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Recognition of Overseas Unilateral Divorce After *K v K*: the Implications for Divorced Spouses' and Child Dependants' Financial Support, State Welfare and Public Policy

Keith Puttick

Introduction

It seems easier than ever before for a spouse in a UK-based marriage to leave the country, divorce his wife, and later gain recognition for that divorce from a UK court – usually in time to trump the wife's later petition for divorce and ancillary relief. This in itself is problematic enough, given that this may oust the divorced spouse's (and children's) ability to look to the courts for a redistribution of property, and maintenance. For some spouses and family dependants, however, notably those who are not UK or EU nationals, their position can be considerably worse – particularly if their ability to access State support is barred out, as it often is in the reception phase following arrival in the UK.

Needless to say, the apparent unfairness and inequalities involved, especially in cases where the wife has had no notice of the divorce proceedings, no opportunity to participate, and no financial provision (either for herself, children or other household dependants), and what to all intents and purposes now seems to be an alternative system of divorce in the UK, prompts a lot of angry commentators to demand the introduction of legislation to reform what looks like a thoroughly unjust blight on our Family Law system. However, there are some important competing considerations which support a rather more measured and generous assessment. In particular, by recognising such divorces our courts are maintaining “comity” with the jurisdiction where such divorces take place. In doing so, the argument runs, they are also catering for the needs and expectations of those who may be based in the UK but who move freely between the UK and that country where such unilateral divorces are readily available – and who may well empathise more closely with the standards and values of the system that supports unilateral

divorce. Furthermore, in an era which advocates respect for diversity, and other cultures' way of doing things, the unilateral divorce system merits respect, even if it may not exactly accord with the UK's mainstream standards and values in relation to divorce – for example in relation to matters like procedural fairness, distributive justice, and the need for both parties to contribute to the needs of the post-divorce reconstituted family in line with the guidance provided by the House of Lords in the *Miller* case, and Baroness Hale's "rationales" (considered below). Apart from anything else, says this discourse, the alternatives offered by unilateral divorce are deeply rooted in the belief systems and culture of a sizeable minority of UK citizens. As a result, the argument runs, the faith communities that adhere to this form of divorce are entitled to complain about any unwelcome intervention by the State in what is, essentially, a private or "faith community" matter. That is a matter that is now, in some respects, underpinned by Convention rights (including ECHR art 9, as it protects communities' right to protect systems of divorce that accord with their religion, and manifestations of religious custom and practice).

This article looks at these points, and related "welfare" aspects, including the operation of benefits, tax credits, and community care systems that assist divorced wives and family members after such divorces. Again, this is another feature of the system that seems to be attracting a lot of concern – especially from critics who say that all this does is facilitate unilateral divorce, and paper over the cracks in what is essentially a defective and unjustifiable recognition system. The article considers this, and in doing so also considers some of the significant difficulties that are experienced by some divorced spouses and child dependants (and other dependent family and extended family members of the wife's household) who may have little choice but to look to the welfare system as their only means of post-divorce support. The system offers a particularly important lifeline to those who may find it difficult to get financial provision under Part III of the Matrimonial and Family Proceedings Act 1984 (the MFPA) following recognition of their husbands' unilateral divorce. The scale of that problem is not known, but it is likely that even the Child Support Agency, when it was functioning at its very worst (with a non-compliance rate of 95%) probably outperformed the MFPA. In practice, many UK-based spouses who find themselves divorced, but without any support from their former spouses, have little choice but to turn to the benefits system for help. The problem, though, is that many of them may well find it difficult to access State welfare support – particularly if they do not have the requisite immigration status, including the "right to reside", that is now the main gateway to most forms of State benefits, local authority community care and

housing services (and which, if they had it, would also enable them to work in the UK legally and be independent of the State welfare system). There are, for example, significant conditions to be met before a right to reside that may have been gained as a spouse or family member of a UK or EEA national can be retained following unilateral divorce (a matter discussed later when addressing the scope for a post-divorce “retained” or “derived” right to reside, and discussing cases like *Ibrahim*). In particular, divorced spouses may not satisfy the requirements for a retained right to reside if the divorce (or separation, together with the spouse’s departure from the country) has come during the one-year reception phase after arrival (and therefore the claimant cannot meet the requirement for year’s residence with the spouse following arrival). Claimants in this group who are not UK or EEA nationals may also encounter difficulties in the form of barriers like the Immigration and Asylum Act 1999, s 115, which bars out claimants who are “subject to immigration control” – something highlighted by cases like *Khan*. Again, typically, the problem arises in the reception phase following arrival, when the precise migration status is unclear; or is subject to a restriction on accessing public funds.

To understand the difficulties of such groups, though, the story begins not with a discussion of the welfare system but with the way our judges are now dealing with “recognition” requests under the legislation concerned, which is the Family Law Act 1986, Part II.

Recognition of Overseas Unilateral Divorce

Case-law in the last ten years indicates that our courts are increasingly ready and willing to recognise overseas unilateral divorces. This has been helped by the development of a number of important principles and judicial perceptions of the factors that should inform recognition decisions. The principles they deploy are, for the most part, an overlay on the statutory scheme in the FLA, and the original scheme that it replaced, which was the Recognition of Divorces and Legal Separations Act 1971. As already indicated, the need to maintain “comity” with jurisdictions that permit unilateral divorce features strongly. Comity is well established in the case-law, and is referred to in leading commentaries like *Dicey Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 2008, 14th ed). More recently, as a judicial discourse, it has been taken much further, extending the parameters of both the comity and “respect” agendas significantly – for example to bring into account the need for respect for the standards that underpin and reinforce the other jurisdiction’s laws,

customs and practices. Implicit in this is the courts' recognition of the importance of respecting the standards with which an increasingly large proportion of UK citizens may empathise. This is difficult and contentious territory, nevertheless it is a new and emerging track that was highlighted in the reasoning in decisions like *El Fadl v El Fadl* [2000] 1 FLR 175 and, more recently, *K v K* [2007] EWHC 2945; [2008] Fam Law 404 (sub nom *H v H (Talaq Divorce)*). Although it may not always be clear *whose* standards, exactly, are being supported (it is unlikely to be those of wives and family members affected by unilateral divorce, or the women and families who feel they may be at risk from such unilateral action in the future). Nevertheless, it is now undoubtedly an important new strand in our judges' thinking, and one that is clearly very potent in its effects. So much so that even in cases where a wife may have had no notice of the divorce, and no involvement in the proceedings involved, it seems to be capable of overriding such considerations, and reinforces the court's willingness to accord recognition to that divorce. In some cases the results appear to be spectacularly unjust, barring out the wife's UK petition for divorce as well as attempts to get financial provision dealt with as part of those divorce proceedings.

As a result of cases like *El Fadl*, a case in which recognition was accorded (despite the wife in that case only just learning that she had been divorced 16 years earlier), UK-based wives will now find it increasingly difficult to resist recognition by our courts of their husbands' unilateral divorce. As a corollary, we can expect to see a lot more cases where those wives' UK petitions for divorce and ancillary relief are blocked in the way that happened in *El Fadl* and *K v K*. This raises some complex issues for policy-makers, especially given that what the overseas unilateral divorce now offers is an alternative, secondary system of divorce, and one that operates in tandem with the usual court-based system. It is also potentially far more advantageous to a party to a UK-based marriage who is eligible to use it, and who wants to do so. It is perhaps no great surprise that a number of important and influential organisations since cases like *El Fadl* now publicise the overseas route to divorce as an option for some UK-based spouses who are in UK-based marriages and, indeed, extol its virtues and advantages.

Despite such concerns from the system's critics, it is important to give proper consideration to the judicial principles and other competing discourses that support this route to divorce. First and foremost, the comity point. Mr Justice Hughes put it this way in *El Fadl*:

"I am satisfied that however much a unilateral divorce without notice may offend English sensibilities, comity between nations and belief systems

requires at least this much, that one country should accept the conscientiously held but very different standards of another, where they are applied to those who are domiciled in it (p. 190) ...”

English sensibilities are not the full story, though. In the bigger picture, these observations run much deeper, and raise other issues around perceived differences in “standards”, to use the judge’s word. Closely allied to this is the principle of non-intervention by the State in what some sections of the community (and commentators) regard as predominantly “private” or faith community matters. The argument runs that the apparent incompatibility with the UK’s “standards” should not be a sufficient basis for refusing recognition – even in cases where a wife has been completely excluded from the divorce proceedings.

Unlike the UK, however, most other jurisdictions appear to be rather more circumspect about some aspects of “non-intervention” discourse.

Non-Intervention v Equality, Fairness and Public Interest Discourses

The non-intervention argument is a potent one, and particularly so in an era in which the rights of faith communities, and of individuals to practice their faith, quite rightly enjoy protection – and may, indeed, in some respects be reinforced by ECHR art 9. Nevertheless, despite its increasing importance in the UK context, it is a discourse that receives far less deference in the rest of the EU, and most other jurisdictions. This is particularly evident when it has to be balanced against the rights of others who are affected by matters like divorce. For present purposes that means, of course, those of the other spouse, the needs of the children, and the community’s. After all, it is the taxpayer and the wider community that funds the State welfare system and, in effect, meets the costs and on-costs of the actions of the divorcing spouse; and mitigates the worst financial effects of this kind of divorce. In Canada, the Supreme Court in *Bruker v Marcovitz* (2007) SCC 54 (14 December 2007), albeit with several powerful dissenting judgments, insisted that the important principle of non-intervention in religious groups’ affairs was not so important that it prevented the courts stepping in to protect a wife’s basic rights. In that case the issue focused on a wife’s ability to obtain a divorce under an agreement freely entered into by the husband, and which was needed to enable her to complete the divorce process, be free of him, and remarry. As Mr Justice Abella put it for the majority, “the right to have differences protected does not mean that those differences are always

hegemonic”, and “not all differences are compatible with Canada’s fundamental values”. He accepted that determining when the assertion of a right based on difference must yield to a more pressing public interest was a complex task. Nevertheless, it was a “delicate necessity”. In the end, he concluded that any harm done to religious freedom by requiring him to pay damages for unilaterally breaching his commitment, was “significantly outweighed by the harm caused by his unilateral decision not to honour it”. He did not accept that the court’s intervention was an “unwarranted secular trespass into religious fields”.

It is fair to say that most European countries have started to be a lot more sensitive to the need to respect freedom of religion, and practices of faith communities’ (including divorce practices) than in previous periods of our history. “Freedom of religion”, and the right of a person to “manifest his religion or belief, in worship, teaching, practice, and observance” in ECHR art 9 is now a central feature of Convention rights. However, as the Canadian Supreme Court stressed in relation to a comparable freedom in Canada’s Charter of Rights and Freedoms, this is subject to limitations. In Europe, one of those limitations is spelt out in article 9(2), namely those that are “necessary for the protection of the rights and freedoms of others”. In the context of unilateral divorce and its impact on UK-based spouses who are being divorced, that means, of course, the rights of such individuals, and others like child dependants and other dependants forming part of the post-divorce reconstituted family. In the European context, and no doubt many other jurisdictions, it is probably fair to say that those jurisdictions strive to ensure that the rights of *both* parties, husband and wife (or partners in a registered civil partnership or equivalent relationship), are properly protected. Procedural rights in the process are no doubt reinforced by ECHR art 6, and the right to a fair trial, but also ECHR Protocol 7, article 5. The latter provides that “spouses are to enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage, and in the event of its dissolution”.

However, the UK government has had a long-term reluctance to bringing Protocol 7, art 5 into operation for a number of complex, and not always clear, reasons. The net effect, combined with the deployment of some of the newer forms of comity discourse that we have been seeing from our courts, is that the UK’s recognition jurisdiction now seems to be significantly out of step with the rest of Europe. In those jurisdictions “fair trial” and “equality” principles are both seen as important elements in their recognition process; and these, combined with financial consid-

erations, offer divorced spouses and children an altogether different scheme than they can expect in the UK.

Recognition and Financial Provision: The UK Position

Broadly, a court in the UK, when hearing an application for recognition of an overseas divorce, confines itself to determining whether the divorce satisfies the requirements in the overseas jurisdiction for a valid divorce in that country. Even if there may be perceived shortcomings in the process, these are, in general, not a relevant consideration for the court here. Whatever may have been the position in the past under Common Law, which took a much more robust approach to awarding recognition, procedural shortcomings will not in most cases be a sufficient basis for refusing recognition. On the face of it this approach is entirely consistent with what was laid down in 1970 when the core feature of the recognition scheme were set out in the Hague Convention on the Recognition of Divorces and Legal Separations (1970) (Cm 6248). As a general principle, the aim was to provide for a system of recognition that avoided the necessity for the recognising court to be judgmental about the other jurisdiction's standards or "values".

Critics make the point, though, that this takes a very narrow view of what the Hague Convention was about, and point out that things have moved on since then, not least in terms of developing human rights jurisprudence; the "equality" agenda; and in terms of key ECHR articles like article 6, and the right to a "fair trial". Among other things, matters such as notice and participatory rights have become central to what, by international standards, can reasonably be expected from a divorce process; and particularly one in which child-related aspects of the redistributive function of divorce need to be addressed. Critics also point out that the Hague Convention does, in fact, explicitly signal to courts the importance of both "public policy" – and in appropriate cases this can extend to procedural failings that include the other spouse' exclusion from the proceedings in the other country. What is more, the Family Law Act 1986 (the FLA) Part II, when it implemented Hague Convention requirements, gave the courts explicit powers to address such matters and withhold recognition. Specifically, the FLA s 51(3)(a) provides that the validity of an overseas divorce may be refused if 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 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...”

The difficulty, though, lies in the use of the word *may* in “*may* be refused” which underlines the essentially discretionary nature of the recognition jurisdiction. Clearly, our courts in recent cases have chosen not to use such powers to withhold recognition – and particularly when comity, respect for others’ standards, and non-intervention arguments come to the fore. In doing so, they have moved away from earlier approaches that in the past (under the FLA and earlier legislation) *would* almost certainly, and in every case, have led to immediate rejection of recognition applications – either on s 51(3)(a) grounds or on the wider “public policy” grounds catered for in the scheme.

And what of the financial aspects, including public interest concerns about the implications of recognising unilateral divorces where there has been no financial provision made for the divorced spouse and child dependants?

Financial Provision: a “Public Policy” Question?

Whatever the controversies around the procedural and inequality aspects of this area of the recognition system may be, it is in fact the *financial* aspects of recognition system that are, if anything, the cause of much of the concern about the way the recognition regime has been operating.

One aspect of this relates to the structure of the legislation that deals with recognition and financial provision. For historical reasons, in the UK the financial aspects of recognition are dealt with in separate legislation. More precisely, if a divorced spouse wishes to apply for financial provision, property adjustment, etc, having been divorced in overseas proceedings or non-court processes, she must make an application under the Matrimonial and Family Proceedings Act 1984, Part III. Unlike most other jurisdictions, where the financial aspects of the overseas divorce are considered holistically, and as part of the merits of the application, a request here for financial provision is dealt with *after* recognition, and under the separate jurisdiction provided by the MFPA. Interestingly, at the “recognition” stage the court is not even required to address financial aspects at all – a curious feature of our system, particularly given that it is usually the cessation of financial support (usually after a period of living apart when provision is being made, as in *El Fadl*) that is the trigger for a UK-based wife’s petition for divorce. Furthermore, most family law specialists, being aware of the difficulties associated with the

MFPA (and the practical problem of getting orders enforced), will seek to get their client's UK petition under way before the other spouse obtains an overseas divorce.

What is even more surprising, and relevant to public interest and "public policy" aspects, the recognition scheme in the FLA Part II does not appear to permit the court to make recognition conditional on such provision – even when it becomes obvious that this will mean the wife and child dependants will have no choice but to start accessing the State welfare system as her source of support. The introduction of such a requirement, for example where that party to the proceedings is plainly not "self sufficient", would, of course, obviate the necessity for a later application under the MFPA jurisdiction.

Undertakings & "Commitments". In practice, a petitioner for recognition here may well make indicate that he is prepared to make financial provision. Indeed, this was a feature of *K v K*, although it is not clear from the judgment whether, and to what extent, it would have affected the recognition issue if he had *not* made such a commitment. Indeed, having secured recognition petitioners who have declined to give such positive undertakings of the kind made in *K v K* may well go on to defend MFPA proceedings. The court may also refuse to give leave to a wife to make an application in the MFPA proceedings. Even if leave is granted, it may later be determined in the MFPA proceedings that it is not appropriate for an order to be made (for example where the husband who pronounced the unilateral divorce has married again, and has new commitments: or there is no longer any property, at that stage, which can be the subject of orders).

