Talaq procedure and the growing challenge of overseas divorces

By Khalda Wali, Principal Solicitor at LKW Solicitors

Khalda Wali is Principal Solicitor at LKW Solicitors, 414 Cathcart Road, Glasgow G42 7BZ

She can be contacted as follows:
email: khalda.wali@lkwsolicitors.co.uk
telephone: 0141 423 6999
fax – 0141 423 6444
website – www.lkwsolicitors.co.uk

Talaq is a form of an Islamic divorce which is effected unilaterally by the will of the husband alone. The recent ruling on 22 August 2017 from the Supreme Court of India is being hailed as a massive victory for women. The fact that Justice Joseph, one of the three judges, specifically set it aside on the basis that it is against the teachings of the Quran and therefore "un Islamic" makes it even more of a fundamental victory. The decision is set to have huge ramifications in many other countries and in local Muslim communities in Scotland who still continue to use this practice.

Talaq itself is not disputed as a valid method of divorce. However, what the judgement confirmed was that the way in which it was being practised in India was incorrect and wrong.

The practice allows a Muslim man to divorce his wife by saying the word 'talaq' to her three times. As different forms of communication have advanced so too did this practice evolve over the years. In recent times there have been cases of

talaq being given face to face, passed to the wife via her family members, communicated by letter, telephone, SMS, whatsapp or even over Skype or social media. It meant that as soon as the three words of talaq were said, whether in jest or in anger, the marriage was over. The legal and social implications were huge leaving the wife without any chance to challenge, object or even respond to her marriage being ended. She went from being married to being a divorcee in an instant.

The Supreme Court in India recognised that whilst the Quran allows a divorce by way of talaq, the practice of saying talaq three times at once was not the correct procedure and was therefore invalid. The talaq procedure set out by the Quran is very specific. It requires the husband to grant a first talaq or divorce and then wait for a period of three months (or three menstrual cycles) before a second talaq can be granted. The third and final talaq would be granted a further three months (or three menstrual cycles) later. It is only once the third and final talaq is granted that the marriage would then be over and the parties divorced. The reason for this procedure is twofold. Firstly, it gives both parties time to think and reflect on their decision. Should the parties reconcile at anytime before the third and final talaq is granted then the marriage would continue and the previous notices of talaq are considered to have become invalidated. The second purpose of this procedure is to allow parties to know if the wife is pregnant. A husband cannot give a pregnant wife notice of talaq and has to wait until after the child is born.

The practice of giving talaq three times at once is therefore not a valid practice and is not in accordance with the Quran. However, in many Muslim communities in Scotland, this practice still takes place and often places parties, especially wives in a dilemma – not knowing whether they remain properly married or not. There are many cases in Scotland where parties seek advice from their local mosques on this very issue. Islamic Councils throughout Scotland regularly advise and adjudicate on the validity of such divorces and counsel parties on whether they are in fact married under Islamic law or not.

Foreign divorces and recognition in Scotland

In an increasingly diverse and globalised jurisdiction more people and families move between countries. As family lawyers we are increasingly facing clients dealing with divorce forum shopping or clients who are already affected by overseas divorces and advising them on the validity and impact of same.

The first step is to satisfy ourselves that the divorce order is valid and legally recognised in the country from which it purports to have been granted. As the Indian judgement has shown this is subject to change as overseas laws change

and develop much the same as in Scotland. It therefore becomes necessary to liaise with family law practitioners in the foreign jurisdiction and obtain specific information from clients about the background to the divorce.

In a recent case in Glasgow, the Court dealt with a divorce from Dubai. The Courts in that jurisdiction recognise talaq and the correct procedure as set out in the Quran is also laid out and incorporated within their statutory legislation. The Dubai divorce order produced by the Defender noted that parties were divorced and even went as far as setting out some financial orders. However, the pursuing wife whom I was representing was outraged. She argued that the divorce order produced was only the first divorce and that the parties had reconciled and even went on to have another child together. The translated foreign court order did not specify clearly the fact that this was a "first divorce only". It was only after liaising direct with the Court in UAE and getting clarity of the divorce laws and procedures there, did we manage to obtain certainty that this was indeed a "first divorce". The case in Scotland eventually settled without proceeding to Proof and therefore no judgement was ever issued. However, it does serve to highlight the detailed examination which is sometimes necessary in respect of foreign divorces. It also highlights the important role which translation plays and the effect which can come from the omission or otherwise of a single word.

It is therefore hugely important to understand the importance of the overseas divorce process and procedure before we can advise clients fully as to how it is likely to impact on the Scottish courts here. No one expects us as Scottish lawyers to be giving advice on overseas laws but it is essential to obtain some understanding and advice on how the divorce laws in the relevant overseas country work - and if necessary to seek expert advice from an Advocate or practitioner from that jurisdiction. We are seeing an increasing number of foreign divorce cases from various countries in our small firm in Glasgow and no doubt this growing trend will be shared in many other firms throughout Scotland.

