RECOGNITION OF FOREIGN DIVORCES UNDER S. 95 (5) OF THE COMMONWEALTH MATRIMONIAL CAUSES ACT

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INTRODUCTION

Recognition of foreign divorces in Australia is now solely regulated by statute. S.95 of the Commonwealth Matrimonial Causes Act provides for the recognition of decrees of the country of the parties' domicil,[1] decrees of the country of a wife's statutory domicil[2] and decrees of countries which are recognized as valid by the country of the parties' domicil.[3] Although each of these subsections of s.95 gives rise to problems of interpretation, by far the biggest problems arise in interpreting s.95 (5) of the Act which provides:

> "(5) Any dissolution of a marriage that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of this section applies shall be recognized as valid in Australia, and the operation of this subsection shall not be limited by any implication from those provisions."

This represents an attempt to devise a "catch-all" subsection to preserve the recognition of foreign divorce decrees which, though not falling within subsections 2-4, were entitled to recognition under the common law rules of the conflict of laws.

INDYKA v. INDYKA

In any discussion of s.95(5) an understanding of the case of *Indyka v. Indyka*[4] is vital. In that case the parties were married in 1938 in Czechoslovakia in which country the parties were domiciled. Both parties were Czechoslovakian citizens. When Czechoslovakia was invaded in 1938 the husband enlisted and eventually joined the forces of the Polish Government-in-exile. In 1946 the husband was discharged

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1 S.95(2). This gives statutory authority to the decision in *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.

2 S.95(3) (a) & (b). A wife will have a statutory or deemed domicil in a country (a) if she has been deserted in a foreign country in which she was domiciled either immediately before the desertion or before her marriage, or (b) if the wife at the time of the institution of proceedings in the foreign country had been resident in the foreign country for 3 years immediately prior to the suit. This gives effect to the decision in *Travers* v. *Holley* [1953] p. 246.

3 S.95(4). This gives statutory authority to the decision in *Armitage* v. *Att. Gen.* [1906] p. 135.

4 [1967] 2 All E.R. 689. For a valuable discussion of this case see 9 *Malaya Law Review* 202 Professor F. R. Beasley.

and elected to settle in England and completely lost contact with his wife, after she declined to join him in England. In 1949 the husband heard through relatives that his wife had obtained a divorce in Czechoslovakia on the ground of the deep disruption in the marital relations for which the husband was alleged to be responsible. In 1959 the husband married an English woman but this marriage was also a failure, and in 1964 his wife petitioned for divorce on the ground of her husband's cruelty. At this stage the husband cross-petitioned for a decree of nullity on the ground that the Czechoslovakian decree of divorce was not entitled to recognition in England and that therefore the second marriage was void.

Eventually, after protracted litigation, it was held in the House of Lords that the Czechoslovakian divorce was valid, Lord Reid holding that the Czechoslovakian decree was entitled to recognition because the parties had had their last matrimonial home in that country.[5] Lord Morris suggested recognition should be granted either because the wife had been resident in Czechoslovakia for three years prior to the petition or because the wife was a Czechoslovakian national and had a substantial connection with the courts of that country.[6] Lord Pearce held that the decree ought to be recognized because by virtue of the parties' nationality and other matters Czechoslovakia was the predominant country with respect to the parties.[7] Lord Pearce in general was prepared to extend recognition of foreign decrees subject only to a public policy restriction on the recognition of "purveyed divorces" where divorce is available on flimsy grounds after a very short residential period.[8] Lord Wilberforce[9] suggested that whenever a substantial connection, whether arising from the length or quality of residence or nationality, existed between a petitioning wife and the foreign courts pronouncing the decree, the English courts should recognize the decree. Lord Pearson's reasoning was broadly similar to Lord Morris and Lord Wilberforce.[10]

The House of Lords might have decided the case on the simple ground that there was insufficient evidence to support the husband's contention that he had decided to make his permanent home in Englan as early as 1946.[11] Certainly the loss of only *one* letter by Mr Indyka, one that might have been vital in establishing his state of mind as to his