The reality, unfortunately, is that the MFPA scheme is replete with problems for applicants to overcome: something that is very unfortunate, not just for the wife and child dependants, but for a wider range of stakeholders than just the wife and child dependants who are affected. The root cause of this is, of course, the fact that a key characteristic of the unilateral divorce system is that in the overseas jurisdictions where it is available there is unlikely to be any provision made for the spouse or child dependants once the divorce becomes effective. This is, no doubt, problematic for the wives and dependants in those countries. Here, the worst effects of this are mitigated by a social security, social services, and housing system that may provide residual support in such cases – although, as discussed later, this is by no means a universal safety-net.

Before addressing this, it is proposed to look at some of the characteristics of unilateral divorce in comparison with the court-based system.

Distributive Justice and the Miller “Rationales”

Most parties to a UK-based marriage who want a UK divorce must petition the court, and go through a court-based process in which *both* parties have the opportunity to participate. If they want financial provision, property adjustments, etc, ancillary relief may be sought. At the request of the petitioner, or the respondent (in his or her answer), orders for maintenance pending the outcome of the proceedings, and for financial provision, property adjustments, or pension sharing may be made.¹

Child support following separation is also if the parent with care, non-resident parent, and qualifying child are habitually resident in the UK. These are all characteristics which have been described as the “judge-determined divorce and property settlement”, the fourth model in what Lloyd Cohen in *Marriage: The Long-Term Contract* describes as the fourth “polar legal structure”.²

The model described also recognises the need for a “fair trial” of the issues and a fair redistribution of resources which does justice between the divorcing couple, and factors in the parties’ needs, particularly those generated by the relationship, and the needs of dependent children. It also addresses the principles and “rationales” for redistributing resources set out in *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618.³ Issues may be raised by both parties, and contested matters can be dealt with by an independent court. Given that in many cases there may be inequalities in terms of access to family resources as between the husband and wife, the UK system, like most modern divorce systems, can address this issue, and do so by the time divorce proceedings are completed. In particular, the process will consider the necessity of redistributing assets, and making provision for income transfers – particularly while dependent children are young.⁴ The system also recognises that there are other stakeholders involved, not least the State welfare system which in the UK provides a secondary level of support at two key stages. First, by providing support during the transition during a post-separation and divorce phase when income replacement may be needed, often in practice for a parent with care and her children. Second, it provides residual support in the aftermath of divorce proceedings, typically after any redistribution of resources has been completed in the ancillary relief stages of divorce. The assumption that underlies such residual support is that parties will have access to at least a proportion of the assets generated during the relationship; and that parents will have re-ordered their affairs in a way that facilitates the upbringing of dependent children. The model assumes that resources will have been transferred between the parties as part of the re-ordering process. Capital and income resources that are

available to a party who claims State welfare support (who, more often than not, will be the wife if she is to be the parent with care) will be taken into account in assessing the State's contribution to supporting the family following separation and divorce. This is evident, for example, in the way that the value of assets like the former matrimonial home and income transfers are dealt with when a parent with care receives benefits like Income Support or tax credits.⁵ The assumption is that redistribution of resources by the parties, either voluntarily or by court order, will obviate the need for parties to seek assistance from the community and the State welfare system.

Support for the Reconstituted, Post-Divorce Family

Looked at this way, the primary source of "welfare" for the reconstituted, post-divorce family must be (as it was always intended to be as the current system evolved) the parties' own resources available for redistribution on dissolution. The secondary (or residual) source is then the State welfare system. Needless to say, the State welfare system, and those who pay for it, have a clear interest in seeing that the divorce system *does* function effectively and, if possible, avoids the necessity for divorcing parties to have to resort to it. This is, of course, an enduring theme of successive governments, and has informed key family legislation like the Child Support Act 1991 and, more recently, the Child Maintenance and Payments Act 2008. The point was also made with crystal clarity by Hale LJ in *J v C (Child: Financial Provision)* [1999] 1 FLR 152,⁶ when she said that it is not unreasonable to look to a father who has the resources to support his children, and "thereby relieve the State welfare system of that burden so far as possible". In that case the party in question had won the National Lottery. Despite this, he was not supporting his former partner and their child, and the Child Support system was plainly not delivering any of the support the mother, as parent with care, needed. She concluded that he *should* be providing support, and this helped to inform the need for an order under the Children Act 1989. She pointed out that there is a point of "public policy" that, where resources allow, the family obligation should be respected in a way that reduces, or even eliminates, the need for support from public funds. In that case the family obligation she referred to was owed by the father in an unmarried relationship but it plainly operates with regard to others, too, including spouses. In both cases it is underpinned by the various statutory duties to "maintain" in legislation like the Social Security Administration Act 1992 and Child Support Act 1991.⁷

More recently, the duty of a former cohabitant to contribute to the costs of the reconstituted family has been restated in Scotland with the enactment of the Family Law (Scotland) Act s 28. This enables a court to require him (or her) to pay the parent with care capital sums or other amounts “in respect of any economic burden of caring”. As recently seen in *CM v STS* [2008] CSOH 125 (Court of Session, Lord Matthews) this is a procedure that involves a transfer of resources between former cohabitants. As well as putting the parent with care in funds, it is a mechanism that reduces or removes the burden to the community and other stakeholders of supporting that parent and child.

Unilateral Overseas Divorce: a Developing Alternative?

An overseas divorce offers an alternative to divorce for a UK-based marriage, and one that can provide the opportunity to side-step the model just described, including the redistributive process and the “family obligation”. This is particularly the case if it is undertaken in a jurisdiction which permits unilateral divorce and expects little or nothing from the divorcing party in terms of financial provision for the other spouse and child dependants. At its core this route simply involves the divorcing party leaving the country, returning to the jurisdiction where he married, and securing a divorce there. Subsequently, he can return to the UK and in a UK court seek “recognition” for the overseas divorce. As a route, it is particularly attractive to parties who maintain their links with the country which offers such a divorce option, and it is facilitated by the UK’s generous jurisdictional rules that enable recognition to be obtained by a person who has residence, domicile or nationality in that country (see the next section, *The UK’s Jurisdiction*). For a UK-based spouse considering divorce, there is no shortage of advice on this on a number of websites – some of which indicates that the overseas route is both “Islamic as well as legally binding”.⁸

There may be perfectly sound, genuine reasons for taking this option – particularly when the marriage and relationship is over, and the choice of divorce forum is genuinely dictated by the fact that the divorcing party has already left the UK and started a new life in that country: furthermore, the divorcing spouse may well declare himself ready to provide financial support to his family (as in *K v K*). In pursuing a divorce in that jurisdiction he may simply be following the processes laid down by the divorce laws of that country. On the other hand a divorcing party’s

motives and reasons may *not* be so clear (or justifiable). Indeed, the attraction for a less scrupulous party is that, depending on the choice of forum, it may dispense with many of the unwelcome features of the court-based UK system including its adversarial nature, and expectations as to spousal and children's support. As discussed later, even if unilateral divorce is a custom and practice recognised and followed within the husband's UK faith community, for example when it is facilitated by his local Sharia council in the UK, the difficulty that a husband faces is that if the divorce is pronounced in the UK it will not prevent his wife declining to participate in that divorce procedure and insisting on initiating a divorce through the ordinary UK courts. In doing so, she will, of course, secure the right to have financial and other matters dealt with by the court. In many instances, the advice she is likely to get from her faith community will be supportive of that approach. She may be counselled to pursue a divorce that utilises the civil courts *and* her faith community as discussed later in this article, referring to examples from the Dewsbury Sharia Council website (see the section *Divorced Wives and Children: Advice from Faith Communities*). In practice, advice centres operated by faith communities may be keen to ensure as much convergence between the advice they give and mainstream rights and responsibilities under UK law. This is readily apparent in the discussion in the *Equal Treatment Bench Book – Guidance for the Judiciary* (2004, Judicial Studies Board, at 3-51: updated 2008).

This may still not suit the husband's priorities – for example if his primary objective is to avoid oversight by a court of financial and property aspects of the divorce; or to re-order his financial affairs before divorce proceedings begin. It is in this context that a husband, particularly one who moves freely between the UK and a country that offers the facility of a unilateral divorce, may well prefer to go to that country and, while there, complete the formalities needed for an effective, unilateral divorce.

The requirements for doing so, and which create the necessary conditions for subsequently achieving “recognition”, are set out in Part II of the Family Law Act 1986 (the FLA). If they are met, the divorce is as good, for most purposes, as a divorce obtained in the UK. It is that new and developing jurisdiction that is now considered.

The UK Court's Jurisdiction

Availability of this route depends, of course, on jurisdictional requirements being met. In theory, such “forum shopping” is not only

discouraged – it might, in appropriate circumstances, enable the UK court to reject a claim for recognition. However, the point is not clear.⁹ In practical terms it is very difficult for a court to decline jurisdiction given that a husband can rely on one of three possible ways of establishing his right to apply for recognition, all of which might be readily satisfied by a party to a UK-based marriage minded to take this route.

Specifically, he must show that at the date when the proceedings were commenced he was *habitually resident* in the country in which the divorce, annulment or legal separation was obtained; or, second, that he was *domiciled* in that country; or, third, that he was a *national* of that country. If either party to the marriage satisfies any of these requirements, the court has jurisdiction. So, for example, if the divorcing husband's wife is domiciled in the UK at the time that recognition proceedings are commenced he will also be eligible on *that* basis, as illustrated in *K v K*.

Needless to say, such overseas divorces are controversial. First, as already noted, the fact that some jurisdictions permit divorces to be obtained *unilaterally* is a major concern for some commentators. That is, the fact that an applicant can get his divorce without telling his spouse, and without giving her the opportunity to participate in the proceedings, flies in the face of core principles that underpin modern divorce (whatever may have been the position in the past, including periods when there was legal support for unilateral divorce in Britain's colonial period).¹⁰ In terms of the UK's modern recognition regime, the "proceedings" can be wide-ranging, and not necessarily judicial in nature, given that the term rolls up judicial proceedings with *other* types of procedures that do not involve any court-based process. Indeed, they may involve minimal State involvement of *any* kind.¹¹ Second, the jurisdiction may require little or no financial provision for the party being divorced, or child dependants.

Accordingly, the procedure may obviate the need for any redistribution of resources, or the kind of support arrangements normally associated with ancillary relief in the course of a UK divorce.

Assuming the UK court recognises that the husband's earlier divorce is "effective", and the UK court *does*, subsequently, grant "recognition", the pre-existing divorce will, in effect, have trumped the wife's UK petition. This relegates any claims the wife and children may have, from that point, to a claim for financial support under Part III of the Matrimonial and Family Proceedings Act 1984 – a route that is far from easy for some applicants; and one that, if unavailable, means the former spouse, children, and other dependants will have no choice but to rely on the State welfare system.

K v K and “Equality” Concerns

K v K provides a valuable case study in how a modern unilateral divorce can be achieved, and how the UK court then approaches such recognition requests. In that case, the court decided the requirements needed for “recognition” had been satisfied after the husband in a UK-based marriage had returned to Pakistan, pronounced a talaq divorce, and then recorded it. The fact that he had not notified his wife beforehand was disregarded. He obtained the declaration sought. This meant that his wife’s subsequent attempt to initiate UK divorce proceedings was unsuccessful. The ease with which such a divorce can be obtained, and then recognised, makes this a very attractive alternative to the rather more demanding, court-based system that would normally operate. This is helped by the fact that the procedure in the FLA Part II has a limited focus, and simply examines whether the overseas divorce is “effective” in terms of the overseas jurisdiction’s requirements. It is not even concerned with *validity*, an entirely different concept according to the leading case on “mail order” divorces.¹² Furthermore, once that exercise is complete, the scope for the UK court to withhold recognition, for example on grounds of “public policy”, or lack of a “fair trial”, now seems to be extremely limited.

“Inequality”: ECHR Protocol 7, Art 5

Recognition in such cases is also assisted by the fact that, unlike other European jurisdictions the UK does not yet apply any pervasive “equality” requirements. In France, applications of the kind seen in *K v K* would almost certainly be rejected, either on equality grounds or by invoking the need for “reasons”¹³ – or by deploying the *fraude à la loi* principle. This is where the court concludes, by referencing to the timing of the divorce and other factors, that the husband initiated proceedings for the sole purpose of avoiding the consequences, including financial factors, of French proceedings. Above all, though, wives can and do invoke “inequality” arguments, relying on ECHR Protocol 7, art 5 and “equality” requirements, to secure rejection of such applications.¹⁴ This does not appear to feature in UK family law, primarily because of delays in ratifying Protocol 7 of the ECHR.¹⁵ As significant, however, the UK recognition approach seems to entirely disregard the fact that recognition is being accorded to a process that may have been the antithesis of a “fair trial”. In doing so, it side-steps the need for both sides to a contested divorce to have access to adversarial proceedings, and proceedings that

satisfy the minimum requirements that would be expected from a system operating within the EU or a European country that subscribes to the ECHR. Indeed, a UK court would almost certainly reject a recognition application in comparable proceedings if it was sought for a divorce obtained within the EU, and coming to it under EC Reg 1347/2000 (on recognition and enforcement of judgments in matrimonial matters or EC Reg 2201/2203: matrimonial matters and parental responsibility).¹⁶

It is not clear, therefore, why a different standard should be applied when recognising divorces after applications have been made in respect of divorces obtained *outside* the EU area. One might have assumed that the need to ensure that “fair trial” and “fairness” requirements would apply equally wherever the divorce takes place, but would certainly be engaged if one of the parties to the marriage, and especially the one that is more vulnerable, is based in the EU and the recognising court is in an EU State (see *Recognition: Divorces in Other EC Member States*).

With these points in mind, closer consideration can be given to the FLA scheme itself.

Recognition and the FLA Part II

The Common Law in earlier times was reluctant to countenance recognition of divorces obtained otherwise than in court proceedings.¹⁷ The current law, which gives effect to the Hague Convention on the Recognition of Divorces and Legal Separations (1970) (Cm 6248), is a *lot* more generous to applicants for recognition. In particular, as discussed later in this article, it permits applications for recognition to be made in respect of divorces gained in a wide range of “proceedings”, some of which involve little or no judicial process whatsoever, and minimal State involvement – either before or after the event. The essential requirement is simply that the divorce must be “effective under the law of the country in which it was obtained”,¹⁸ as provided by the FLA s 46(1). Assuming the court accepts that the divorce was, indeed, “effective”, the only bar to recognition at that point is if the court exercises its discretion to refuse the application. However, the discretion to refuse recognition can only be exercised in very limited circumstances – namely on several limited procedural grounds, or if recognition would be “manifestly contrary to public policy” under s 51(3). Present indications, from the case-law, are that our courts are reluctant to exercise that discretion except in a very limited range of circumstances. Not only is there no express power in the 1986 legislation that enables the UK court to insist, as a condition of obtaining recognition, on the husband making financial

provision for his wife and children (as would be necessary in mainstream divorce proceedings), the court does not have any other powers to regulate other matters that might impact on the divorced wife's or children's "welfare".

Unilateral Divorce: Pronouncements in the UK?

Interestingly, if similar divorce processes are attempted by a husband in the UK (as opposed to completing them in an overseas jurisdiction) they would not satisfy recognition requirements under the FLA. They may be effective from the point of view of the faith community (a consideration that is significant, especially given the support there may be within that community, and in the parties' kinship network for this form of divorce) – but they will not be effective, for the most part, without the parties' agreement. Unilateral divorce using this route is now a possibility in the UK, although it is a softer variant, and one that looks to the parties themselves to sign up to the process, and for consent to be obtained. For example, in the advice and guidance provided by the Muslim Law (Shariah Council) UK a woman seeking a divorce from her husband is invited, as one option, to contact her husband to "ask for an Islamic Divorce". In what is essentially a *consensual* process either spouse may be invited to agree a divorce, and sign documentation that is witnessed by "two competent Muslim witnesses". Such approaches have, more recently, been reinforced this year by the introduction of newer procedures, including the introduction of Shariah "courts" acting as arbitration tribunals, operating in terms of the Arbitration Act 1996 – and making rulings that can be legally binding. Initiation of the process, however, is still dependent on the parties' agreement; and in this respect there are similarities with other faith communities' approaches to mediation, arbitration, and divorce (Jewish Beth Din courts have been operating in a similar way, and under similar powers, for many years, as they have done in jurisdictions like the USA and Canada). Nevertheless, the development has not been at all well received in some quarters. Dominic Grieve, the Shadow Home Secretary, reportedly said:

"If it is true that these tribunals are passing binding decisions in the areas of family and criminal law, I would like to know which courts are enforcing them because I would consider such action unlawful."

(Abul Taher, "Revealed: UK's First Official Sharia Courts", *The Sunday Times*, 14 September 2008.)

The pronouncement of a unilateral divorce by a husband (in the UK,

or wherever he is) may also be effective under the law of the country where the marriage was celebrated, for example if the divorce is then completed by formalities recorded in that overseas jurisdiction. This may, in fact, be all that the party wants if he anticipates a permanent return to that country. But it will not qualify for recognition under the FLA Part II, and be “recognised” here.

