NOVA SCOTIA COURT OF APPEAL
Citation: Qaoud v. Orabi, 2005 NSCA 28

Date: 20050215
Docket: CA 220670
Registry: Halifax

Between:

Bashar El Qaoud

Appellant

v.

Nashwa Orabi

Respondent

Judge(s):	Bateman, Hamilton, Fichaud, JJ.A.
Appeal Heard:	February 3, 2005, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Fichaud, J.A.; Bateman and Hamilton, JJ.A. concurring.
Counsel:	Appellant in person Lee W. Mitchell, for the respondent

Reasons for judgment:

[1] This is an appeal from a decision of Justice Coady in the Supreme Court (Family Division). The issue is whether a Jordanian divorce decree should be recognized in Canada.

Background

[2] Justice Coady made these findings:

> The parties were born and educated in Kuwait and came to Canada in April of 2002. They have two children who live with their mother in Canada at the present time. They purchased a home in Canada and other assets. Their marriage has broken down . . .
>
> On October 29, 2002, Mr. El Qaoud returned to Kuwait to be with his family after separation from his wife which I gather was quite painful for him. He went to Jordan for three days and obtained an ex parte divorce from a Sharite [sic Shariite] Council. That divorce did not deal with any issues other than a divorce from Ms. Orabi based on the laws of Jordan. Other than that trip and occasional other trips, everyone in this family is substantially connected to Canada. I find that everyone in this family is domiciled in Canada for the purposes of this proceeding.

[3] The following facts appear from the affidavits. The parties were married on February 3, 1990 in Kuwait. Their children were born on December 22, 1991 in Kuwait and on June 15, 1995 in Colorado. They lived in Kuwait from their marriage until they moved to Arizona in September 1997. In December 1997 they returned to Kuwait. Several years later they decided to emigrate to Canada, applied for landed immigrant status, and in April, 2002 were admitted to Canada as landed immigrants. They separated in June 2002 and have lived separate since then.

[4] As found by Justice Coady, after the separation in 2002, Mr. El Qaoud travelled to Kuwait, then visited Jordan for three days. He then returned to Canada. During his visit to Jordan, he initiated a form of divorce proceeding in the Shariite (Canonical) Council. As a result of those proceedings, the Council issued a document entitled “Revocable Divorce Document”, dated October 29, 2002. This document’s translation, confirmed as accurate by Mr. El Qaoud’s affidavit, states:

Revocable Divorce Document

> In a Shariite (Canonical) Council held here I Sameeh Sulaiman Al Zoghbi, deputized Shariite Judge of Suwaileh (a district in Amman), being mentally competent and of legal age Bashar Kayed Mohammed El-Quaoud [sic] came to me. After having been identified to me as mentally competent by Ali Abdul Rahim Ali Al-Ibrahim and Rami Noman Ali Khalaf, he declared saying I would like to divorce my wife Nashwa Yousef Ramadan Orabi by my own choice, am not insane and enjoy full mental health. I say my wife and my legitimate spouse (with whom I had actual marital relation) Nashwa Yousef Ramadan Orabi is divorced from my matrimonial bond and free from my marital contract, this is a revocable divorce. I am requesting this to be registered and that she be informed. Therefore as it is been confirmed to me that they were actually married and there were marital relations between them according to his declaration and as per the confirmation by the above mentioned, I explained to him that a revocable divorce has been in effect by him on the above mentioned wife Nashwa. He has the right to return her to his matrimonial bond during the Iddah (a duration of 4 months and 10 days) unless it was preceded by two previous divorces. He has to register this officially as the Shariite (Canonical) Court. Her Iddah will be starting as of this date. It has been decided to advise her as per the common practice. Issued on 22/8/1423 corresponding to 29 Oct 2002.
>
> National No of the divorced
> 2000204765

[5] Justice Coady found that Mr. El Qaoud proceeded with the Jordanian divorce *ex parte*. There is evidence to support this finding. Ms. Orabi's affidavit says:

> I received absolutely no notice whatsoever of these proceedings. I received a copy of the alleged divorce decree by Federal Express in December, 2002.