5 Ibid p. 703.
6 Ibid p. 708.
7 Ibid p. 718.
8 Ibid p. 715/6.
9 Ibid p. 727.
10 Ibid p. 731/2.
11 However there is something to be said for W. W. Cook's view in 'The Logical & Legal Basis of the Conflict of Laws' p. 194, that it is important to define not merely domicil but the purpose for which it is necessary to define domicil. Certainly cases like *May* v. *May* [1943] 2 All E.R. 146, *Cruh* v. *Cruh* [1945] 2 All E.R. 545 and *Boldrini* v. *Boldrini* 146 L.T. 121 support the view that it may be easier to prove a change of domicil in matrimonial cases than in other proceedings.

future movements in 1946, seemed suspicious.[12] In spite of statements by Lord Denning[13] in the Court of Appeal that it was not open for the Court to change Latey J.'s finding that Mr. Indyka acquired an English domicil in 1946 prior to the Czechoslovakian divorce, this seems contrary to decisions like *Winans v. Att. Gen.*[14] which was finally decided in the House of Lords by a 3-2 majority on the correct inferences to be drawn from the facts of Mr Winans' life in order to determine his domicil. In the end it appears that the House of Lords was looking for an opportunity of both mitigating the hardship arising from the rigidity of the doctrine of domicil, the most important common law connecting factor in recognition of foreign divorces, whilst at the same time recognising that many foreign countries took jurisdiction in divorce on the ground of nationality rather than domicil. This desire to prevent 'limping marriages', may have resulted in subsequent cases stretching the original principle enunciated in *Indyka* far beyond that expected by the House of Lords. This may have prompted the recent English Law Commission enquiry into Jurisdiction in Matrimonial Causes.[15]

SUBSEQUENT ENGLISH FIRST INSTANCE DECISIONS

The true ratio of *Indyka* has only become clear in subsequent cases. In *Angelo v. Angelo*[16] Ormrod J. recognized a divorce granted by the German courts of which country the wife was a citizen and in which she had lived prior to her marriage and for the short time after the marriage broke down before she filed her divorce petition. In *Peters* v. *Peters*[17] it was held that there was no sufficient connection between the courts pronouncing the decree and the petitioner where a wife currently with a British nationality and domicil went back to Yugoslavia, where she had been married and of which country at the time of marriage she had been a citizen for the purpose of obtaining a divorce. It was clear that the wife intended to return to England and continue living there after the divorce.

In *Brown* v. *Brown* [18] a husband domiciled in England married in 1957 in Sweden, a woman of Swedish nationality. After living

12 This is referred to only in the All England Report of the case in the Court of Appeal [1966] 3 All E.R. 584 letter E.

13 [1966] 3 All E.R. 585 letter C.

14 See [1940] A.C. 287.

15 See Working Paper No. 28. This is amusingly examined in 120 N.L.J. 399, particularly in relation to the proposed new concept of "juriscentre" as a connecting factor. This is not, however, free from difficulty as the Law Commission and the New Law Journal point out even though it has something in common with earlier Scottish law concept 'of the home of the marriage'. The New Law Journal posed the case of "an Englishman who marries a Greek girl in Turkey but never lives with her. Where, then, is the home of their marriage? We leave this question with our readers; it may serve to pass a wet Sunday. How, one wonders, did the Scottish courts manage? Perhaps the Scots, with their well known thrift, never indulged in the wastefulness of marrying a Greek girl and then never living with her."

16 [1967] 3 All E.R. 314.

17 [1967] 3 All E.R. 318.

18 [1968] 2 W.L.R. 969.

together in Holland and Switzerland during which time the husband retained his English domicil, the wife returned to Sweden alone in March 1963. The following year she obtained in Sweden a decree of judicial separation and in June 1966 she obtained a decree of divorce on the ground of irreconcilable incompatability. Cumming-Bruce J. held the Swedish decree was entitled to recognition (a) because the wife had been resident in Sweden for 3 years prior to the decree of divorce and the English Courts, under the Rule in *Travers* v. *Holley*, would recognise in a foreign court a jurisdiction that they themselves claimed and (b) it had been shown that the wife at the time of the divorce in Sweden had a real and substantial connection between herself and that country and that connection had persisted to the time of the current proceedings.