This was highlighted, for example, in 2002 in *Sulaiman v Juffali* [2002] 1 FLR 479, a case in which the husband pronounced the talaq in England the day after his wife filed her petition for divorce here; and then recorded it in Saudi Arabia (in an attempt to head off a UK divorce initiated here by the wife). Recognition was refused. The main obstacle was, and remains, the FLA s 44(1).¹⁹ Similarly, in the earlier, pre-FLA House of Lords case in *R v Secretary of State for the Home Department ex parte Fatima (Ghulam)* [1986] AC 527, the husband pronounced a talaq divorce in the UK in respect of his wife who was living in Pakistan. This was then recorded in Pakistan. However, in accordance with the notification requirements, this then necessitated completion of a 90-day period from that point before it became effective. In the meantime he had decided to marry again. He had selected his new bride, and wanted to bring her into the UK. The divorce was recorded properly, and satisfied Pakistan’s laws in every respect. In the ordinary course of events it only needed a 90 days period from that point before it became fully effective. However, the husband failed in his attempt to bring her into the UK as the immigration authorities refused her leave to enter. One of the immigration officer’s objections focused on the operation of the talaq divorce, and the time it would take before the marriage to the fiancée became effective. The validity of the divorce itself arose as a collateral issue in the ensuing judicial review proceedings to contest the immigration officer’s decision. In the event, the husband’s case eventually failed in the Lords, on the ground that the requirements relating to “proceedings” in the legislation required that all the actions required to complete a divorce must undertaken in *one* country, not two.

A similar requirement operates now under the FLA, and this was the reason for an application for recognition failing in *Berkovits v Grinberg* [1995] 2 All ER 681. In that case the writing of the Jewish “get” by the husband had been done in England, but it was then served on the wife in Israel. It was held that the divorce was not effective in the UK, and did not qualify for recognition under the FLA. Although the wording of the scheme was different from that in the 1971 Act, the court held that the law has not changed in this regard.

Divorce, Further Marriage and “Support” Issues

Plainly, a combination of restrictions in the FLA s 44(1) and cases like *Sulaiman v Juffali* are a significant obstacle to divorce and remarriage faced by many UK-based husbands who want the freedom to divorce their spouses in accordance with the customs and practices of their faith community, and in the ways permitted in the jurisdictions with which they may have ongoing, close ties. Typically, this would be places like Pakistan, North Africa and East Africa (Somalia, Eritrea, etc), and some parts of South-East Asia with Muslim communities, such as Malaysia and Indonesia. It is in this context, and for some husbands, that other options become important, including the possibility that he simply marries *again*. For a UK-based husband, this may well be very attractive. Indeed, it already appears to be a well-established practice, particularly among the older generation of migrants into the UK. According to one researcher, it is “not uncommon practice for an immigrant man to have one wife in Britain, and another in Pakistan”.²⁰

The fact that the UK welfare system now assists polygamous unions, and households where there is more than one wife living in the UK (through benefits like Income Support, Tax Credits, and social housing), is helpful in this regard. It helps to make a UK-based polygamous union financially, and in other ways, a more viable proposition than it would be, in fact, in those countries where such support for divorce is generally not available (and where regulatory mechanisms have, consequently, sought to introduce deterrents to entry into polygamous unions, particularly if the husband is unable to demonstrate that he can support further family members). That said, despite the perceived advantages in the UK, there are a number of difficulties for both the husband and the members of the polygamous union (newer entrants to the union as well as existing members). In particular, there are potential difficulties with the immigration system when a person who is already married seeks to bring a new spouse into the UK (for example as her/his sponsor) given the restrictions on obtaining clearance, leave to enter, leave to remain, or a variation on leave in the Immigration Rules (mainly in Part 8 – Family Members). The precise scope (or rationale) for these restrictions is not always clear. What is clear, though, is entry can be particularly problematic if the authorities are not satisfied that there has been a valid divorce of an existing, UK-based spouse. There are restrictions, too, in the State welfare system. These are less of a problem than they used to be, largely as a result of an increase in the number of entrants to the UK of groups from countries like Somalia where polygamous unions are more common. Nevertheless, there are some restrictions. Most of the remaining restrictions are mainly

aimed at inhibiting entry into polygamous unions while a spouse who is already claiming benefits is still resident with another spouse in the UK. The issue has come to the fore on occasions when benefits have been refused to a claimant who has entered into a new marriage while the system is still supporting other wives and family members. Normally, as the guidance to welfare agencies' decision makers confirms, unless a new wife is being married after an effective divorce has been obtained, the expectation is that such marriages *must* have been celebrated abroad, and not in the UK. This is confirmed, albeit not very clearly, by updated Housing Benefit and Council Tax Benefit guidance (Housing Benefit Guidance Manual (DWP, 16 June 2008, para 1.11).

In some cases, there may be doubt about the validity of a polygamous marriage, and therefore the precise status of a new wife in a polygamous household. This may, in turn, be problematic for a claimant seeking polygamy payments as part of benefits like IS, HB and Working Tax Credit, given that those additional payments are dependent on satisfying a marital status requirement as a gateway to a claim – and then maintaining that status subsequently. This is, in fact, increasingly problematic for husbands making claims given the closer regulation of entry into polygamous unions now starting to take place in many countries; and given the greater scope for treating such marriages as invalid. If a decision-maker is uncertain, for example, whether a partner for whom a claim is being made is, in fact, the claimant's spouse then it may be necessary for the claimant to provide further evidence of her status.²¹

When a UK-based husband goes abroad and enters into a new marriage, while still married to a wife or wives in the UK, the emotional impact of this may be significant, and the insecurity this can cause, are clear enough (a theme explored in the film *East is East* (1999, directed by Damien O'Donnell, based on the book by Ayub Khan Din). However, it may also have other unwelcome effects, financially and for her take-up of benefits if benefits and tax credits are being claimed from that household. This is something that is not unusual for some UK-based wives during protracted periods of separation from their husbands. In the first place the husband's absence may be for a period that is long enough to amount to a change of circumstances that can have a number of consequences, and possibly require the existing award to end, and a new claim to be made. But at that point there may simply not be enough information for decision-makers to make the right decision. For a wife and children who are already part of a polygamous union, she may already be helped by components like polygamy payments – something that is often invaluable in meeting the extra costs associated with polygamous marriage. However, continuity of payments depends on the husband and

other partners continuing to live in the same “household”. Furthermore, awards will generally end if the composition of the group changes, which it will when a new spouse joins the polygamous union (in the same way that a divorce, and cessation of “living together” will trigger a change of circumstances and end to an award in most cases). From a decision-maker’s point of view this can also in practice be problematic – particularly when they lack accurate and up-to-date information about a household’s circumstances. Not all the wives to the polygamous union may be aware of what is happening in terms of changes to the composition of the “household”, something that may be difficult if their first language is not English and they are unable to respond effectively to agencies’ enquiries, and have limited access to advice. Eligibility criteria may not be satisfied while the parties’ marital status remains uncertain, although vulnerable claimants, especially when they have child dependants living with them, are helped by IS “urgent cases” payments and other award mechanisms.²²

In the area of immigration law there may also be difficulties at the marriage-immigration interface given that, as Prakash Shah has pointed out, the immigration authorities are not particularly supportive of “non-English marital practices” like polygamy. Although that evaluation probably needs revisiting as a result of changing policy and attitudes in the last five years to polygamous unions, and what may at one time have been regarded as “atypical”. Nevertheless, the operation of some of the substantive rules that regulate uptake can still impact negatively on claimants in this area of the system; and, as a result, some vulnerable groups can suffer.²³ The welfare system is now a lot more receptive to claimants in polygamous households than it used to be, and it is also more accommodating of polygamous household’s needs. Nevertheless, the system does come under strain, and claimants can sometimes experience a lot of difficulty when a husband either divorces one of the wives in the union, or simply introduces another member to that union. In either case it will trigger an immediate, reportable “change of circumstances”. This may then prompt a protracted enquiry into issues like status and eligibility. In some cases, as will be considered later, the impact on a former spouse (assuming the divorce is legally effective), or a spouse who has ceased to reside with her husband who is either a UK or EEA national may be severe if she is not a UK or EEA national, and cannot from that point retain a “right to reside” or secure a derived right to reside; or if, having left the household, she is subject to immigration control, and cannot come within one of the exemptions that assist a former wife who has been residing in the UK as her husband’s family member or spouse.

Polygamy, Divorce and Related Issues

As the judges in *K v K* and *El Fadl* pointed out, many UK nationals and residents maintain close links with countries like Pakistan, Bangladesh, India and other comparable jurisdictions which permit polygamous marriage, as well as unilateral divorce.²⁴ For that reason, a husband in the UK, whether or not he has UK nationality, domicile, or habitual residence, may already have more than one wife. In some cases he may want to divorce his wife and marry again, possibly within a short period of pronouncing a divorce. Alternatively, he may simply marry again, entering into a polygamous union. This may be done outside the UK, and is perfectly acceptable, and potentially valid if carried out properly and in accordance with the law and custom and practice. However, the marriage's validity may depend on compliance with the laws of the jurisdiction where he marries – and this needs to be considered. For example, in Pakistan the Muslim Family Laws Ordinance of 1961 (the MFLO) has procedures designed to regulate such entry into polygamous marriage; and there are comparable procedures in other States like Bangladesh. The MFLO, which as Werner Menski explains “caused huge controversies” because of its attempts to curtail the rights of Muslim men to polygamy,²⁵ is still good law and imposes certain minimum procedural requirements. Specifically, it requires those wishing to enter into a polygamous union to submit an application to the local union council, together with a fee, before then requiring the council to adjudicate on the application in discussion with the parties, or representatives of the parties. The application is supposed to indicate whether the applicant has obtained the consent of an existing wife.

However, even if it does not do so, the chairman of the council, and the arbitration council, can still consider the matter, and determine if it would be appropriate for the marriage to proceed. If consent is not obtained, there are financial implications – notably the husband is supposed to pay dower to the existing wife or wives (and he is also subject to penalties if the council decides to pursue this). A key point is that a failure to comply with the procedures laid down, or to obtain prior consent, does not necessarily invalidate the husband's subsequent marriage to his new wife. In this regard the legal position is similar to the position after non-registration of a talaq divorce (as discussed later). The procedures in the MFLO would appear to be, for the most part, merely directory, not mandatory.²⁶ In practice, the fact that the existing wife is resident abroad, and out of contact with the husband and council, are potential reasons for the council to disregard the need for compliance. Accordingly, what was intended as a measure to regulate unrestricted

entry to remarriage after a talaq divorce, or a further marriage, does not in practice appear to do so.

The wider welfare points referred to are revisited later. Before then, consideration is given to the requirements of the FLA on “recognition”.

The FLA and “Recognition”: Key Requirements

The lead provision in the FLA Part II is s 45(1). This provides that subject to s 46(2) and ss 51, 52, the validity of a divorce, annulment or legal separation obtained in a country outside the British Isles *shall* be recognised in the United Kingdom if, and only if, it is entitled to recognition by virtue of ss 46–49. Essentially, when it enacted Part II Parliament set out to provide a scheme to facilitate recognition of overseas divorce, but which also tried to bring some minimum procedural requirements into the process – particularly for parties, mostly wives and their children. It has been argued that the scheme also displaced earlier principles developed by the case-law under the preceding 1971 legislation, and thereby effectively limited the scope for invoking “public policy” grounds in order to refuse an application – but this is by no means clear.

The scheme differentiates between two types of process. First, where the overseas divorce was obtained in “proceedings”, which as already noted include “judicial or other proceedings” (s 54). Second, it caters for divorces obtained *otherwise* than by means of proceedings.

The essential pre-conditions to a divorce obtained in “proceedings” are in s 46(1), and in this case the gateway, as noted already, is that the divorce is “effective under the law of the country in which it was obtained”; *and* at the relevant date (i.e. the date when the proceedings were commenced) 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.

It will be clear from this that there will be many would-be applicants for divorce using the *K v K* route who could readily satisfy at least one of the above three criteria. Indeed, it is not unusual for a person to maintain alternate “residence” between the UK and a country like Pakistan, Bangladesh, or India, or, indeed, any of the North African States or other countries where unilateral divorce is available. Indeed, many UK residents routinely move between the UK and a country like Pakistan, and it

may not be clear at any given time which country he is “habitually resident”.

Mr Justice Hughes made the important point in *K v K* that “there are a great many people living in the UK from Pakistan and many move freely between both countries”.

For a divorce obtained *otherwise* than by means of proceedings the requirements are rather more demanding. Specifically, the divorce will be recognised if:

- (a) it is “effective under the law of the country in which it was obtained”;
- (b) at the relevant date (i.e. the date on which it was obtained)
 - (i) *each party* to the marriage was domiciled in that country; *or*
 - (ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce is recognised as valid; and
- (c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date.

The Discretion to Refuse: Public Policy

Assuming s 46 is satisfied, there are still several grounds for refusal in s 51 – but these are discretionary. Recognition *may* be refused if the divorce was granted or obtained at a time when it was irreconcilable with a decision determining the subsistence or validity of the marriage. Further, it *may* be refused if the divorce was granted or obtained at a time when there was no subsisting marriage between the parties. In the case of a divorce gained in proceedings recognition *may* be refused under s 51(3)(a) if 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”.

In this regard, it is clear that in cases decided before *K v K*, either under the scheme that the FLA replaced or, indeed, after 1986, the likely consequence of a breach of paras (i) or (ii) above was that the divorce would

not be recognised. Recognition was refused, for example, in *D v D (Recognition of Foreign Divorce)* [1994] 1 FLR 38 when a UK-based wife was not told of divorce proceedings in Ghana. Her UK petition for divorce was therefore able to go ahead (similarly in *Durhur-Johnson v Durhur-Johnson* [2005] 2 FLR 1042, discussed in the section *Earlier Case-Law: Inconsistencies?*, below).

One of the difficulties that UK courts experience is with the quality of the evidence that applicants adduce in support of recognition; and it is not unusual for a wife in recognition proceedings to allege that documents are not genuine or have been fraudulently obtained. In this case the court may properly direct that the case be dealt with in the courts of the jurisdiction in question, particularly if it is better placed to deal with allegations of forgery. This was the course of action taken in *Abbassi v Abbassi* [2006] 2 FLR 414, and approved by the Court of Appeal. In that case the wife had petitioned for divorce in the UK. At that point the husband contended that he had divorced her several years previously, but had not told her – and had nevertheless continued to cohabit with her. The seriousness of this, given that it meant (if correct) she had been cohabiting with someone to whom she was not married, merited careful consideration rather than the court simply rubber-stamping the overseas divorce.

Divorce Otherwise than by “Proceedings”. In this case, recognition may be refused under s 51(3)(b) if:

- (i) there is no official document certifying that the divorce is effective under the law of the country in which it was obtained; *or*
- (ii) where either party was domiciled in another country at the relevant date, there is no official document certifying that the divorce is recognised as valid under the law of that other country.

Public Policy “Refusals”

Parliament in 1986 went further and, in accordance with the Hague Convention, maintained the public policy basis for refusal in s 51(3). This provides that the court may refuse recognition where recognition “would be manifestly contrary to public policy”. This extends to both divorce processes. Since the enactment of the FLA, and its predecessor, the Recognition of Divorces and Legal Separations Act 1971, the general view that appears to have been taken by the courts is that if a divorce is effective then the ground available in s 51 to refuse recognition on public policy grounds should only be used “sparingly”.²⁷

The precise scope for invoking public policy objections in proceedings for recognition is unclear, but it almost certainly extends to concerns about incompatibility with the right by one of the parties to a “fair trial”.

This is evident from the parallel recognition jurisdiction that operates for divorces obtained in proceedings in another EU country – a point revisited later in this article (see *Recognition: Divorces in Other EC Member States*, below). The problem is, however, that the issue has not been considered in cases under the FLA Part II.

Declarations of Validity

A declaration is the remedy that will be the end result in most successful recognition proceedings. In this respect, the s 55 jurisdiction extends to declarations in a variety of contexts. When the UK makes a declaratory decree in accordance with the FLA Part III it is a potent remedy, as intended by Parliament when the scheme was enacted, and in accordance with principles set out by the Law Commission in its report *Declarations in Family Matters*.²⁸ In some cases the jurisdiction is aimed at establishing whether a marriage subsisted where, perhaps, there may be doubt. In others it focuses on the efficacy of a *divorce*. Specifically, the process enables applicants to establish whether a marriage was effective at its inception, or was subsisting at a specified date.²⁹ It also enables an applicant to establish, at least in the UK, that a marriage did *not* subsist at a particular time.³⁰ In other cases, though, the focus is simply on establishing the validity of a divorce, at least in the UK. In this case an applicant can seek a declaration that the validity of a divorce, annulment or legal separation obtained outside England and Wales is entitled to recognition, or that it is *not*.³¹ Needless to say, the stakes can, in some proceedings, be high with the result impacting on matters such as inheritance, and the validity of subsequent marriages if, perhaps, a divorcing husband has entered a new marital union before the previous one was dissolved.

