the Attorney-General.

[67] I have had the advantage of representations on behalf of the Attorney-General and Foreign Secretary. I accept without question the submissions on the recognition of the acts of the TRNC. When it comes to recognition of exceptions to that principle, the assistance I have had from Mr Bethlehem is no less helpful but of a different nature. He has drawn to my attention a line of argument and a series of cases which support the existence of the exceptions, as well of course as Dr Mann's clear argument in opposition.

[68] Having had the opportunity to consider the material he has placed before the court, in my judgment the courts in this country can and should grant recognition to decrees of divorce validly granted in the TRNC. That is provided there are no grounds in statute to refuse it.

Statutory construction

[69] In my judgment on a proper construction of ss 46 and 49 of the 1986 Act, there are three different ways in which the validity of this decree may arguably be upheld. The first is to consider the results of the actions of the Turkish forces in 1974. They occupied the northern part of Cyprus. They drove out most of the Greek Cypriots. They lived in the area and thereafter administered it. The question is whether that means that a territory has been created within the Republic of Cyprus for the purposes of s 46 of the 1986 Act.

[70] The Treaty concerning the Establishment of the Republic of Cyprus 1960 remains in force. The UK recognises only one State on the island of Cyprus, namely the Republic of Cyprus established under the 1960 Treaty.

[71] The Treaty provides that the territory of the Republic of Cyprus comprises the entire island save for two UK Sovereign Base Areas. Since 1974 the Government of the Republic of Cyprus has exercised jurisdiction de facto in the southern part of the island only. As Mr Bethlehem points out, de facto authority in the northern part of the island has been exercised by those purporting to act in the name of the TRNC.

[72] The Government of the Republic of Cyprus does not exercise effective control of the northern part of the island. There is a buffer zone between the two parts manned by the United Nations. For more than 25 years the northern part has governed itself, celebrating marriages, and pronouncing decrees of divorce. It adminsters a law different from that in the south, though a law that was recognised under the Constitution.

[73] The de facto position is therefore this. Under s 49(1) of the 1986 Act, I find that the island of Cyprus comprises two parts in which different systems of law are in force on matters of divorce, and have been since 1974.

[74] The 1986 Act expressly recognises both countries under s 46(1) and territories under s 49(1). It enables the court under s 49(2) to treat as a country an area more properly defined as a territory.

[75] Adopting the approach of Graham J (in Re Al-Fin Corporation's Patent [1970] Ch 160) in relation to a foreign State, which may well require a higher standard than is needed for a territory, I look at three particular points. First, the area of northern Cyprus with which I am concerned is a well-defined area. Its border was established when cease-fire lines were established by the United Nations Force over 25 years ago. It has remained unchanged since then.

[76] Secondly, during that time a separate authority has exercised effective control. Though not accepted internationally, that has not prevented control being exercised throughout the entire area of the northern part. Finally, there can be no question of this being a temporary or short-term state of affairs. That does not apply here.

[77] For the reasons I have set out, I hold that this court is not barred at common law from recognising a valid decree of divorce pronounced by a court in the TRNC. That recognition is possible because the Republic of Cyprus is one country but with two territories, each with their own system of law within s 49(1) of the 1986 Act.

[78] The TRNC is only recognised by Turkey. It is not recognised by the UK, and it has

been censured by the Security Council. That does not in my judgment stop the courts here, on the sound arguments put forward on behalf of the Attorney-General, from recognising its divorce decrees, provided the necessary statutory requirements are met. In my judgment they are.

[79] Secondly, I should also consider whether the TRNC can by itself be regarded as a country for the purposes of s 46. Mr Bethlehem has obvious reservations about any such finding because of the diplomatic stance taken by Her Majesty's Government.

[80] Dicey originally defined a country as:

' The whole of a territory subject under one sovereign to one body of law.' (Dicey and Morris, The Conflict of Laws (Sweet and Maxwell, 13th edn, 1999), para 1-060)

[81] It can be seen immediately that given the history and present administration of the TRNC, there is an argument that, if it is not a territory, it is a country. However to make that finding might well lead to the court acting inconsistently with the foreign policy of the UK. I therefore decline to follow that argument.

[82] There is a third means by which the validity of the divorce decree might be approached. The Constitution of the Republic of Cyprus 1960 recognised the ability of Turkish Cypriots to set up their own communities which could legislate on matters such as marriage and divorce. It may be arguable that, despite the de facto position after 1974, there is a sufficient line of continuity flowing from the Constitution through to the present day. The divorce decrees in the TRNC thus constitute a valid act under the Constitution of the Republic of Cyprus. However this approach runs the same risk as the earlier one, and I do not follow it.

The effectiveness of the decree

[83] I have a certified copy of that decree at p 184 of bundle 1 with a translation at p 185. The relevant parts are in the following terms. Having given the title of the matter and identified the applicant by name and her address it goes on:

— ' In the above mentioned case,

— in the presence of the plaintiff and his lawyer I Saglamer and defendant lawyer Tayman and the absence of the defendant herself,

— after hearing the statements of both sides in full,

— the court has ruled that the above mentioned plaintiff and the defendant be divorced on grounds of irreconcilable differences arising from the defendant's faults and misdemeanour.

— Date of ruling: 7.6.2000

— Date of documentation: 16.6.2000

— Signed: Judge C Amber

— Signed: Court Registrar'

[84] The applicant was represented at the hearing by her advocate. He has sworn an affidavit attesting to its validity. I have no reason to question that view, and, as I have said, I accept it.

Substantial grounds for marking the application

[85] I have set out the bare details of the financial background. Decisions require to be taken after divorce about the ownership both of the matrimonial home within this jurisdiction and the investment property quite apart from maintenance for the applicant and the two children.

[86] I am in no doubt that those are substantial grounds. Accordingly, for the reasons I have set out, I grant the applicant leave to make her claim for ancillary relief, provided she satisfies the court that s 46 of the 1986 Act is complied with. This may be readily possible by oral or affidavit evidence.

DISPOSITION:

Application under s 13 of Matrimonial and Family Proceedings Act 1984 for leave to make a claim for ancillary relief granted, subject to satisfying s 46 of Family Law Act 1986.

SOLICITORS:

Kenneth Elliott & Rowe for the applicant; Treasury Solicitor.