Neither *Angelo* nor *Peters* involved an extension of the forum's rules of recognition to cover petitions by husbands who alleged that there was a real and substantial connection between themselves and the foreign country from whose courts they had obtained a decree.[19] There were dicta in *Indyka* which suggested that it would be possible to extend rules of recognition to favour a wife without extending a similar rule to husbands. Lord Wilberforce said[20]:—

> "If it be said that it is illogical, or asymmetrical, to sanction a breach in the domicil rule in favour of wives and not in favour of husbands, then the answer must be that experience has shown (and has so convinced our own and other legislatures) that it is the wife who requires this mitigation, that the nature of what is required has been clearly shown, and that (with the possible exception of the case where he is respondent to a wife petitioner and desires to cross petition) no corresponding case has been shown to exist as regards the husband. He retains his domicil and the right to change it. All that this development does is remove an inequitable inequality arising from the anachronistic dependence of the wife for her domicil on her husband."

The matter was resolved in a series of first instance English decisions which also investigated a further point, namely whether it was sufficient to show a substantial connection between the respondent rather than the petitioner and the court of the country pronouncing the decree. In the first case of *Mather* v. *Mahoney*[21] Payne J. approved a "purveyed" or "quickie" divorce decree granted to a wife on the ground that, though the wife had no real and substantial connection with Nevada, it was enough if the Nevada decree was recognized in Pennsylvania with which, by virtue of residence, the wife did have

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19 The cases have not so far involved the recognition of non judicial divorces, though under s. 95(8) such decrees would be entitled to recognition.

20 [1967] 2 All E.R. 726/7.

21 This decision seems inconsistent with the earlier decision in *Mountbatten* v. *Mountbatten* [1959] 1 All E.R. 99 which was thought by the House of Lords in *Indyka* to be correctly decided (see [1967] 2 All E.R. at 717).

a substantial connection. This case has been highly criticised[22] as have *Blair* v. *Blair*[23] and *Mayfield* v. *Mayfield.*[24] In the former case an Englishman married a Norwegian girl in 1957, settled in Norway and acquired a domicil of choice there. In 1959 he had to return to England for training but intended to return to Norway when his training was completed. In 1963, however, his wife informed him that she had committed adultery and so the husband, though he had resumed his Enlish domicil, took proceedings through a Norwegian lawyer in Norway and obtained a divorce. At the time of the proceedings the husband had no real or substantial connection with Norway by virtue of domicil, residence or nationality. Nevertheless, recognition was granted as it was in *Mayfield*, where a British husband, after the breakdown of the marriage took proceedings in Germany to have the marriage dissolved. The respondent had real and substantial connection with Germany by virtue of her nationality and residence and Sir Jocelyn Simon said:

> "If the wife had brought the proceedings and had secured a decree there can be no question in my view that the case would be covered by *Indyka* v. *Indyka* and that we should recognise the German decree as valid to dissolve the marriage. Is it, then, a material distinction that the proceedings were brought by the husband who had no close or real or substantial connection with Germany and not by the wife? In my view the difference is not material. What is the material fact is that the German decree operated on the status of the wife who had such close, substantial connection. If it operated on the status of the wife and should be recognized as such, for the reasons I have ventured to give in *Lepre* v. *Lepre* 1963 2 All E.R. 49, at pp. 55-57, we should recognize the decree as also operating on the status of the husband."[25]

There is, however, one decision which contrasts strongly with *Blair* and *Mayfield* and that is *Tijanic* v. *Tijanic.*[26] In that case two Yugoslavian parties married in Yugoslavia in 1934. The husband served with the Royal Yugoslavian Army and the British forces during the war but after the war he considered that it would be unsafe to return to Yugoslavia and he settled instead in England, and in due course acquired both an English domicil of choice and British nationality. The wife declined her husband's repeated requests to join him and eventually in 1960 the husband initiated divorce proceedings in Yugoslavia under provisions whereby a long separation of the parties could lead, if both parties consented, to a divorce. In October 1961 a decree of divorce was pronounced by the Yugoslav courts.