K v K

Facts and Issues

The case was started when Mr Imdad K sought a declaration that a talaq divorce granted to him in Pakistan in March 1987 (and effective in

Pakistan from April 1988) was a valid divorce, and entitled to recognition in the UK. The application was contested by Mrs Rukhsana K who lived in Ilford, Essex in what had been the former matrimonial home. The parties were married in April 1966 in Pakistan where Mr K was living at the time of his application. Following the marriage, they began to live in the UK in 1966, and had four children, all of whom were over 18 years of age by the time of the application. In October 1986 the husband returned to Pakistan; whether he returned to the UK after that is in dispute. He claimed that in March 1987 he obtained a divorce by talaq in the chambers of an attorney in Faisalabad. This, he said, became effective 90 days after it was received by the chairman of the union council (the official required to record the husband's action in accordance with the MFLO). That was in December 1987. Mr K then said that he had returned to the UK and visited the wife in March 1998; and gave her a copy of the divorce. None of this was accepted by the wife.

In January 2004 the wife petitioned for divorce in the Ilford County Court on the grounds of five years' separation; and two months later gave notice of her intention to proceed with an application for ancillary relief.

In August 2004 the husband filed an affidavit with the court saying that he had divorced his wife in Pakistan in March 1987, and delivered the divorce personally to her when he came to England in 1987. She denied this. A decree nisi was then granted in Ilford in October 2004. The husband appeared at a hearing in December 2004, and in March 2005 issued his petition asking for recognition. It was served on the Attorney General who, having filed an Answer, decided to take no further part in the proceedings.

FLA: Applying the Requirements

In the course of his judgment, Mr Justice Sumner reiterated the requirements of the FLA s 55 (as discussed earlier in this article) enabling a person to apply for a declaration, pointing out that the validity of a divorce obtained overseas was entitled to recognition. The court had jurisdiction, he noted, if one of the parties was domiciled in England and Wales on the date of the application. In this case there had been no dispute that the wife was domiciled in the UK.

He added that under s 46 the validity of an overseas divorce should be recognised if it is effective under the law of the country in which it was obtained: but at the relevant date either party to the marriage had to be habitually resident or domiciled in the country in which the divorce was obtained. It was accepted that the husband was ordinarily resident in

Pakistan at the relevant time. By s 51(3) the validity of an overseas divorce may be refused if the divorce was obtained “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”.

It could be refused, he noted, if the divorce was obtained “without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in proceedings as, having regard to those matters, he should reasonably have been given”.

The Evidence

The court considered the evidence. It had not been possible to produce any copy of the notice of the talaq which it had been said was sent to the union chairman, which was a mandatory procedural requirement. However, the “next best evidence” was a Certificate of Validity of Divorce which was available. On that basis the judge could conclude that notice had been given to the union chairman for the purposes of registration and in compliance with the law in Pakistan. It had also been recorded that an iddat period of 90 days from 31 December 1987 to 31 March 1988 (another post-pronouncement requirement) had been completed. This was important as a talaq divorce is not effective until 90 days after the notice has actually been received by the chairman. The necessity of informing the wife of the talaq divorce before it became effective, following a judgment of the Pakistan High Court, was pointed out.

However, the court was shown other evidence supporting the validity of the divorce, including a deed of divorce presented in evidence. Despite changes made by the Muslim Family Law Ordinance (MFLO) 1961³² that required a husband to send notice of the talaq to his wife (also pointed out by the expert witness), and apparently this had not happened, “on balance” Mr Justice Sumner considered that the talaq pronounced by K, coupled with evidence of a valid notice to the chairman, was “effective”.

He concluded that the talaq pronounced in this case would have been recognised by a Pakistani court. In doing so he was supported by the expert witness’s conclusions, and his impressions of the husband’s evidence. His conclusions were assisted by the consideration that the husband would have tried to secure a divorce before remarrying. He observed: “I think it is unlikely that he would have entered a second marriage without divorcing his first wife. This is so in particular when he was going to continue living in the community where he was known. I

do not consider that he would have run the risk associated with such a course.” However, he was in greater difficulty in deciding when the wife became aware of the divorce. On balance, he also concluded that: “the husband did tell the wife of the divorce before his remarriage in 1992. It may have been in 1987.”

The Earlier Case of *El Fadl*

Mr Justice Sumner noted that in *El Fadl v El Fadl* [2000] 1 FLR 175, a case that involved the validity of a talaq pronounced in Lebanon (and in which, again, the wife had not been given notice, and had not participated), the court had held that consent or objection of the wife to the divorce was irrelevant. Nor had it been necessary for her to have notice of the pronouncement in order to give effect to the talaq. In terms of compliance with the procedures applicable in Lebanon, the talaq divorce had been recorded in the Sharia court in accordance with Lebanese law. That registration was sufficient for the talaq properly to come within the definition of “proceedings”, and therefore for the process to be regulated by s 46. Furthermore, it had been said by the judge in that case that it would not have been a proper exercise of discretion to refuse a divorce which was valid by the personal law of both parties at the relevant time, and which had been known to them for many years.

Wider Considerations: Comity and Free Movement

In the course of his judgment, Mr Justice Sumner made some further important observations.

First, he concluded that the case was regulated by the requirements of s 46(1) of the FLA on the basis that there was involvement in the divorce process by Pakistan’s union council system, and regulatory laws. In *Chaudhary v Chaudahary* [1985] Fam 19 it had been held that the mere pronouncement of divorce before witnesses was insufficient to amount to “proceedings”. Proceedings required:

“some form of State machinery to be involved in the divorce process: not necessarily machinery established by the state, since existing religious machinery recognised by the state is sufficient ... The act or acts of one or both of the parties to the marriage, without more, cannot amount to proceedings; there must be the intervention of some other body, a person with a specific function to fulfil such as the Union Council in the case of the talaq considered in.”

In *Quazi v Quazi* [1984] AC 744 (and in particular Lord Scarman at p.

824) it had been established that the following were capable of qualifying as proceedings:

“... any act or acts, officially recognised as leading to divorce in the country where the divorce was obtained, and which itself is recognised by the law of the country as an effective divorce.”

Second, he was clear that he should exercise his discretion in favour of granting the application. Although the decision of Mr Justice Hughes in *El Fadl* was not binding it was of persuasive authority. However, he decided to accept the analysis of the court in that case, and follow it. Having regard to the fact that the wife had not been given notice of the divorce, nor any “opportunity to take part”, he adopted the following key passage from the judgment:

“I am satisfied that however much a unilateral divorce without notice may offend English sensibilities, comity between nations and belief systems requires at least this much, that one country should accept the conscientiously held but very different standards of another, where they are applied to those who are domiciled in it (p. 190) ... I am satisfied that where, as here, the talaq is the prevailing form of divorce in the country of both parties, where it had been validly executed there, so that the marriage is at the end in the country, where it was contracted, and to which both parties belonged and where there is no evidence of forum shopping, not only does public policy not call for non-recognition, in the end it summonses recognition.”

In *K v K* the judge pointed out that the wife had been away from Pakistan for 25 years when the divorce took place. She was likely to be domiciled in the UK. “However she was born, brought up, and married in Pakistan to someone of the same background. They both have family there. The husband returned when their marriage came to an end. It is not an uncommon situation.” He went on to say, in an important passage in the judgment that:

“There are a great many people living in the UK from Pakistan and many move freely between both countries. Where there are as here close links to each country, it is important that marriages and divorces recognised by the country where they take place should be recognised in the other country unless there are good reasons for not doing so.

I see no good reasons here. That the wife has been away from Pakistan for a long period and is no longer domiciled there are factors. Also she was not given notice of the divorce nor the opportunity to participate. That is a feature of a talaq divorce. But neither party wishes the marriage to continue.

The husband has expressly accepted that the wife has a valid financial claim under Part III of the Matrimonial and Family Proceedings Act 1984.”

Accordingly, Mr Justice Sumner accepted the husband’s case, and pronounced the declaration sought.

Earlier Case-Law: Inconsistencies?

The successful outcomes for the applicant husbands in *El Fadl v El Fadl* and *K v K* undoubtedly marks a major shift when compared with earlier cases where recognition has been refused when spouses have not been informed of proceedings – and have been excluded from participation in the divorce process. They contrast with earlier cases such as *Zaal v Zaal* [1983] FLR 284 – a case in which a husband had left his wife in the UK, and then divorced her by talaq divorce in a brief ceremony in front of two witnesses in Dubai. This was effective under Dubai law. However, it became clear that the wife had only learned about the divorce after the event, by which time it was irrevocable, and she could do nothing about it. The absence of formal notice had also deprived the wife of an opportunity for reconciliation, and meant that she could not make contact with, and gain support from, her husband’s family. Such “secrecy” was against public policy, held the court, and recognition by the UK court was refused. The wife’s UK petition for divorce was thereupon accepted, and a decree nisi pronounced. As considered when looking at the discretion to refuse recognition, under the FLA 1986 s 53(1) there was a similar outcome for the applicant in *Durhur-Johnson v Durhur-Johnson* [2005] 2 FLR 1042. In that case the husband and wife had married in Nigeria in 1998 and had then settled in London in 1999. In 2004 the wife petitioned for divorce in London. Before a decree nisi could be pronounced, the husband, who by then was living in Nigeria, said that he had already been divorced in Nigeria. It was clear from the evidence that there had, indeed, been Nigerian proceedings, and a divorce had been granted: and this had happened after the wife had failed to answer the divorce petition. He asked for the proceedings in London to be stayed, and asked the court to recognise the overseas divorce under s 46(1). It was pointed out in the proceedings that the wife had never been informed of the Nigerian proceedings, and had therefore not been given an opportunity to participate in them. The Attorney-General took part in the proceedings, and contended that the court should refuse to recognise the decree using its powers under s 51(3). The court agreed. There was no evidence that the divorce in Nigeria was legally effective, but even if it was, and it could be assumed that the requirements of s 46(1) had been

met, the court was not satisfied that it was appropriate to recognise the divorce given the husband's failure to give notice of the Nigerian proceedings to his wife. The husband had failed to inform his lawyers that his wife might be in London (rather than at an address in Nigeria). Similarly, recognition was refused in *D v D (Recognition of Foreign Divorce)* [1994] 1 FLR 38 when a UK-based wife was not told of divorce proceedings.

Recognition was also refused in *Joyce v Joyce and O'Hare* [1979] Fam 93; [1979] 2 All ER 156 on the basis that no reasonable opportunity to "take part" in overseas proceedings had been given to the wife who had been divorced. The case was decided on the Recognition of Divorces and Legal Separations Act 1971, the legislation that the FLA Part II replaced.

In that case the wife had obtained a magistrates' order for custody of the children and maintenance on the grounds of the husband's adultery and desertion. In the event, he paid nothing before leaving the UK for Canada where he filed a divorce petition. The petition was served on his wife, and it made clear that she only had 60 days to which to file an appearance. The wife, however, had difficulties in getting over to Canada, and in getting legal aid in England and in Canada to contest the husband's action. Before an appearance was entered, the wife was sent the court's decree nisi. Thereupon the wife filed a divorce petition in England, and at the same time asked for financial relief. By this stage, however, the court in Canada had awarded a divorce, and the decree nisi was made absolute. This enabled the husband to ask the UK court for a declaration that the Canadian decree had already dissolved the marriage.

It considered s 8(2), which read:

"Subject to sub-s (1) of this section, recognition by virtue of this Act or of any rule preserved by s 6 thereof of the validity of a divorce or legal separation obtained outside the British Isles may be refused if, and only if – (a) it was obtained by one spouse – (i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken ..."

The wife had not tried to rely on this as she had been given proper notice of the proceedings. However, s 8(2) went on to state:

"... or (ii) without the other spouse having been given (for any reason other than lack of notice) *such opportunity to take part* in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given ..."

On the facts it had been clear that the wife had been unable to attend the proceedings, and had therefore been denied the opportunity to take part.

For these purposes, “opportunity” to take part meant both an adequate opportunity to be heard by the court. This had not happened, and the court refused to recognise the Canadian divorce. The equivalent provision in the FLA s 51(3) is in the same terms, and cases like *D v D* and *Durhur-Johnson* show how the courts have been ready to reject applications if wives have been excluded from the divorce process. Yet in *K v K* the court declined to exercise its discretion – despite the fact that the wife had received neither notice nor the opportunity to “participate”.

In conclusion, cases like *K v K* and *El Fadl v El Fadl* represent a clear move in favour of putting considerations like “comity” ahead of concerns about process and fairness – and in circumstances that, until recently, would have provided ample grounds for rejecting a recognition petition. This begs the question, of course, how ratification of Protocol 7, article 5 by the UK (expected next year) will affect the position. Will it require our courts to be more circumspect in similar cases in the future?

Recognition: Divorces in Other EC Member States

The recognition provisions in the FLA Part II do not apply to cases involving divorces in other EC Member States – specifically those cases where recognition is dealt with by a different scheme, namely in EC Reg 1347/2000 (on recognition and enforcement of judgments in matrimonial matters or EC Reg 2201/2203: matrimonial matters and parental responsibility).³³

Broadly, this requires that a judgment in a Member State is to be recognised in other Member States without any particular special procedure being required. In general, the grounds on which recognition may be refused are extremely limited. They include, for example, situations in which recognition would be manifestly contrary to the public policy of the Member State in which recognition is sought.

However, what is interesting for present purposes is such case-law as there has been on this makes it clear that one of the grounds where this is possible includes cases where a party to the proceedings has not had a fair trial for the purposes of ECHR art 6 – a point illustrated by *Maronier v Larmer* [2003] 3 All ER 848; [2003] QB 620, CA.³⁴

Arguably, if public policy is available as a ground for refusing recognition in cases operating between EC Member States then, by extension,

it ought to be available to enable a UK court to decline recognition where it is clear that one party to the proceedings has been excluded from participation. This, it is suggested, would also be consistent with pre-*K v K* cases like *Joyce* and *Durhur-Johnson*.

The Route to Recognition: Potential Difficulties

On the face of it, unilateral divorce offers a straightforward and easy option for a party to a UK-based marriage to exit that marriage. This may be so where unilateral divorce, for example utilising a talaq divorce, is readily available and the procedural requirements governing its use in the particular jurisdiction are clear and readily satisfied. This also supposes that the talaq, wherever it is pronounced, offers a straightforward, effective means of ending the marriage bond. That is by no means always the case, however. Custom and practice may vary greatly – and there may be difficult issues of timing, for example determining at what point, precisely, a triple talaq or “staged” talaq is completed, and post-pronouncement formalities, reconciliation, etc, are completed.³⁵ This may require a painstaking exercise on the part of the UK court that is being asked to recognise the divorce, with hearings requiring the input of specialists to assist the court. Furthermore, there may be a legislative overlay that imposes mandatory requirements before the process is completed, and in some jurisdictions court oversight may be required. What may look like essentially *administrative* requirements, such as recording and publication, may in fact require a greater degree of State involvement, aspects of which *can* present barriers to recognition if they are not carefully complied with – as seen, for example, with fulfilment of Japan’s kyogi rikon – illustrated by the leading case of *H v H (The Queen’s Proctor Intervening) (Validity of Japanese Divorce)* [2006] EWHC 2989 (Fam).