[6] On December 11, 2002, Ms. Orabi began an interim application in the Supreme Court of Nova Scotia (Family Division). An interim *ex parte* order was granted on December 18, 2002 giving Ms. Orabi interim custody, care and control of the children. She filed an amended application dated October 28, 2003 under the *Maintenance and Custody Act*, R.S.N.S. 1989. c. 160, for custody, child support, spousal support and exclusive occupation of the residence. She commenced a further application under the *Matrimonial Property Act*, R.S.N.S. 1989, ch. 275 for an order giving her exclusive possession of the residence and claiming division of matrimonial property. These proceedings have continued

inter partes before Justice Williams of the Supreme Court (Family Division) and a decision is imminent.

[7] In February, 2004, Ms. Orabi applied to the Supreme Court (Family Division) for a declaration that the Jordanian Revocable Divorce Document not be recognized in Canada for purposes of determining the marital status of the parties.

[8] Justice Coady granted Ms. Orabi's application. Mr. El Qaoud appeals, and requests that this court deny the declaration which, in effect, would recognize the Jordanian divorce.

Standard of Review

[9] The standard of review is stated by *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 8, 10, 19-25, 31-36. Points of law, including those which are extractable from mixed questions of fact and law, are reviewed for correctness. Facts, including inferences and mixed questions of fact and law with no extractable error of law, are reviewed for palpable and overriding error. See also *Creager v. Provincial Dental Board*, 2005 NSCA 9 at para. 14.

Tests for Recognition of Foreign Divorce

[10] Justice Coady reasoned:

> [6] I find also that Section 22(1) of the *Divorce Act* does not apply as Mr. El Qaoud was not ordinarily a resident of Jordan for one year prior to the granting of that divorce. I find that the Jordanian divorce does not come within the common law exceptions that have been set forth by Mr. Julian [*sic* Julien] Payne in his family law treatise and as articulated at page 5 of Mr. Mitchell's legal memorandum.

[11] In my view, Justice Coady made no error of law and no palpable and overriding error of fact.

[12] Section 22 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) states:

> 22. (1) A divorce granted, on or after the coming into force of this *Act*, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all

> purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.
>
> (2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.
>
> (3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this *Act*.

[13] As neither spouse was ordinarily resident in Jordan for one year immediately preceding the commencement of the Jordanian proceeding, s. 22(1) does not apply. As Ms. Orabi has not been domiciled in Jordan, and the Jordanian divorce was not granted on the basis of her domicile in Jordan, s. 22(2) does not apply.

[14] Section 22(3) recognizes common law principles governing the recognition of foreign divorce decrees. Domicile was the traditional common law test. Following the decision of the House of Lords in *Indyka v. Indyka*, [1967] 2 All E.R. 689, Canadian courts added "real and substantial connection" as a basis for recognition: *Powell v. Cockburn* (1976), 68 D.L.R. (3d) 700 (S.C.C.) at 707-708; *Holub v. Holub* (1976), 71 D.L.R. (3d) 698 (M.C.A.)at 699-700. Later cases have stated subcategories to these two basic tests for recognition of a foreign divorce. These subcategories are summarized by Julien Payne, *Payne on Divorce*, 4th ed., p. 111:

> . . . Section 22(3) of the *Divorce Act* expressly preserves pre-existing judge made rules of law pertaining to the recognition of foreign divorces. It may be appropriate to summarize these rules. Canadian courts will recognize a foreign divorce: (i) where jurisdiction was assumed on the basis of the domicile of the spouses; (ii) where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties; (iii) where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings; (iv) where the circumstances in the foreign

> jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada; (v) where either the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted; and (vi) where the foreign divorce is recognized in another foreign jurisdiction with which the petitioner or respondent has a real and substantial connection.
>
> Although the aforementioned rules were established by decisions of the English courts, they have generally been followed by Canadian courts, at least in those provinces that adhere to the common law tradition.

To the same effect: Castel and Walker, *Canadian Conflict of Laws*, 5th ed., p. 17-6.

[15] Accepting, as I do, Justice Coady's findings of fact, the Jordanian divorce does not fit within any of Payne's subcategories:

> (i) **Domicile:** Neither party was ever domiciled in Jordan. Justice Coady found that the parties were domiciled in Canada.
>
> (ii) **Recognition by Place of Domicile:** The parties' domicile was Canada. Section 22 of the *Divorce Act* states the statutory basis for Canadian recognition for a foreign divorce. As discussed earlier, s-ss. (1) and (2) do not permit recognition of the Jordanian Divorce Document.
>
> (iii) **Corresponding Recognition tests:** There is no evidence of Jordanian jurisdictional rules. Foreign law is proven by expert evidence, of which there is none here. Section 3(1) of the *Divorce Act* states that a provincial court has jurisdiction to determine a divorce proceeding if either spouse was ordinarily resident in the province for at least one year immediately before the commencement of that proceeding. If Jordanian jurisdictional rules corresponded to those of Canada, then Mr. El Qaoud's three days' residence in Jordan would not have entitled the Jordanian tribunal to grant the divorce.
>
> (iv) **Canadian Jurisdiction:** Section 3(1) of the *Divorce Act* states that a court of a province has jurisdiction if either spouse was ordinarily resident in that province for at least one year immediately preceding the

commencement of the divorce proceeding. Three days' residence in Canada would not confer jurisdiction on a Canadian court.

(v) **Real and Substantial Connection to Jordan:** Justice Coady found:

> Other than that trip [Mr. El Qaoud's trip to Kuwait and Jordan in 2002] and occasional other trips, everyone in this family is substantially connected to Canada."

Castel and Walker, *Canadian Conflict of Laws*, 5th Edition, p. 17-7 states:

> In recent years, Canadian courts have been committed to the view that they will recognize foreign decrees of divorce where there existed some real and substantial connection between the petitioner or the respondent and the granting jurisdiction at the time of the commencement of the proceeding. The purpose of the rule is to avoid limping marriages. Whether there exists a real and substantial connection between the granting jurisdiction and either the petitioner or the respondent must be determined by the court upon an analysis of all the relevant facts.

An occasional trip, or a passage with temporary residence merely for the purpose of satisfying a foreign divorce competence requirement, is not a "real and substantial" connection. In *Indyka* (p. 731), the House of Lords worded the test to exclude artificial bases of jurisdiction. The only real and substantial connection found by Justice Coady was to Canada. Neither party had a real and substantial connection to Jordan. There was no palpable and overriding error in Justice Coady's findings of fact and no error of law in his definition of "real and substantial connection".

(vi) **Real and Substantial Connection to Kuwait:** Justice Coady made no finding that either party had a real and substantial connection to Kuwait. His comments, which I have quoted earlier, point to the conclusion that the only country to which the parties had a real and substantial connection was Canada. This conclusion involves no error of law or palpable and overriding error of fact.

Further, there is no admissible evidence that the law of Kuwait recognizes the Jordanian divorce. Foreign law must be proven by expert evidence. There is no expert evidence respecting the law of Kuwait. Mr. El Qaoud is

> not an expert in foreign law and his affidavit, stating that Kuwait would recognize the Jordanian divorce, is inadmissible to prove the law of Kuwait.

[16] Justice Coady correctly ruled that the tests for recognition of a foreign divorce do not allow the recognition of this Revocable Divorce Document. I would dismiss the appeal.

Rules of Natural Justice

[17] I would dismiss the appeal for a second and independent reason. *Castel*, p. 17-8 states:

> ***Grounds for Refusing to Recognize Foreign Divorces***
>
> Although the foreign court that granted the decree may be jurisdictionally competent in the eyes of Canadian law, recognition will be refused if the respondent did not receive notice of the proceeding, especially if fraud was present. The jurisdiction of the foreign court must not be established "through any flimsy residential means" and the petitioner must not have resorted to the foreign court for any fraudulent and improper reasons such as solely "for the purpose of obtaining a divorce". The foreign decree must not be contrary to Canadian public policy. Denial of natural justice may also be a reason for refusing recognition.

Payne, p. 112 states:

> A foreign divorce may also be denied recognition where principles of natural justice have been contravened.

To the same effect: *Indyka* at pp. 706, 715 and 731.

[18] Mr. El Qaoud knew where Ms. Orabi resided. Yet Mr. El Qaoud did not serve Ms. Orabi with notice of the divorce proceeding . This was not a case where the respondent was difficult to locate, avoiding service, or subject to an order for substituted service. The Jordanian tribunal granted the divorce apparently without requiring any proof that Ms. Orabi had been served with notice. In December, 2002, Ms. Orabi received her couriered divorce decree, issued by a tribunal before which there was no role for her participation, in a country to which she had no connection, after a proceeding of which she received no notice. This divorce decree would affect her status and corollary relief. This violates the principles of

natural justice. I would deny recognition of the Revocable Divorce Document on that ground.

[19] I would dismiss the appeal. Ms. Orabi did not seek costs on the appeal; I would make no order as to costs.

Fichaud, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.