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22 See 20 N.I.L.Q. 169. Surely this was just the sort of decree that Lord Pearce in *Indyka* did not intend to recognise.
23 [1968] 3 All E.R. 639.
24 [1969] 2 All E.R. 219.
25 [1969] 2 All E.R. 219 at 220.
26 [1968] P. 181.

The husband took proceedings in England for either a declaration that the Yugoslav decree was entitled to recognition or that he was entitled to an English decree of divorce on the ground of the wife's desertion. Sir Jocelyn Simon, who was later involved in *Mayfield*, decided that the Yugoslav decree was entitled to recognition because the wife, who clearly had a substantial connection with Yugoslavia had joined in the initiating of the divorce proceedings and could be regarded as a petitioner by the English courts:—

> "Whatever the formal position may have been, the reality of the proceedings in Yugoslavia in 1961 was that the wife joined with the husband in seeking relief. Moreover, under the article under which the proceedings were taken, the decree is granted to both parties, whereas if the decree is on the ground of a matrimonial offence it is granted only to the aggrieved party. It follows that in so far as the wife joined in the application and the decree was granted to her, it was granted to a woman who had been for the whole of her life within the jurisdiction of the court concerned".[27]

This case seems to turn solely on the reality and substantiality of the link between petitioner rather than the respondent and the courts of the country pronouncing the decree.

The most recent case involving an application of the principles enunciated in *Indyka* is *Turczak* v. *Turczak*.[28] In that case the parties, who were Polish by origin, married in that country in 1939. At the end of the war the wife remained in Poland but the husband settled in England and in due course acquired an English domicil of choice and British nationality. When the wife declined her husband's request that he divorce her, the husband instituted his own proceedings for divorce in Poland. A decree nisi was pronounced in March 1967 despite a subsequent appeal by the wife. In May, after her unsuccessful appeal in Poland against the divorce, the wife, through agents, instituted proceedings in the English High Court against her husband under s.22 of the Matrimonial Causes Act 1965[29] alleging that he had wilfully neglected to maintain her. Unfortunately, the wife's application was not heard by Lloyd-Jones J. until March 1969, by which time the Polish decree nisi had become absolute;[30] Lloyd-Jones held (1) that the Polish decree was entitled to recognition and (2)

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27 [1968] P. 181 at 184.

28 [1969] 3 All E.R. 317 noted by Karsten in 33 M.L.R. 205.

29 "22.—(1) Where—
(a) a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or any child to whom this subsection applies; and
(b) the court would have jurisdiction to entertain proceedings by the wife for judicial separation,
then, without prejudice to the provisions of section 35 (2) of this Act, the court may on the application of the wife order the husband to make to her such periodical payments as may be just.

30 It became absolute in October 1967.

that since at the time of the hearing the parties were no longer married, no order under s.22 could be made.

As Karsten rightly points out the effect of the decision is to deprive a wife, who first applies to an English Court after a foreign divorce, of any right to maintenance. Anomalously, because of the doctrine of severable divorce, maintenance orders obtained before a foreign divorce are unaffected.[31] Karsten properly points out there is a need, whilst recognising foreign divorces out of a desire to prevent "limping marriages", to allow applications for maintenance by former spouses in order to limit the number of destitute divorced wives.