One of the main difficulties associated with recognition hearings, and illustrated by the *K v K* case and *El Fadl v El Fadl*, is that it may often be unclear whether a failure to comply with post-pronouncement registration requirements will affect the validity of the divorce. The problem is more than just academic, especially if the failure then impacts on *other* aspects of the process that prompt the court to question the overall fairness of the divorce – aspects such as the requirement in the FLA for parties to a divorce to have been given notice of the proceedings. Furthermore, if in the jurisdiction in question it is clear that mandatory requirements have *not* been complied with, this may impact on the validity of the divorce, the validity of the husband’s remarriage (if he

remarries), and, of course, the divorced wife's ability to remarry. It may also have implications for the divorced wife in the UK, for example in informing welfare agencies of her marital status. In Pakistan, for example, a marriage is supposed to be registered in accordance with requirements laid down by the MFLO. This is helpful in a number of ways, for example where, following a talaq divorce, the husband has then remarried. The fact of registration may be relevant in resolving uncertainties that divorced spouses and their advisers may have about the parties' marital status in the aftermath of a talaq divorce, and would ordinarily help to resolve doubts about the legal effectiveness of a divorce in a particular case. The problem, however, is that despite the sanctions imposed for non-registration, a marriage is not necessarily invalid if it has *not* been registered. The position is similar to that relating to requirements on the entry into polygamous marriage, already discussed. It would appear that, until the 1970s, a failure to register invalidated the divorce. After that, and following the enactment of Pakistan's Zina Ordinance (which provided for severe punishment for repudiated wives who, thinking they were divorced, but were not, could be accused of a range of charges and, not least, *zina*, i.e. extra-marital sex and adultery) the requirements were relaxed at the behest of the courts. The position since then has improved to the extent that the position of divorced wives in Pakistan is less precarious (and dangerous), helped by the courts' approach to the subject, regarding non-registration as no longer fatal to the divorce.³⁶ The position for women who may want to contest the validity of the divorce, for example in UK recognition proceedings, assisted by non-registration, is *not* helped by this development, of course. The regulation of divorce law in Pakistan, including the position since the Zina Ordinance, and more generally the way that the Quran and Sunna, as the foundations of the Sharia, have shaped modern divorce law (including its more "contested" aspects) is discussed by Javaid Rehman in his intriguing and insightful commentary on the subject.³⁷

Variations on Unilateral Divorce and the Talaq

In respect of the variant of the talaq that enables a wife to divorce her husband, i.e. the khul (or khoola or khula), it is widely assumed that the process requires court proceedings, and judicial oversight, before it can be effective. Indeed, at the time the FLA was debated and passed, it was assumed that this was what the khul entails. It led the Opposition spokesperson to say:

“The principal objection to a talaq is that it discriminates against women because the procedure is available only to men. If a Moslem woman wants a divorce she must initiate judicial proceedings ...”³⁸

This is not necessarily the case, however, at least in *all* cases, as our legislators seemed to believe in 1986. Indeed, there are a variety of contexts in which a court may treat the wife’s divorce as effective without the necessity of court proceedings, and without the husband’s consent, as is assumed. In some jurisdictions this is possible as a matter of custom and practice, and, like the talaq, practice can vary greatly. In other countries, the khula is extensively catered for *and* regulated by civil law. For example, in Pakistan, the availability of the khula is recognised in legislation, including the Dissolution of Muslim Marriages Act 1939 – and is regulated to the extent that if it is undertaken without the husband’s consent then it *may* be subjected to a greater degree of judicial oversight if it is to be effective. This depends, however, on the grounds on which the divorce is sought. Exceptionally a wife may divorce her husband without consent (albeit in some instances subject to a financial settlement, or forfeiture of financial rights accruing during the marriage). A court-based divorce route is available if certain grounds can be shown, including failure to maintain for a two year period or more; cruelty; unequal treatment within a polygamous union; desertion for a four year period or more; or entry by the husband into a polygamous union in breach of procedural requirements. In Morocco, the position since reforms introduced by the Mudawwana laws (from 3 February 2004) is that court-based divorce is available to both parties, but divorce is also now subject to a much more comprehensive statutory regime superimposed on existing custom and practice. Before recognition requirements in the UK are satisfied, the court would inevitably be faced with a number of significant issues – and would need to be satisfied on a number of procedural points.

Suffice to say that the picture in relation to unilateral divorce is a very varied one. Family law, in a lot of countries where the talaq is practised and sanctioned, is coming increasingly under pressure to reform – not least because of the pressures of globalisation, and the pressure from women and other stakeholders in the divorce process looking for greater “equality” and processes that respect gender equality. The pressure for change, unsurprisingly, may well focus on the manner and form in which unilateral divorce is effected.

In some jurisdictions this has led to a lot of controversies, with vociferous calls for reform being met by equally determined opposition.

Divorce by Text Message?

The issues around this mode of using this system of divorce came to a head in the Malaysian family law system in 2003 when a Syariah judge in Selangor State pronounced that a husband's divorce of his wife had been properly initiated by text message (SMS, or short message service) – this being seen as the cyberspace equivalent of serving divorce papers.

Initially, the case was not particularly contentious as unilateral divorces undertaken this way had come before the Syariah courts in Selangor many times. They had also been an increasingly common feature of family law proceedings in other Syariah courts in Malaysia's thirteen States and three federal territories. Not all of the Selangor divorces were upheld, however. The Syariah Chief Justice and other justices had rejected some of them, for example in the absence of clear proof of the husband's identity, or amidst doubts about the husbands' intent and "sincerity" in sending their message.³⁹

The use of the mobile phone to unilaterally divorce a wife might, in principle, raise serious doubts about its efficacy as a way of bring a relationship, albeit one founded on "contract" or a "bond" to an end. It may also be seen by some critics as taking the whole system of unilateral divorce to a new "low". But is such a variant on the talaq *lawful*? Plainly, in some jurisdictions the manner in which the talaq is pronounced is regulated by civil law; and in jurisdictions where the manner and form of pronouncement is regulated by mandatory procedures the divorce would undoubtedly be ineffective.⁴⁰ But how have other jurisdictions that permit unilateral divorce treated such developments as telephone and text message divorce? It has caused significant problems in countries like Malaysia and Singapore. Given the close links between Malaysia and the UK, and the number of Malaysians working and residing in the UK, given that the courts have pronounced that divorce by text message is a valid and effective divorce, the issue is more than just academic – and it is quite likely that such a case would come to a UK for "recognition".

Would such a divorce be capable of recognition here? If *K v K* was rightly decided, then the answer would seem to be "yes".

The point can be explored, first, by considering the *Latif* case.

Text Messaging the Talaq: the Latif Case

Assisted by the excellent and detailed account provided by Eric Taylor,⁴¹ the problems associated with pronouncing the talaq by text message, and concerns about the procedural propriety of such methods, can be seen by

considering the *Latif* case, decided in favour of the divorcing husband in Selangor, Malaysia. The case precipitated a crisis about the use of the talaq when effected in this way in a modern, forward-thinking country like Malaysia. In the era of rapid news, and dissemination of news reports, the case inevitably gained a world-wide audience, and very quickly. The repercussions were felt in other countries in the region, and then much further afield.

The facts were that Shamsuddin Latif had an ongoing dispute with his wife, Azida Fazlina Abdul Latif. They had only been married for eighteen months. She left the matrimonial residence to go and live with her mother. Her husband thereupon sent her a text-message requiring her to return to their home, and, if she did not do so, divorcing her. She did not do so, and he regarded her from that point as “divorced”. On 24 July 2003 the Selangor Syariah Court upheld the divorce, treating this as sufficient to bring the marriage to an end. There the matter would have rested, except that in the same week a government minister pointed out that whilst such divorces may be acceptable under Islamic Law, and Malaysia wanted to respect this, in some circumstances (including those presented by this case) she pointed out that they could be contrary to the country’s Islamic Family Law Act⁴² – indeed a husband who purported to carry out a divorce in such a inconsiderate way could be fined or even imprisoned. Reports of the case in the media started to trouble Islamic traditionalists as well as legal academics, primarily because such a unilateral divorce, carried out in that way, cut out the role of the kadi (an Islamic lawyer or official). This was the main objection, although some of these commentators did also concede that the manner and form of the divorce, when carried out this way, showed disrespect to the wife, and did not meet the expectations of Syariah law. After the country’s Women’s and Family Development Minister, Shahrizat Abdul Jalil,⁴³ described the use of SMS messaging as “dishonourable”, women’s groups in Malaysia took up the issue. The Prime Minister, Mahathir Mohamad, then described the divorce as “contrary to Malay culture and against the spirit of Syariah Law”, and the Malaysian Cabinet announced plans to review the divorce laws, and divorce by this method. All of Malaysia’s State governments supported this initiative, and also announced that in other cases like this in the future they would look to the courts to impose mandatory jail sentences on such husbands.

In the event, public interest in the issue subsided, the government decided to put the reform process on hold while keeping the issue under review, and legislation did not follow. Most family law jurists in Malaysia consider that divorce by talaq is still available in Malaysia, unquestionably. Furthermore, and in the absence of clear and authorita-

tive court rulings to the contrary, divorce can still be undertaken by SMS message. However, it will generally be necessary for the husband to attend court to “verify” his actions.

The author of this article was lecturing in Malaysia that summer, as in previous years, and, after being told of the case by friends at the University of Malaya, followed these developments in the media. Taylor’s account is a very full one, although it might, perhaps, be added that the reason *why* the government did not introduce new regulatory legislation was almost certainly down to the sizeable backlash by traditionalists against the government’s plans for reform.⁴⁴ Nevertheless, as in other centres of the Muslim faith, the talaq as a form of unilateral divorce (despite continuing to be widely used) became a significant talking point, and has undoubtedly started to come under much closer governmental scrutiny. Among other things, the expectation is that husbands should be making greater use of mediation as a prelude to initiating their divorce, as well as in the phase after the initial pronouncement.⁴⁵

Divorce by SMS in Other Countries?

It is interesting that similar concerns about unilateral divorce by text message have been expressed in other large jurisdictions where there are big Muslim populations, such as India.⁴⁶ A recent BBC report concerned a women’s campaign in India in response to cases where Muslim men have reportedly divorced their wives “in minutes”, using mobile phone text messages, and, as in Malaysia, have had those divorces upheld. The report highlights differences between practice between India, Pakistan, Bangladesh, Indonesia, and Malaysia. It also provides an informative case study about the experience of a woman, Rehana, with four children who had been thrown out the house by her husband Akram after a 20-year marriage, who then took a new wife. She was not sure if she had been divorced following her forcible removal, but was careful not to answer the phone whenever it rang – particular if she could see that the call was coming from his phone. The report indicates that a majority of the clergy in India (the ulema) appear to support the continuation of the practice, and believe that it is legal and binding when carried out properly in line with the Sharia code as it is observed in India.

It would appear from the BBC’s coverage that a majority of the All India Muslim Personal Law Board now thinks that the practice is a “sin”: but it would only try to “discourage it”, as it did not have the power to impose a ban.

In the rest of this article it is proposed to focus attention on the finan-

cial and “welfare” aspects of unilateral divorce. Specifically, consideration is given to Part III of the Matrimonial and Family Proceedings Act 1984 (the “MFPA”) and then, briefly, the position in relation to State benefits.

Financial Provision and MFPA 1984

As already noted in the preceding discussion, the issue of overseas divorce and recognition in the UK often runs hand-in-hand with financial support. In many cases, in the process of obtaining the overseas divorce the spouse obtaining it will not have made (indeed will not have been expected to make) financial provision for his wife and dependants. Furthermore, the UK court, when dealing with recognition, will also not have dealt with the matter. It might have been expected that the court, at that stage, would look to the applicant for recognition to have made such provision by the time a petition for recognition is received – or, failing that, to have made recognition *conditional* on such support. Unfortunately, though, this is not the case. The FLA Part II contains no explicit provisions authorising or *requiring* the court to do this, even if in practice advisers may offer to make provision (as seen in cases like *K v K*; and *Abbassi*).

In the *Abbassi* case, discussed previously, counsel for the applicant for recognition accepted that if the application for recognition failed he would concede liability to make financial provision under the Matrimonial Causes Act 1973. In the alternative, it was accepted that he had financial responsibility under the MFPA Part III if it succeeded. Assisted by those concessions, the court made an order requiring the husband to comply with earlier directions in the ancillary relief proceedings. He was also required to file and serve all the documentation required by his Form E; and file and serve answers to the outstanding questionnaire. This was all required within a tight timetable to which a penal notice was appended. This was, of course, an unusual case. What was not so unusual, however, was that the husband’s announcement that he was already divorced came just in time to block the wife’s attempt to secure a decree absolute (having already obtained a decree nisi). As Thorpe LJ pointed out in the Court of Appeal, the fact that if the husband was correct it would mean that the wife had been cohabiting in a non-marital relationship made the case particularly problematic. All the allegations about impropriety in that case, and the allegedly bogus, false, and improperly procured evidence, and the concerns about procedural irregularities and non-compliance with proce-

dures in the other jurisdiction, did not prevent the experts concluding that the divorce would have been accepted as valid. As he put it:

“In very broad summary, the experts all noted irregularity and inconsistency in the documentation but were generally of the view that the asserted talak divorce would be recognised as valid in Pakistan.”

Perhaps not surprisingly in the circumstances, the husband’s counsel accepted the court’s order to transfer the case for determination to the other jurisdiction’s courts enthusiastically (the trial judge described it as “adventitious”); and the wife’s advisers opposed the transfer. For the purposes of financial provision, however, the arrangements were clearly acceptable – and removed much of the usual uncertainty that pervades recognition proceedings. The question, however, is whether the courts are able to withhold recognition if such concessions are not made as a matter of course. It would appear that, under the scheme as it currently stands, this is not something that is a *requirement*.

Public Policy & Financial Provision. As the courts do not, as a matter of course, use their powers to withhold recognition on “public policy” grounds in order to ensure that financial provision is made in every case, the spouse who has been divorced in an overseas divorce may need to go on to utilise the procedures in further proceedings, following recognition, using the MFPA 1984, Part III. The 1984 Act was introduced to meet a need for such provision, as the Law Commission report *Financial Relief after Foreign Divorce* (1982, Law Com 117) explained. The key recommendation was that English courts should be given power to entertain applications for financial provision and property adjustment orders notwithstanding the existence of the prior foreign divorce, and one that has been recognised by our courts (para 22).

What follows is a discussion of the key requirements involved.

Applications: “Leave” and Interim Maintenance

MFPA applications are by no means easy, or trouble-free. An applicant has it all to do, and applications can fail on a number of counts. Even if the court has jurisdiction (which it may not), and even after leave has been granted, there are a number of potential grounds on which an application can still fail.

The lead provision is s 12. This provides that where a marriage has been dissolved or annulled, or the parties have been legally separated, by means of “judicial or other proceedings” in an overseas country, and 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 for an order for financial relief. This requires the court's leave, however, and this may not be granted unless the court "considers that there is substantial ground for the making of an application for such an order". Leave may be granted subject to such conditions.

In general terms it has been said that an application is a "two-stage process", with a threshold test, namely "whether in all the circumstances of the case it would be appropriate for an order to be made at all"; and then satisfying particular matters calling for specific consideration (discussed below: The s 16 Hurdles). The purpose of this is to "block unmeritorious applications under the Act and avoid abuse of its underlying purpose".⁴⁷ The purpose of the Act is limited, namely to "remit hardships which have been experienced in the past in the presence of failure in a foreign jurisdiction to afford appropriate relief".⁴⁸

An important feature of the scheme is that leave can be given even though an order for maintenance payments or property transfer has been made by a court in another country. The significance of this, of course, is that an existing provision, perhaps when made at the time of the divorce, is inadequate. Another important factor is that the party needing the financial support may have difficulties enforcing her rights. It is one thing to get a maintenance order, but an entirely different thing getting it paid. In *Lamagni v Lamagni* [1995] 2 FLR 452 an applicant's husband had obtained a divorce in Belgium. The wife later petitioned for divorce in the UK, and was successful. However, the Belgian divorce and arrangements took precedence and this prevented her obtaining ancillary relief here.

Initially, her application for relief under the MFPA failed, particularly as a result of the delays there had been, delays caused in part by the difficulties the applicant had experienced in trying to get enforcement. However, her appeal was successful. The reasons for the delays, said the court, should be considered when the application was considered – but they should not have caused the grant of leave to be refused.

Interim Maintenance

If it appears to the court that the applicant or any child of the family is in "immediate need of financial assistance", the court can make an interim order for maintenance. This is an order requiring the other party to the marriage to make periodical payments to the applicant or child at any time after the grant of leave up to the date of determination of the application, as the court thinks reasonable.

The MFPA and Jurisdiction

Jurisdictional requirements are not particularly onerous for applicants. Specifically, the court has jurisdiction to entertain an application if any of the following jurisdictional requirements are satisfied: (a) *either of the parties to the marriage was domiciled in England and Wales* on the date of the application for leave, or *was so domiciled* on the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or (b) either of the parties to the marriage was *habitually resident in England and Wales* throughout the period of one year ending with *the date of the application for leave*, or was so resident throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or (c) either or both of the parties to the marriage had at the date of the application for leave a *beneficial interest in possession in a dwelling-house* in England or Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.

What are more demanding, however, are the hurdles in s 16 that must be satisfied by applicants. Some of these can, in practice, prove to be much more problematic.

The s 16 Hurdles

Before it can make an order for financial relief the court is obliged to consider whether in all the circumstances of the case it is “appropriate” for such an order to be made by a court. If the court is *not* satisfied about this it must dismiss the application.

The court must, in particular, have regard to:

- (a) the connection which the parties to the marriage have with England and Wales;
- (b) the connection which those parties have with the country in which the marriage was dissolved;
- (c) the connection which those parties have with any *other* country outside England and Wales;
- (d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, by virtue of any agreement or the operation of the law of a country outside England and Wales;
- (e) in a case where an order has been made by a court in another country that requires the other party to the marriage to make any

- payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order “and the extent to which the order has been complied with or is likely to be complied with”;
- (f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of another country and if the applicant has omitted to exercise that right the reason for that omission;
 - (g) the availability in England and Wales of any property in respect of which an order in favour of the applicant could be made;
 - (h) the extent to which any order is likely to be enforceable;
 - (i) the length of time that has elapsed since the date of the divorce, etc.