Once it is confirmed that the divorce order is legally valid in the country from where it purports to be, the next question is whether there is any scope to argue that the overseas divorce should not fall to be recognised by the Scottish courts. Section 51 of the Family Law Act 1986 allows a challenge on recognition in Scotland to be made on the grounds of lack of opportunity to participate in the proceedings.

In the case of AF v AF [2017] SC GLA 39, Sheriff Miller in Glasgow Sheriff Court heard arguments at a preliminary proof to determine the specific issue of whether or not the parties were already divorced in Pakistan. In that case, the defender argued that the Scottish court should recognise the validity of the decree of divorce which was issued by the High Court in Pakistan in June 2013. The

pursuer accepted that the divorce order from Pakistan was valid in that country, but argued that the Scottish court should refuse to recognise it in terms of section 51 of the Family Law Act 1986, on the grounds of lack of opportunity to participate in the proceedings. That would clear the way for him to then proceed with his claims for financial provision.

The relevant legislation

In his judgement, Sheriff Miller helpfully set out the legal framework which the Scottish court ought to have regard to.

Part II of the 1986 Act makes provision for the recognition in the United Kingdom of divorces and other matrimonial decrees granted elsewhere.
Section 46(1) Part II of the Family Law Act 1986 says:

> "The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognised if—
>
> (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and
>
> (b) at the relevant date either party to the marriage—
>
> (i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or
>
> (ii) was domiciled in that country; or
>
> (iii) was a national of that country."

That is not all because section 51(3) then goes on to state that recognition of validity may be refused if the divorce or other decree was obtained

> "(i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or
>
> (ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given."

There are other relevant provisions in UK law for the recognition of foreign divorces within the EU area. These are contained in the European Council Regulation No. 2201/2003 of 27th November 2003. Although of course the Regulation applies only to mutual recognition of judgments within the EU, it is

still very useful to be aware and have regard to case law on the Council Regulation when considering recognition under the 1986 Act.

In his own analysis, Sheriff Miller took note of Mr Justice Mostyns' discussion in the English case of *X* v *Y* EWHC 1462 (Fam). It was noted that there are two points that a party who opposes recognition must prove, and a further point that he or she must be able to counter if raised. Sheriff Miller summarised these as follows:-

Firstly that the decree overseas was obtained in default of any appearance in the proceedings by the opposing party. Secondly, that the opposing party did not receive intimation at such a time and in such a way as to enable him or her to defend the action. Exceptionally, this can be argued even where service has been effected in a way that is formally valid within the requirements of the relevant jurisdiction, but in a way that, when assessed against UK requirements for service, did not actually enable the opposing party to arrange to defend the action;

Finally, irrespective of these matters the judgment might still be recognised if it is found that the opposing party has in fact accepted it unequivocally. Accordingly, if put in issue by the party supporting recognition, the opposing party must be prepared to persuade the court otherwise. Sheriff Miller went on to clarify that mere failure to commence proceedings to challenge the judgment (ie to lodge an appeal or seek reduction of the Decree in the overseas jurisdiction), for instance, would not suffice to demonstrate unequivocal acceptance.

In AF v AF [2017] SC GLA 39, the Court heard evidence from the Pakistani Advocate who dealt with the divorce in Pakistan as to the procedure followed to effect service. This was compared with the procedure which would take place in Scotland if an action for divorce was raised here. The critical factor for the court was whether the procedure for service in Pakistan was in any way analogous to the Scottish process.

In that case, the husband was known by the wife to be living in the UK when she raised proceedings in Pakistan. The Advocate from Pakistan confirmed that the divorce action in Pakistan was served locally at an address in Pakistan (being the ancestral family home of the husband) and via a local newspaper. This satisfied the service requirements for the Court in Pakistan. Against that background and considering his assessment of the credibility of the parties, Sheriff Miller found that the tests for refusal of recognition had been met.

On the first test, it was clear that the foreign decree had been obtained in default of any appearance by the pursuer. On the second test, although the legal requirements for service in Pakistan were met, the fact the pursuer received no

proven intimation of the proceedings as he would have done had the action been raised in Scotland, this also then fell short and therefore met the test necessary.

Taking into account the evidence before him, Sheriff Miller noted that there appeared to be a "highly significant difference" between (1) the requirements for effective intimation of court proceedings and (2) the requirement for proof of service applicable to the defender's action in Pakistan and those applicable to consistorial actions in Scotland.

Accordingly, in terms of section 51(3) of the 1986 Act, Sheriff Miller refused to recognise the decree of divorce granted in Islamabad as valid. This then cleared the way for the husband to continue his divorce action in Scotland and pursue his claims for financial provision.

The case is a useful reminder as to the issues and factors which the Scottish courts need to consider when dealing with foreign court judgements and foreign divorce decrees. A decision on the validity of these foreign divorce orders have huge implications for parties, and in turn, can impact the validity of Scottish proceedings. These cases also highlight the importance of understanding different types of divorces and being aware of the changing legal landscape not just in Scotland but in jurisdictions throughout the world. Communication and reliance on foreign language interpreters and translators is something we are all aware of but the ever increasing role these services are playing in our courts and tribunals is also something we need to appreciate.

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