THE AUSTRALIAN POSITION

The only Australian cases in which *Indyka* has been mentioned are *Alexandrov* v. *Alexandrov*[32] and *Norman* v. *Norman* (No. 2).[33] In the first case Mitchell J. was able to recognise a Bulgarian divorce on the ground that the wife was possessed of a statutory domicil in Bulgaria within the meaning of s.95(3)(b) of the Matrimonial Causes Act. Even though the Bulgarian decree preceded the introduction of the Commonwealth Matrimonial Causes Act, s.95(8) which states:—

> "Sub-sections (2) to (7) of this section apply in relation to dissolutions and annulments effected, whether the decree, legislation or otherwise, before or after the commencement of this Act."

gave retroactive recognition to the decree.

This being so, it was unnecessary for Mitchell J. to consider the application of the principles enunciated in *Indyka* to the facts of the instant case. Earlier in the decision, however, Mitchell J. had formulated what she considered to be the 'ratio decidendi' of *Indyka*:—[34]

> "The House of Lords in *Indyka* v. *Indyka* has recently reviewed the question of recognition of foreign decrees of dissolution of marriage. In that case the nationality of the claimant wife was the basis upon which the court in Czechoslovakia assumed jurisdiction. In the opinion of the majority of their Lordships it was sufficient for recognition of the decree that there was a substantial connexion between the claimant wife and Czechoslovakia where she had lived always, married and had her matrimonial home, and that she had Czechoslovakian nationality and her husband either had or had had Czechoslovakian nationality."

After having elaborated on the reasoning of their Lordships in *Indyka* Mitchell J. somewhat guardedly concluded that:—

> "There may, however, be some doubt as to whether that approach is available to this Court. Having regard to the view which I

31 See *Wood* v. *Wood* [1957] P. 254.
32 12 F.L.R. 360.
33 12 F.L.R. 39.
34 12 F.L.R. 365.

take of the applicability of s.95 of the Matrimonial Causes Act 1959-1966 and the facts before me, it becomes unnecessary for me to decide this question."

In *Norman* v. *Norman* (No. 2) the Court had to consider whether an English divorce decree was entitled to recognition where jurisdiction had been taken on grounds substantially similar to those entitling the decree to recognition under s.95(3) (b) of the Commonwealth Matrimonial Causes Act. The Court held that the mere fact that an English Court had taken jurisdiction on the ground of the wife's ordinary residence in England for 3 years prior to the suit did not preclude the Court from testing by *Australian law* whether the wife was really resident in England for the necessary period before recognising the decree under s.95(3) (b) of the Matrimonial Causes Act. Moreover, the Court held that in so far as it was alleged that fraud had been practised by the wife on the English Court in misleading the English Court into asserting a jurisdiction which it would not otherwise have claimed, the question of fraud could be investigated by the Australian Court notwithstanding that the respondent had chosen to raise the alleged fraud as to jurisdiction in proceedings in the English Court of Appeal and that the Court had held against the husband's contentions.

Fox J. did however suggest by his passing reference to *Indyka* that he thought that the principles of that case were incorporated into s.95(5),[35] but since a detailed discussion of the limitations to be placed on *Indyka* was unnecessary to the case in hand nothing of further value can be derived from this case.

It is uncertain how far the English first instance interpretations of *Indyka* v. *Indyka* will be acceptable in Australia. If the decision of the Victorian Supreme Court in *Fenton* v. *Fenton*[36] refusing to accept the introduction of the *Rule in Travers* v. *Holley,* and the guarded language of Mitchell J. in *Alexandrov* is indicative of the conservatism of Australian judges and of their refusal to unduly liberalise the rules of recognition of foreign divorces, the Australian Courts may be unwilling to follow cases like *Blair* and *Mayfield.*

It is possible that the Australian Courts may firstly restrict the *Indyka* principle to foreign divorce decrees obtained by wives. Secondly the "real and substantial connection" required by the Australian Courts between the foreign parties and the courts pronouncing the decree would have to exist between the *petitioner* and the courts of

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35 See for instance P. 44. This may allay fears voiced in Nygh's "Conflict of Laws in Australia" P. 435 that s.95(5) may not incorporate the *ratio* of *Indyka.* If Nygh's fears are correct, s.95(5) is irrelevant in recognition of foreign divorces, though it might be relevant to the recognition of foreign nullity decrees where the *respondent* was domiciled or resident in the foreign country whose courts pronounced the decree, or, in the case of a *void* marriage, where the foreign country pronouncing the nullity decree had been the *lex loci celebrationis* of the marriage. *(Merker* v. *Merker)* [1962] 3 All E.R. 928.