Overseas Provision and Orders

In general, the courts regard the scope of the scheme as quite narrow, as shown by cases where applications have been rejected when provision has already been made by an overseas court – and particularly where this has been done as part of a comprehensive settlement negotiated by the parties’ lawyers and generally complied with by the parties. The fact that the parties’ circumstances have subsequently changed, for example after a resumption of cohabitation, but without further arrangements being agreed, or made by the courts, is not something that the courts can deal with under the MFPA scheme.⁴⁹

On the other hand, if arrangements made by the foreign court do not amount to a “clean break”, and the provision made is not sufficient and does not reflect the contribution a party has made, for example in bringing up children, even after a relatively short marriage, then an application can be entertained under the scheme. In *M v L (Financial Relief After Overseas Divorce)* [2003] 2 FLR 425; [2003] Fam Law 563 the parties had married in England, and lived throughout the marriage in England between 1966 and 1970, but were divorced in South Africa after a four-year marriage. The South African court had made provision, including maintenance payments and rent-free provision of the husband’s flat (facilitated by a lease that lasted until the younger of the two children was aged 22). Assistance for the children continued until after they reached 18, but the former wife felt that it was appropriate to seek further support, particularly as she approached retirement, and having undertaken much of the childcare since the divorce, and had not exploited her earning capacity to the extent she could have done. In these

circumstances, and especially as the financial support in South Africa was not a “clean break”, the court accepted that an application under the MFPA was appropriate. The Matrimonial Causes Act 1973 s 25, and principles, applied, despite a short marriage and the length of time since the divorce. Taking into account the work done in bringing up the children, and the requirements of fairness, it was right to order the sale of the flat, with payment of a lump sum for repairs and modernisation; and to require payment of a pension of £1,000 per month (with a further capitalisation on “Duxbury” lines to produce a lump sum of £150,000 making up for a shortfall in her old age pension as a result of her employment).

Financial Provision and Property Adjustment

On an application, the court has a wide range of powers. Broadly, these equate to the orders that can be made under the Matrimonial Causes Act 1973, Part II when a divorce, decree of nullity, or judicial separation is granted, including:

- financial provision orders;
- property adjustment orders;
- pension sharing orders.

If the court makes a secured periodical payments order, an order for the payment of a lump sum, or a property adjustment order then it can also make orders for the sale of property under Part II of the 1973 Act. In exercising its powers the court must have regard to “all the circumstances of the case”: but first consideration must be given to the welfare of any child of the family under the age of 18, and the other considerations in s 18.

Avoidance of Transactions to Defeat Applications

As might be expected, the scheme gives the court considerable powers for dealing with transactions intended to defeat applications for financial relief. Indeed, the powers are available from the point that leave is granted, and are directed at anything preventing financial relief from being granted or reducing the amount of relief which might be granted (or frustrating or impeding enforcement of orders). If it is satisfied that the other party to the marriage is “about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property” with

the intention of defeating the claim for financial relief the court can “make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim” (s 23).

Applications may also be made by a party to a marriage to prevent transactions intended to defeat *prospective* applications (s 24)

The Grant of Leave in Recognition Proceedings

The UK court, when it grants recognition, can if it wishes expedite an application under the MFPA by granting leave in the recognition proceedings. This occurred, for example, in *Eroglu v Eroglu* [1994] 2 FCR 525 when Thorpe J granted leave at the end of his judgment upholding the parties’ divorce, obtained in Turkey. In that case a UK-based wife of a Turkish citizen, whom she had married in Turkey, had been divorced in Turkey. The divorce was valid in Turkey. However, when she later petitioned for divorce in the UK, she contended that the divorce in Turkey had been a sham, and had been obtained by fraud after the parties had colluded in gaining it (to help the husband regain privileges which he had lost as a result of the marriage). The husband asked the court to dismiss the petition, relying on the fact that the divorce was effective in Turkey. The wife urged that the Turkish decree should be refused recognition, and also sought financial relief. In the event, the court (Thorpe J) rejected the wife’s arguments, and confirmed the validity of the Turkish divorce.

However, at the same time as granting recognition the court granted the wife leave to apply for financial provision under the MFPA.

The MFPA: Conclusions

The MFPA is, without doubt, potentially problematic for the system’s users and advisers – and not just because of the s 16 “hurdles”. The scheme is highly discretion-laden, and even if an applicant satisfies eligibility and jurisdictional criteria, the court can take into account a wide range of factors in order to refuse an application – not least, of course, being the husband’s resources and changed domestic arrangements since the time of the divorce (including matters of which the applicant may have had little knowledge, possibly over a lengthy period since the divorce became effective). Even if an applicant obtains an order (typically requiring a former husband to make periodical payments) it is by no means clear that such payments will be paid, or paid regularly – especially from a former spouse who has left the UK, and has few remaining

links with this country. In this respect, the system is not unlike the problems associated with payments of Child Support by non-resident parents. Indeed, some practitioners regard the MFPA scheme, at least in some areas of its operation, as an even worse performer than the Child Support system. Furthermore, once a former spouse has gained recognition in earlier proceedings (which is primarily all he is interested in, particularly if he wants to marry again) it will not be long before he starts to have concerns about being able to meet newer responsibilities, including duties towards his later spouse and child dependants. In this respect the issues are very similar indeed to those around child maintenance.

There are useful anti-avoidance provisions, notably in ss 23 and 24 as discussed. However, the reality is that in many cases a husband who has gone abroad, gained a unilateral divorce without informing his wife using a system that does not require such notice (or, if it does, will disregard such failures), will have rearranged his property and finances long before recognition proceedings begin. For a former spouse who maintains his (or her) connections with the UK, and has assets in the form of property, bank accounts, etc here, the position is more favourable, of course. If not, though, the position of the UK-based former spouse – in most cases a wife – the position is a lot more precarious. Inevitably, as for those who are unable to be assisted by the MFPA, that means support will come, primarily, either from intra-family sources or from the State welfare system, or both.

Divorced Wives and Children

Advice from Faith Communities

Needless to say, unilateral divorce systems, especially when undertaken without the knowledge and participation of both spouses, and when appropriate welfare arrangements are not in place to assist the wives and child dependants affected, can generate some significant advice needs.

Many people in this situation will turn to their spiritual leaders, and faith communities. In the UK, Islamic centres provide a lot of advice and support through their networks, and counselling on a wide range of aspects. They deliver practical support as well as spiritual advice. Organisations like the East London Mosque and Muslim Centre and its imams provide a sizeable section of the Muslim community in London with advice on a wide range of matters, including matrimonial problems,⁵⁰ and take-up of employment.⁵¹ Other centres also provide

information on the web and through web-based advice for enquirers with concerns: for example when their husbands have divorced them, and they face uncertainty about their status and rights to the support they should expect. In some cases this will take the form of case studies provided for readers. In one case, publicised on the website of the Dewsbury Sharia Council to enable others to understand the issues in question (with the parties anonymised, of course), an enquirer had asked for her divorce case to be dealt with by the Sharia Council in Dewsbury and had been informed that she had received her divorce through the court.

Specifically, she had received a “talaq-e-baain”. However, she was not clear what that actually meant – or whether she would get any financial help, during her period of *iddat* (separation following the pronouncement) from her husband. She pointed out that she and her husband had been living separately before that (for over two years) due to the problems they were having. It had seemed at the end that a divorce was the best solution for their relationship, as communication and contact had broken down. She asked for advice, including advice on the financial point, as her Sharia Council had not dealt with this. Helpfully, the response was that *talaq bain* meant that she was divorced – and that as the period following the pronouncement had expired as well the marital relationship was completely ended.⁵² Financial help from the husband from that point would not be due.

In another informative case study, on the same site, a wife sought advice having experienced a range of problems, including infidelity on the part of the husband, regular physical violence, and financial problems linked to the husband’s sale of their home (on which she had been paying the mortgage, but had refused to continue to do, and would just pay a share). The advice sought included a query as to whether she would lose her dowry (which in any case he had still not paid) if she initiated the divorce. The advice confirmed that she would, indeed, lose the right to her dower if she initiated the divorce (and would have had to repay it if it had been paid). The advice she received was that she should initiate a civil divorce along with an Islamic divorce in order to achieve a clean separation.⁵³

The Developing Role of Sharia Law in the UK

Interestingly, the Archbishop of Canterbury, Dr Rowan Williams, in his speech “Civil and Religious Law in England: a Religious Perspective” on 7 February 2008 referred to the work done by such Sharia councils. He made the important point that such bodies now play an important role in helping people order and re-order their lives. It was in this context that

he made his remarks about the scope for recognising “supplementary jurisdictions” in some areas, especially family law. However, he also appeared to offer a warning, as well, about the potential effect of reinforcing in minority communities “retrograde elements” and “particularly serious consequences for the role and liberties of women”. In a key passage he speculated about the possibilities, in the future, for “plural jurisdictions”, and the conditions under which they might be permitted. He also said that:

“If any kind of plural jurisdiction is recognised, it would presumably have to be under the rubric that no ‘supplementary’ jurisdiction could have the power to deny access to the rights granted to other citizens or to punish its members for claiming those rights. This is in effect to mirror what a minority might themselves be requesting – that the situation should not arise where membership of one group restricted the freedom to live also as a member of an overlapping group, that (in this case) citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship – or, better, to recognise that citizenship itself is a complex phenomenon not bound up with any one level of communal belonging but involving them all.”

Supportive observations about the Archbishop’s views have been provided by some sections of the media, and by some law academics. For example it has been pointed out that the supplementary jurisdiction offered by Sharia courts can be helpful to women who are in “limping marriages” after their husband has moved on to another woman whom he wants to be his wife, but refuses either to acknowledge or divorce his wife: such courts are “often the only answer for such women”.⁵⁴

The Value (and Limits) of Sharia Law in the UK

Following the media frenzy over the Archbishop’s comments, the Lord Chief Justice, Lord Phillips, joined the debate in a lecture he gave at the East London Mosque. As well providing the Archbishop with some support, he provided some necessary clarification about the scope (and limits) of divorce when it is effected through faith communities’ systems (“Sharia Law Could Have UK Role, Says Lord Chief Justice” in *The Guardian*, 4 July 2008).

Among other things, he made it clear that it is “possible for individuals voluntarily to conduct their lives in accordance with Sharia

principles without this being in conflict with the rights guaranteed by our law”, and that:

“It is possible in this country for those who are entering into a contractual agreement to agree that the agreement shall be governed by a law other than English law. Those who, in this country, are in dispute as to their respective rights are free to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution.”

The full text of his lecture is accessible on the website of the East London Mosque (via www.eastlondonmosque.org.uk/?page=home).

Those remarks have, without doubt, added to the impetus behind moves to revisit the basic elements of the Islamic marriage contract; and develop new initiatives such as Sharia tribunals.

Marriage and Divorce: Expectations and Risk

Marriages fail in every faith community. With marital breakdown come further risks. In the case of unilateral divorce, the risk is perhaps heightened by the divorce process being firmly within the control of one side to the marriage bargain. Similarly, control over the timing of withdrawal of support for the family is also in most cases in the divorcing spouse’s control. In most cases the duty to maintain continues while the marriage continues – and until the divorce is completed. Until that happens, the expectation is that a husband should continue to support his wife and children during the period of *iddat*, and pending the stage at which the divorce is complete and is irrevocable.⁵⁵ Interestingly, there are some sources that argue that the duty to maintain may, in some circumstances, continue *after* that.⁵⁶

There are, of course, variations on the divorce scenario. For example, rather than divorcing his spouse (thereby bringing his obligations to support to an end at that point) a husband may elect to just *separate* while, perhaps, maintaining financial provision. This was the position in *El Fadl v El Fadl* [2000] 1 FLR 175 where the focus was on unilateral divorce law and practice in Lebanon. In that case the husband maintained financial support following separation. For most husbands in this scenario doing this will accord with the expectations of his family, kinship circle, and faith community. In *El Fadl*, however, financial support was eventually withdrawn. Once the wife stopped receiving

financial support she decided to initiate a UK petition for divorce – only to find that she had already been divorced 16 years later. However, the fact that she had continued to receive some financial support after the divorce did not prevent that divorce being effective in Lebanon; nor did it prevent it being recognised by our courts.

The precise status and scope of the “duty to maintain” in Shariah law and practices is unclear as is readily apparent in recognition cases despite important sources on the matter. This is, to some extent, analogous to the problems associated with the Common Law duty to maintain.⁵⁷ It is far from clear where that duty begins or when it ends, or what, exactly, the parties’ rights may be in terms of taking steps to secure such a fundamental right in domestic partnership law. Indeed, it was a pervasive, but (eventually) unresolved issue in the *Keohoe* case, and one which remained unclear by the time it reached the European Court of Human Rights (see *R (Keohoe) v Secretary of State for Welfare and Pensions* [2005] UKHL 48; [2008] 2 FLR 1014). In the process, the litigation not only highlighted the imprecise nature of the duty to maintain (and, reciprocally, the right to be maintained) at Common Law and even after the legislative overlay on the Common Law, it still managed to be inconclusive on key matters such as whether our legal system recognises a child’s right to be maintained – quite apart from any post-separation and post-divorce rights that a spouse may acquire. Nevertheless, the litigation, like some of the recognition cases being considered, certainly highlights the potential areas which “public policy” has scope for encompassing. Arguably, as with the *Keohoe* litigation, “public policy” ought to be as much about children’s right to be maintained as it is about the divorced wife’s – a major consideration in addressing issues around the recognition of unilateral divorce without property or financial settlement.

This undoubtedly poses a challenge, as well, for modern Islamic family law, and for the imams and their spiritual advisers who provide day-to-day advice on such matters.

Changes and Reform: The Islamic Marriage Contract

There are discernible trends in the way some jurisdictions are approaching the matter of marriage and divorce. In countries where unilateral divorce is still available, including North Africa, the Middle East, and Pakistan, India, and South-East Asia, there is evidence of closer regulation of unilateral divorce, not least by expecting the divorcing party to attempt reconciliation as a prelude to divorce. There are a number of factors and catalysts involved, and not just what may be a growing secularisation of divorce in some countries (although it is

unclear to what extent this is evident in the countries concerned). As traditional systems of intra-family and kinship support break down, however, it is clear that one consequence is that some States and communities simply cannot meet the welfare needs of divorced spouses and families in the post-divorce phase.⁵⁸

Within the Muslim community in the UK, a number of changes have been initiated in 2008, directed in part at reducing some of the undoubted risks and uncertainties associated with some aspects of the Islamic marriage bond, and divorce. This may be seen, for example, in the new *Islamic Marriage Contract*, developed by the Muslim Institute. As one commentator writing in *The Guardian* (8 August 2008) argues, this “sets aside cultural practices” and is starting to give women “the right they are due under Sharia law”. Among other things, the new model, she says, deals with eventualities if “things go awry and the couple divorce, the woman – and it is almost always the woman – experiences great difficulty securing the financial rights guaranteed to her under sharia law”. The terms and conditions of this new contract, signed at the nikkah stage of marriage, “clarify both husband and wife’s rights and obligations in all eventualities”.

The risk of a failed marriage is no doubt just one of the worries for brides-to-be, and family members involved in pre-marriage arrangements. As one leading commentator has said, “arranging a marriage is understood to be a risky process, with the dangers that potential spouses’ flaws may be concealed, proposals may be rejected, or daughters mistreated”. As she says, there is a dilemma in that whilst transnational marriage serves to introduce risks for British brides they are still seen as a way of *avoiding* perceived dangers – for example those that result from “selecting a spouse raised in the West”. Her informants suggested that “British-born” spouses may be more likely to “neglect religious knowledge or practices, indulge in ‘immoral’ activities, or to exhibit a lack of commitment to marriage and the family – in contrast to the more traditional, religious, hardworking or family-oriented spouse they hoped might be obtained in Pakistan”. Elsewhere, the same commentator has suggested that the popularity of marriage between trusted close relatives is at least in part a reaction to the various risks involved in selecting suitable spouses, as well as helping to strengthen connections between kin divided by migration (most notably in a paper for the British Sociological Association Conference, “Risk, Trust, Gender and Transnational Cousin Marriage Among British Pakistanis” (York: 22 March 2005). Her research has, among other things, looked at the way marriage arrangements and rituals have been adapted in ways that introduce greater protection for the parties.⁵⁹

Like other jurisdictions, the UK is wrestling with the need to give faith communities as much leeway as possible, and to try to meet the needs and wishes of minorities in the area of marriage and divorce. At the same time, though, it is trying to ensure that parties' basic rights in the divorce process are protected. This is highlighting some of the tensions between a secular, civil divorce system and divorce according to the customs and practices of religious minorities.

In the remaining part of this article, consideration is given to financial aspects of "welfare" in the post-divorce phase.

State Welfare: Facilitating Unilateral Divorce Without Provision?

The difficulties that divorced wives and family dependants face in securing financial provision, a problem aggravated by the disjunction of the recognition and post-recognition processes and difficulties in securing provision from MFPA proceedings, means that in practice they will have no option but to seek support from other sources, including family members if any are ready and willing to assist. Otherwise, the State welfare system provides the fallback.

In providing support, the welfare system is, of course, actually helping the unilateral divorce system to work. Indeed, it might be argued that without the State welfare system the unilateral divorce system simply would not function, and it would not be long before the legislature would be obliged to review the way the system works; and it would almost certainly have to introduce changes to the FLA system that would have the effect of stopping courts recognising overseas divorces where adequate financial provision has not been made. It would also need to legislate to ensure that the financial aspect of post-divorce support is dealt with at the same time as the merits of recognition are being dealt with – as in other jurisdictions. It would almost certainly be necessary, too, to require courts to start addressing a wider range of "public policy" requirements before making recognition declarations.

It is in this context, and in relation to post-divorce support, that the door opens to discourses on a much wider raft of "welfare" issues around unilateral divorce, bringing in complex matters at the interface of family, welfare, and migration policy – primarily because of the highly restrictive status barriers that the immigration system has constructed, and which have a significant capacity for impacting severely on some very vulnerable claimants. The reality that policy-makers need to start

addressing is that some parties can and do suffer extreme hardship, and a range of welfare crises, including financial insecurity, lack of housing, and other needs, after a divorce. The catalyst for this, invariably, is that the main breadwinner, and spouse initiating the unilateral divorce, has failed to make adequate provision for supporting his family members. This is hardship which, in practice, the welfare system then has to relieve, particularly in those cases where other family members are not on hand to offer support; or themselves lack the ability to provide that support. This can be traced back in many cases to the lack of formal requirements in many jurisdictions to cater for such support. There may be good reasons why this is so, and why those systems have evolved the way they have done. Typically, most of them may well look to other institutions to provide the necessary post-divorce support – the family, remarriage, and inter-family support networks rather than the State.

Recognition in France; Equality and Public Policy

Unlike the UK, similar factors to those that have informed changes our welfare system have, in fact, elicited very different policy responses in other countries like France. Increased applications from husbands seeking “recognition” for their unilateral divorces was one of the factors that prompted the French courts, and in particular the Cour de Cassation from 2004 onwards, to stop readily recognising unilateral divorces obtained in jurisdictions like Algeria: a jurisdiction where, until recently, a wife could expect no financial support whatsoever – leaving a wife who remained resident in France to look to the French welfare system for support. Not surprisingly, perhaps, France’s courts started to draw the line, and treat this as one of the “inequality” factors that ought to be brought within the public policy grounds for refusing recognition. However, it was not the only consideration that prompted French courts to reconsider the recognition process, as discussed by Gilles Cuniberti.⁶⁰

Unfortunately, the problem whereby the jurisdiction where the unilateral divorce takes place has failed to require a divorcing party to make provision is then compounded in the UK at a *secondary* level when the recognition system is engaged. Specifically, this does not provide a “long stop” by preventing the divorced wife’s and children’s potential destitution after a divorce (at least in those cases where the divorcing party has the resources that could reasonably be expected to be redistributed to avoid this). As referred to earlier, this problem is made worse by the court’s apparent inability (or reluctance) to invoke expectations of a “fair trial” as a pre-requisite to recognition in the way the jurisdiction in rela-

tion to intra-EU divorces may be required to respect such requirements. Until ECHR Protocol 7, art 5 is up and running in the UK, and deployed in this jurisdiction to address such “inequality” issues, the courts lack the ability to utilise that as a basis for refusing recognition.

Accessing State Benefits

As in many cases financial support for divorced spouses will end when they are divorced (if not before that, and when the relationship has broken down), those spouses will, inevitably, have to look to the State welfare system for support. In some cases, for example where the husband elects to marry a new partner to form a polygamous union, the expectation is that he will continue to support his other wife (or wives). In other cases, though, he may not – something that is generally not consistent with Sharia law, or the expectations that his faith community will have of him. This is also reflected in the regulatory requirements in the legislation of countries where unilateral divorce is available. In Pakistan, for example, the Muslim Family Law Ordinance Order provisions are aimed at vetting the feasibility of entering into a further marriage, particularly if the husband cannot support his existing family. The requirement that an existing wife be told of the proposal was aimed at providing her with the opportunity of making representations on the subject when the local union council adjudicates on the proposal. Although, in practice, the MFLO may not provide an effective deterrent to remarriage when a new marriage may not be viable, it nevertheless signals the State’s interest in the process, and expectations.

When a husband in a UK-based marriage leaves his spouse and children, he may simply take the view that he is no longer obliged to support her (and them). A husband contemplating leaving his family, or withdrawing support from them, is no doubt going to be less concerned, and less likely to hesitate perhaps, if he knows the State welfare system is going to “provide”. In the UK, the system, if it chooses to pursue a husband who has transferred responsibilities to support to the community, has the power to seek reimbursement for the costs that the community incurs when this happens. The fact that the husband may not feel obliged to provide support is not, in law, a defence in such recoupment proceedings.

This was the position, for example, in *Din v National Assistance Board* [1967] 1 All ER 750. In that case the husband, who was already married, married again and brought his wife and children to the UK. He then left her and their four children. She was then obliged to claim bene-

fits. When the welfare agency sought to recover some of the costs involved he refused to pay, arguing that the word “wife” could not apply to a wife in a polygamous union. His counsel argued that such marriages were not recognised in the UK on the grounds of “public policy”.

The issue in the court focused on the provision in the National Assistance Act 1948 s 43 (now in the Social Security Administration Act 1992 ss 106 and 107) which states that:

“Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the board or the local authority concerned may make complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted.”

The provision read: “For the purposes of this Act – (a) a man shall be liable to maintain his wife and his children...”

It was argued that the word “wife” could not apply to a *polygamously* married wife. Similarly, in respect of his alleged failure to support his four children, if there was no valid marriage then the children of that union were not *legitimate* children. Accordingly they could not be “children” within the meaning of the Act; and the father should not, therefore, have to reimburse the agency.

The Court of Appeal rejected this, and upheld the agency’s claim. Lord Justice Salmon observed that the marriage was, indeed, polygamous in the eyes of UK law as the appellant had another wife who was still alive. Having brought one of those wives and four children to the UK, he “abandoned” them, and for two years they had to be supported by the benefits system. The question was whether the system could look to him for reimbursement? The court held unanimously that it could, his lordship commenting that:

“It would perhaps be as remarkable as it would be unfortunate if a man coming from a country where he is lawfully married to a woman and is lawfully the father of her children may bring them here and leave them destitute with impunity, so that when the National Assistance Board is obliged to come to their assistance, he can avoid all responsibility and thereby throw the whole burden of maintaining his wife and children upon the public. When a question arises of recognising a foreign marriage or of construing the word ‘wife’ in a statute, everything depends upon the purpose for which the marriage is to be recognised and upon the objects of the statute. I ask myself first of all: is there any good reason why the appellant’s wife and children should not be recognised as his wife and children for the purpose of the

National Assistance Act, 1948? I can find no such reason, and every reason in common sense and justice why they should be so recognised.”

New Challenges for the Welfare System

The *Din* case was important for a number of reasons, and not just in that it reinforced the UK’s “duty to maintain”, reminding individuals of their responsibilities to their families and to the community. It was also a significant landmark for an altogether different reason. Namely, that the State welfare system had started, by the late 1960s, to adapt to a wider range of responsibilities, including responsibilities to provide a safety-net for needy groups of the kind that featured in the case.

The system was entering a new phase, in the face of major changes and changing demographics, and migration into the UK of a wider range of ethnic groups where polygamy is more prevalent. This meant it had to deal with increasing numbers of needy spouses and families, including spouses who were parties to a polygamous union rather than the conventional monogamous model characterised by the majority of UK households. More recently, important developments have included the wider availability of support for polygamous unions, and also specifically targeted support to help in “crisis” situations, including cases in which there has been withdrawal of inter-familial support, and “urgent cases”, following a unilateral divorce that, as in *Din*, leaves the divorced spouse and family dependants “destitute”. There is also recognition that the system needs to adapt in relation to key areas like support for mortgage and other housing costs. A good example of this can be seen in the use of “capital disregards” to facilitate take-up in situations of overcrowded accommodation. For example, the courts now recognise that a husband with a lot of family members and children should be permitted to have at least two houses, at least in circumstances where it is appropriate to treat them as a single dwelling. By doing this he is permitted a capital disregard of the value of both houses that will then enable him to claim benefits like Income Support, Housing Benefit, and Jobseeker’s Allowance as in *Secretary of State for Work and Pensions v Miah* [2003] 4 All ER 702. The significance of this, and the judicial policy that informs such decisions, is that the welfare system is extending support to such needy claimants, and incurring a cost to the system. As the current reforms get under way, it is significant that as the system starts to progressively remove support from groups like lone parent Income Support claimants (most recently under restrictions on those whose

youngest child reaches twelve, as considered in this issue), fears grow for the vulnerability of ethnic minority lone parent households who may not be well equipped for the labour market and who, in practice, find the barriers to entry into employment and retention very difficult to surmount (something that was highlighted by reports like *Moving on Up: Ethnic Minority Women at Work* (Equal Opportunities Commission, 2007: a study that examined the work experiences of groups like Pakistani and Bangladeshi women).

Some commentators, for example Prakash Shah, have observed that the UK legal system, in a variety of areas like immigration and family law, has not adapted as well as it might to such demographic changes, and changing priorities.⁶¹ In the welfare law arena this was probably not as valid a point as it was in the immigration law area. Nevertheless, there were court decisions that continued to surprise most observers, including post-*Din* cases like *Bibi v Chief Adjudication Officer* [1998] 1 FLR 375 in which the Court of Appeal upheld a refusal of Widowed Mothers Allowance in a case where the deceased had more than one wife, and one of them argued unsuccessfully that eligibility for WMA should extend to *all* wives.

In the context of welfare adjudication processes, a reluctance to adapt to the needs of a more diverse community is sometimes put down to the reluctance of individual decision-makers (and policy-makers) to adapt to new realities, and the need for change. More realistically, however, it is usually a problem within the system itself. Indeed, it is not difficult to find, without searching too hard, examples of *structural* problems within the legislation itself and in the underlying policies that shape and maintain it. The point is readily illustrated by the absence of any specific provision within primary legislation of an inclusive definition of the “family” – for example one that embraces polygamous relationships, despite opportunities to include one (for example at the time that the Civil Partnership Act 2004 led to extensions to the meaning of a “couple”).⁶² Indeed, up-to-date guidance on benefits like Housing Benefit (as at June 2008) still explicitly disavows any such possibility. This can be seen in the Housing Benefit Guidance Manual (DWP, Amendment, 16 June 2008, para 1.11). It recognises the existence of such a relationship “for HB/CTB purposes”, but this is conditional on there being a marriage ceremony in a country which permits polygamy; and the marriage being between the claimant and more than one partner of the opposite sex “the relationship with each partner being that of a married couple” (para 1.41). It then adds, for good measure, that “Any polygamous relationship formed in this country is excluded”; and that in these circumstances a second or subsequent partner is to be treated as a “non-dependant”

(HB Regulations, reg 2; and para 1.42). This has been seen by critics as a deliberate attempt to create disincentive or, at the least discouragement, to enter polygamous unions – but one which is hardly very effective if the main purpose was to contain the potential for a proliferation of claims when new unions are entered into. In cases where the claimant (usually the husband but it could be other parties) is “absent from home” for 52 weeks, or the decision-maker considers that he is likely to be absent from home for that period, the remaining partners will be treated as the “members of the household” for award purposes (paras 1.44 and 1.45). Similar guidance applies with other means-tested benefits.

At the same time as such structural problems subsist in the adjudication system, issues of marital status, and particularly polygamous relationships, have still tested the courts from time to time. In general, and particularly in the pre-ECHR era, decisions tended to support the adjudications of decision-makers that excluded access to benefits in a number of scenarios involving claims by those who were a party to what the system regarded as an atypical marriage. In terms of domestic partnerships, there is no more “atypical” a domestic partnership than a polygamous union – a problem highlighted by the *Bibi* case, but also in *R v Department of Health, ex parte Misra* [1996] 1 FLR 128, decided shortly before *Bibi*. In that case, a UK-based doctor died leaving wives from polygamous unions. The issue of eligibility for pension, including State as well NHS pensions, arose, with the doctor’s wives putting in for both a full State pension in each case and for his occupational pension. Both wives had good claims. Nevertheless, the system was clearly still not ready to accommodate such generosity; the case was resolved (eventually) by confining the award of the State pension to only one of the wives, and dividing the NHS pension between them. In many respects, the issue around access to the system’s resources has parallels with other areas of welfare “demand” following separation and divorce, such as access to social housing (highlighted by cases like *Holmes-Moorhouse v Richmond upon Thames LBC* [2008] 1 FLR 1061; (2007) *The Times*, November 19, showing how the system has to devise rules to limit access to housing support). In terms of compatibility with Convention rights and the ECHR, though, it is likely that the system will face increasing demands as it faces increasing numbers of court challenges to refusals of the kind in *Bibi*. For now, though, the government is assisted by decisions of the European Court of Human Rights that have affirmed that, in principle, limits on how far it can be expected to cater for the needs of all of a person’s partners and household may be justified.⁶³

What follows is a discussion of specific areas of welfare support that merit attention, especially in the context of unilateral divorce, and situa-

tions in which divorce (or entry into a new marital relationship, including polygamous union) impact on parties and generate needs for support. This discussion also considers the inter-play between orders for financial provision under the MFPA 1984, Part III (for example periodical payments under s 17) if these have been made following recognition; and support from the community in the form of State benefits, and Community Care and housing.

Specific Forms of Post-Separation and Divorce Support

Typically, it will be necessary for a wife in the UK (whether she is in a monogamous relationship or one of the spouses in a polygamous union) to access State benefits that are available to single parents. In this respect the position of a wife who is affected by a unilateral divorce is no different to that of any other UK-based former spouse.

Income Support and HB/LHA

The key benefits available to divorced spouses, and those who can no longer look to their husbands for support, include Income Support (IS) (utilising the “lone parent” category),⁶⁴ and Housing Benefit (HB) or Local Housing Allowance (LHA), which meet rental costs. An IS claimant who is in the lone parent category will not only receive income each week, she will be passported to maximum HB (to meet rental costs); and to maximum Child Tax Credit if she has children.⁶⁵ As a lone parent she will also be eligible for support from her former spouse following an assessment under the Child Support Act 1991, as amended by the Child Maintenance and Payments Act 2008.

If the claimant’s former spouse (spouse if the unilateral divorce’s formalities are still being completed) is not habitually resident in the UK this feature of the welfare system will not be able to assist her. In some instances the State welfare system “tops up” periodic payments made under MFPA orders – for example where the amounts fall short of the payee’s weekly “applicable amount”. In reality, though, most UK-based former spouses do not receive any financial assistance from their former husbands – either for themselves or for their children. Where, exceptionally, payments are being made under MFPA orders it is not unusual for those to cease after a short period of payment (something that mirrors the experience of child support recipients, usually after the former spouse has met a new partner and taken on new responsibilities). As with child

support, payers may well stop paying when they realise that all their payments do is reduce the value of their former spouse's means-tested benefits.

As far as Income Support is concerned, this will be for many of the wives and dependent children affected by a divorce the main source of income, at least once the claimant is no longer "living together" with her husband, or former husband (whatever the marital status is at that point). The position on post-separation and divorce support is complicated in practice by the possibility that bills are being paid, and costs that would normally be borne out of benefits income are being met. Typically, this will take the form of mortgage payments or utilities bill that are being met by the husband, either directly or through another family member. This can be problematic in a number of ways, not least in that it will engage the complex provisions in the IS (General) Regulations, Chapter VII; and give rise to "income" that should fall to be taken into account. Broadly, the system will provide potent disincentives to family members and others providing support, primarily by treating such support, unless it comes within narrowly defined exceptions, as "income" – and by punishing those who provide such support with "overpayments" demands, or, possibly, prosecution for welfare fraud.⁶⁶

As with tax credits (considered below) special provision has been made to ensure that the "applicable amount" within the IS assessment does not just cater for divorced wives in monogamous relationships. It also now assists those in polygamous unions, and makes complex arrangements for those exiting such unions. In practice, this is increasingly the type of marriage most commonly affected by unilateral divorces. Given that such payments are often very helpful in meeting a wider range of needs than mainstream IS, if a divorce brings the award to an end, on the basis that it is a "change of circumstances", then this will be a particularly negative development for many lone parent claimants.