36 [1957] V.R. 17.

the country pronouncing the decree. Thirdly in so far as *Mather* v. *Mahoney* permitted the recognition of so called "quickie" divorces it may not be followed.

If the *Indyka* principle is introduced into Australian law it may be necessary to preserve the right of a former wife, even after a valid foreign divorce, to obtain a maintenance order in Australia. Under the Maintenance Acts[37] there is a requirement that the complainant and defendant be married. The exception permitted under the Tasmanian Maintenance Act[38] to permit applications for maintenance by *de facto* wives seems scarcely apt to cover applications by former wives. The position in Australia seems similar to that revealed by the English cases of *Wood* v. *Wood* and *Turczak* v. *Turczak* in that a foreign divorce decree will not affect an existing Australian Maintenance Order, but it will prevent the making of a subsequent Australian State Maintenance Order.[39] Moreover s.84 of the Commonwealth Matrimonial causes Act which provides maintenance by way of ancillary relief to a matrimonial cause seems inapplicable to cases where a foreign divorce is recognised under s.95 of the same Act. The claimant would no longer be a 'party to a marriage' as required by s.84(1), where a foreign divorce decree was denied recognition under s.95 of the Commonwealth Act maintenance, by way of ancillary relief to a matrimonial cause might be available.

The interpretation of "real and substantial" connection may be restricted to cases (a) where a wife is a national of the country whose courts pronounced the decree and has a substantial period of residence in the country where the decree was pronounced or (b) in which, though the wife is not a national of the country whose courts pronounced the decree, she has a substantial connection in terms of residence with the country whose courts pronounce the decree. The residence can take the form of (i) substantial residence in the foreign country prior to the marriage, plus a further lesser period of residence prior to the divorce if it seems likely that the residence will not be terminated by wife on obtaining the divorce decree, (ii) a substantial period of residence in the foreign country during the subsistence of the marriage, (iii) a substantial period of residence in the foreign country prior to the divorce, even if the wife did not live in the foreign country prior to the breakdown of her marriage. In this latter connection the period of residence need not be for the three year period necessary to comply with s.95 (3).[40]

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37 See for example Victorian Maintenance Act 1965 s. 6, Maintenance Act (Tas.) 1967 s. 11.

38 Maintenance Act (Tas.) 1967 s. 16.

39 S.8(4) Commonwealth Matrimonial Causes Act states that an Australian (but by implication not a foreign) divorce decree has the effect of terminating a Maintenance Order granted under the State Acts.

40 See the case of *Welsby* v. *Welsby* [1970] 2 All E.R. 467 where Cairns J. recognised a divorce decree of the Courts of Washington D.C., the wife had been resident for 2½ years after the marriage broke down in Washington and seemed likely to continue living there.

Nationality per se ought never to be enough to amount to a substantial connection as the following example may show.

> Suppose a wife migrates from Europe and marries an Australian, and settles in Australia. Suppose she takes out Australian nationality but is allowed to retain her European nationality. If the marriage broke down after 15 years, could the wife on a 1 month tour of Europe obtain a decree of divorce from the courts of her European nationality, and then come back to Australia expecting the divorce to be recognized, leaving herself free to take another Australian husband?

Whilst some liberalisation of the rules of recognition of foreign divorces is desirable in an attempt to avoid "limping marriages" recognition of foreign divorces is not to be achieved at any price. The public policy of the forum is an important factor[41] and in cases like the hypothetical example above policy considerations might well demand the non-recognition of the foreign divorce decree.

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41 See *Formosa* v. *Formosa* [1963] P. 259.