The rules for determining the precise applicable amount in such cases are dealt with by special provisions.⁶⁷ There is also special provision for urgent claims to be made – something common in this area, and essential for needy claimants and children.⁶⁸ A major difficulty, however, that can face a claimant already in receipt of polygamy payments is that take-up and eligibility depends on the status of a wife *continuing*, as well as other characteristics of a polygamous household and unit of claim being present. As already noted, if that status changes it will, of course, affect eligibility – and decision makers will expect to be advised of any changes to avoid "overpayments" arising. The transition from the status of a wife in a polygamous union to that of a single parent will be complicated by

a number of factors, not least that other adult members residing in the household may be treated as “non-dependants”, thereby reducing the value of any award. With increased numbers of family relatives seeking to establish a “right to reside” in the UK on the basis of “extended family member” status (under the Immigration (EEA) Regulations 2006, SI 2006/1003, reg 8), a status that requires a dependency or attachment to the claimant’s household, this has been a potent factor affecting take-up and eligibility.

Housing Assistance: ISMI

In some cases where the divorcing husband has failed to make provision for the continuation of mortgage payments, and the house continues to be the family home following the divorce, a wife who is at that stage claiming Income Support will become dependent on the Income Support Mortgage Interest (ISMI) system (probably assisted by the “abandonment” exception that enables her to avoid having to wait for 39 weeks from the date of the IS claim).⁶⁹ This assumes, however, that she has, at that point, the right to continue residing in the family home, and has taken over responsibility for mortgage payments. A worse case scenario is where she has been forced out of that accommodation (“forced out” catering for a variety of possibilities, including domestic violence). In this case, access to ISMI, for example to facilitate maintenance of payments to a lender, is assisted by the scope for claiming such support from another location as “abandonment” encompasses violence and unreasonable behaviour that forces the claimant out of her primary home, but preserves her right to use the ISMI system to preserve the option of a return to the home. In the overseas divorce context this may be important, for example where the husband later goes abroad for what is more than just a “temporary” visit; and if she is able at that point to return to the house.

In other scenarios, a wife who is forced out of the matrimonial accommodation may be able to access social housing, assisted in some cases by her “priority” under the homelessness scheme. The rigours of this particular area of the Community Care system is illustrated by cases like *Holmes-Moorhouse v Richmond-on-Thames LBC* (referred to previously): a case on access to social housing by parents required to leave the former family home, but who have their children staying with them in accordance with a shared residence order (discussed in the Practice Note, “Residing or ‘Staying’ with Dad? Priority Need and Eligibility for Housing after Separation and Departure from the Family Home”, WB 15.2.

Older Claimants: Pension Credit

In the case of older claimants, Pension Credit (PC) offers yet another major source of assistance. Like IS, it is now the bedrock of State support for the older claimant and those without any income, or who only have modest incomes that need topping up. Typically, it will be available to supplement modest periodical payments made to a divorced wife under an MFPA order – usually from abroad or out of an account in a UK bank, and made under standing order. In some cases, MFPA orders providing for small amounts that have barely changed since the order was first made (often going back many years) need to be supplemented by a benefits top-up, if only to bring the recipient up to the minimum level of weekly income at which she would receive maximum PC or Income Support. For a wife who is living within a polygamous union who is affected by her husband's further marriage, polygamy payments made with PC payments are not only readily accessible within the State Pension Credit, they are responsive to changes in circumstances that might dictate a need for an increase. However, this assumes that she continues to remain eligible at that point in terms of status and means; and if the person is still within the claimant unit represented by the wives and members of the “union” which was the subject of the original award.⁷⁰ In some cases an award may end, and a new claim may be needed, following a review of the claimant's status. If the husband has left the household in circumstances that are anything more than temporary, and if the wife becomes aware that his departure is anything more than temporary (or if she is aware that she has been divorced), it will be necessary to report this fact as a “change of circumstances”. If this is not done there is scope for a recoverable overpayment to arise as the couple rates are higher than the rate at which the benefit is paid to “singles”.

In some cases a new claim, based on a position where the claimant is not part of a “couple” within the meaning of the phrase⁷¹ may, in fact, be financially advantageous, as from that point the claimant's resources will not be aggregated with those of her husband.

Tax Credits

A single *working* parent (or claimant without children in some cases) is able to claim tax credits following separation or divorce, and do so as a single claimant, if the HMRC decision-makers consider the other spouse to have exited the household and the separation is in circumstances that make this “permanent”.⁷²

A claim for Working Tax Credit will raise the household's income,

although the precise amount by which it does this will depend on the means-test. In some cases claimants may already have been assisted by income provided from a WTC claim made by a working husband – and in households where he has more than one wife the value of the award will have been increased by polygamy payments. However, a change of circumstances on the husband’s departure, or a divorce (if the wife is aware of this), will have triggered an end to the claim – and in most cases the need for a new claim. An increasing number of claimants in the UK are parents who are members of a polygamous marriage, and they are now helped by the legislation. Accordingly, the Tax Credits (Polygamous Marriages) Regulations 2003, SI 2003/742, now make special provision on the subject, for example requiring claims to be made with all the partners, and with all income and resources *aggregated*. Increased benefits are paid in a way designed to take into account the needs of all the partners.

Immigration Status: Barriers to Support for Divorced Spouses

For some claimants, including those who are not UK or EEA State nationals, separation and divorce may be particularly problematic if a claim for support is made for benefits, tax credits, or support from social services (for example social housing) and is barred out on immigration status grounds. At that point, if decisions cannot be successfully contested, recourse may have to be made to local authority social services for help. However, this has also become increasingly restricted in recent years. A significant barrier in this regard is in the Immigration and Asylum Act 1999 s 115. Basically, this applies a blanket ban on eligibility for most forms of benefit and support if a person is “subject to immigration control”. Among other things this extends to anyone who

- requires leave to enter or remain in the UK but does not have it;
- has leave to enter or remain in the UK which is conditional on not having recourse to public funds;
- has leave to enter or remain given as a result of a maintenance undertaking.

Exceptions are catered for by s 115(3) and regulations.

The restrictions also apply to community care services, which is important given that benefits may not be available. For example, the National Assistance Act 1948 (the NAA) may be the basis for accessing support in exceptional circumstances, notwithstanding the application of

s 115. More precisely, unless the duty to support is barred out excluded by the NAA s 21(1A), local authorities with social services functions must make arrangements for the provision of residential accommodation for not just the elderly and disabled but other adults who are ordinarily resident in their areas and who by reason of “any other circumstances” are in need of care and attention which is not otherwise available to them. In general, that need must go beyond mere financial destitution, and engage the authority’s residual duties and s 21(1) in particular (see, as well, Department of Health Circulars like LAC(93)(10) App.1, accessible at the DoH website).

In practice, it is often the condition in s 115 that bars out those subject to a condition at entry that they do not have recourse to public funds that is the basis for most claimants’ exclusion, including women who have separated from their spouses who are UK or EEA nationals. *Oxfordshire County Council v The Queen on the Application of Saima Khan* [2004] EWCA Civ 309, Court of Appeal offers a valuable case study. In that case Mrs Khan was a national of Pakistan. She had leave to enter the UK to join her husband, and lived with him in Oxford. The relationship broke down, mainly as a result of violent behaviour. After trying to strangle her and attacking her with a knife she was forced to flee the matrimonial home – but was then kidnapped, taken by her husband and his family to Bolton, and locked up in accommodation there. After escaping and returning to Oxford she was kidnapped again and brought back. The police intervened, however, and she decanted to a women’s refuge. However, her immigration status at that stage, including the condition imposed at entry, meant she was barred out of State benefits. The local authority assessed her needs, as they are required to do, but only gave her limited support. Specifically, it determined that her needs only extended to provision of safe and secure accommodation, a limited amount of money, and legal advice. However, they refused any further assistance under s 21 of the NAA on the basis that she was not presenting with any significant mental or physical needs that engaged any duty to support – and any needs she had were not made worse by anything other than her lack of accommodation and income. Later, however, a GP’s letter indicated that she was likely to suffer psychological problems as a result of the domestic violence – and also as one of the effects of the social and family stigma of being separated and then divorced by her husband (an issue that is not uncommon in unilateral divorce cases). In practice, though, as women’s shelters and social work studies indicate this is just one of the major stresses such victims experience, and it is then aggravated by the cessation of financial support. In *Khan*, the authority conducted a further assessment of the claimant’s needs but, once again,

determined that she did not qualify for assistance. In a letter with “reasons” the council’s service manager said: (a) that the test of entitlement to assistance under the 1948 Act was whether the claimant’s need for care and attention was to any material extent made more acute by circumstances other than the lack of accommodation and funds; and, (b) that although the claimant lacked accommodation and funds, there was nothing to indicate that there were any other circumstances that made her needs more acute.

The claimant then initiated a judicial review of the authority’s decision, arguing that: (i) the authority had wrongly decided she was not entitled to assistance under s 21 of the NAA; and, (ii) if she was not so entitled, the authority had a discretion to provide her with financial assistance under s 2 of the Local Government Act 2000. The case was only partially successful. Mr Justice Moses held that the authority had erred in law when it concluded that domestic violence could not make an applicant’s need for care and attention more acute for s 21 purposes. The matter was essentially one of evidence and facts. He quashed the decision refusing to accommodate her. However, he also concluded that in such cases authorities do not have power to provide financial assistance under the 2000 Act. Section 21(1A) in combination with s 115 represents an effective bar to such support. The authority appealed to the Court of Appeal against the first decision and the claimant cross-appealed.

The court overturned the judge’s order. The council had been justified in refusing support, and the restriction in s 21(1A) could not be circumvented by resorting to claims under the 2000 Act. It held that claimants like Mrs Khan cannot be assisted by the scheme. Nor did the Human Rights Act 1998 assist in any way; and having barred out support in the form of direct provision of housing the court could not accept that this could somehow be circumvented by any duty to provide financial assistance. In a key passage that is, essentially, bad news for women in Mrs Khan’s situation it was observed that:

“It is difficult to believe that Parliament intended to prohibit the direct provision of accommodation to persons like Mrs Khan, but not to prohibit its indirect provision by the giving of financial assistance for the securing of such accommodation ... it has not [been] suggested that Parliament would have had any rational basis for drawing such a distinction, and no material has been placed before the court to suggest that this is what Parliament in fact wanted to do ...”

The “Right to Reside”

A further barrier that is currently operating to prevent support is in the form of the “right to reside” in the Immigration (European Economic Area) Regulations 2006, SI 2006/1003. For a wife who is not a UK or EEA national this can be a potent barrier, particularly from the point she is no longer residing with her spouse, and may have lost her right to reside as a “family member”. This is highlighted by the leading case of *Harrow London Borough Council v Ibrahim* [2008] 2 CMLR 841, CA (21 April 2008),⁷³ as discussed in the report in this issue. Although that case is currently before the ECJ, following the referral from the Court of Appeal, it is already evident that for a claimant who does not meet the requirements for a “retained” right to reside, for example following a unilateral divorce, before the conditions in reg 10 are satisfied, the only recourse left is to seek to establish a derived right to reside based on factors such as a child’s attendance at a UK school.

What is particularly problematic is the provision in reg 10 as it assists spouses who have ceased to be a family member following divorce. It facilitates retention in some cases, but only if the conditions it sets out can be met. Specifically if:

- “(a) he or she *ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;*
- (b) he or she was residing in the UK in accordance with the regulations at the date of the termination; and either –
 - (i) prior to the initiation of the proceedings for the termination of the marriage (or civil partnership) the marriage or partnership had lasted *for at least three years* and the parties had *resided in the UK for at least one year during its duration;*
 - (ii) the former spouse or civil partner of the qualified person has *custody of a child of the qualified person;*
 - (iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the UK; or
 - (iv) the continued right of residence in the UK of the person is ‘warranted by particularly difficult circumstances, such as he or another family member having been a *victim of domestic violence while the marriage or civil partnership was subsisting*’.

Needless to say, not all women will be able to meet these conditions. That being so, a derived right to reside along the lines contended for in

Ibrahim may be the only alternative route to maintaining the right to reside. However, it is far from clear that this is a viable option, particularly for a claimant who is not “self-sufficient”; and, as considered in this article, that is precisely where a unilateral divorce without financial provision may leave women and their dependants.

Conclusions

From the preceding discussion, it will be clear that the use of unilateral divorce has the capability of becoming an important feature of our divorce system, at least for a small but significant group that satisfies current “recognition” requirements. As the courts in *K v K* and *El Fadl v El Fadl* explained in their judgments, there are powerful reasons why such divorces can and should qualify for recognition, not least out of respect for comity and in order to cater for the changing expectations and needs of the UK’s increasingly diverse communities.

Nevertheless, it is undeniable that this can, in some cases, and in less meritorious cases than *K v K*, give rise to injustice – and in a variety of ways. Furthermore, the establishment of what appears now to be a two-track route to divorce poses some significant challenge to other stakeholders, including the State welfare system and those who pay for it. It also raises complex issues for some of the UK’s faith organisations that are taking on an increasingly important role in facilitating divorce, and catering for the needs of those affected. This is an aspect of the subject that has been giving rise to some important debates and discourses, not least on the subject of the widening role of bodies like Sharia councils.⁷⁴

If, as is expected, the government finally ratifies Protocol 7 of the ECHR next year, and this includes Article 5 and its requirements on “equality” between spouses in matters of divorce, it will undoubtedly necessitate closer consideration of a range of difficult issues by the courts.

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 NOTES

1. For example, The Muslim Law (Shariah Council) UK at its site at <http://shariahcouncil.org/FAQ.htm> provides helpful advice on obtaining an Islamic Divorce in the UK, and describes the overseas route for those who have married abroad. In section C.1 it says: “Apply to the respective courts for a divorce in the country where the marriage took place. This divorce is considered Islamic as well as legally binding [The divorce is acknowledged by British Law as a Civil Divorce].”
2. In Anthony W Dnes and Robert Rowthorn (eds), *The Law and Economics of Marriage & Divorce* (Cambridge University Press, 2002) 30. Cohen includes in his discussion of “unilateral divorce without property settlement” (another of the “pillars”) some forms of “no fault” divorce.
3. In the key passage in *Miller v Miller* Baroness Hale said: “The most common rationale is that *the relationship has generated needs* which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage ... But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together ... The needs generated by such choices are a perfectly sound rationale for adjusting the parties’ respective resources in compensation ... A second rationale, which is closely related to need, is *compensation for relationship-generated disadvantage*. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. ... A third rationale is *the sharing of the fruits of the matrimonial partnership...*” On the wider issues relating to parental duties, see J Eekelaar and M Maclean, *The Parental Obligation* (Oxford: OUP, 1997); and on the many contradictory assumptions about the nature of the marriage relationship and individuals in that relationship, see A Diduck, *Law’s Families* (London: Lexis-Nexis, 2003), ch. 3.
4. For a fuller discussion of the role of the courts and the State on divorce, and expectations of divorcing parties, reference may be made to works like J Eekelaar, *Family Law & Personal Life* (Oxford: OUP, 2007); M Maclean and J Eekelaar, *The Parental Obligation* (1997); and B Hale, D Pearl, E Cook, D Monk, *The Family Law & Society* (Oxford: OUP, 2008, 6th ed).

5. Through “disregards” the Income Support and Child Tax Credit systems, in particular, facilitate post-divorce re-ordering by providing income replacement, despite the parent with care having access to realisable capital like a share in the matrimonial home.
6. The case, the scope for court-based child maintenance if parents do not pay their CSA-assessed payments, and other “welfare” aspects, are discussed by K Puttick, *Child Support Law: Parents, the CSA and the Courts* (XPL/EMIS).
7. See, in particular, the SSAA 1992 s 106; and the CSA 1991, s 1.
8. See note 1, above. A variation on unilateral divorce, available in the UK to the parties to a UK-based marriage, is also described at this site which is for the wife to agree to be divorced by her husband, in front of witnesses. More recent options are assisted by more formalised procedures regulated by the Arbitration Act 1996 – and which enable the parties to be bound by the process to which they have agreed. In a Parliamentary answer on 23 October 2008, Bridget Prentice, Parliamentary Under-Secretary of State for Justice, when answering a question from Michael Penning MP, indicated that another option available to disputing parties was to draft a consent order embodying the terms of the agreement, and submit it to a court for approval (which she saw as a way of ensuring that a court could scrutinise financial arrangements).
9. In *El Fadl v El Fadl* [2000] 1 FLR 175 Hughes J made the point, while giving judgment, that there had been “no evidence of forum shopping” (190). But it is difficult to see how, and on what basis, recognition could be declined even if it *was* apparent that the husband had preferred to seek a divorce in a jurisdiction that was more advantageous to him, probably on his lawyer’s advice.
10. During British rule in India, the law permitted divorce in a variety of ways, and in accord with local custom and practice. In *Moonshee Buzulul-Rabeem v Luteefut-oon-Nissa* (1861) 8 MIA 379 such a unilateral divorce was described as “the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, and with or without cause”. See, on this, the commentary provided by Asaf A Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh* (Oxford: Oxford University Press, 2005), p. 129.
11. FLA s 54. The mere pronouncement of divorce before witnesses is insufficient to amount to “proceedings” – *Chaudhary v Chaudahary* [1985] Fam 19 – as the process requires “some form of State machinery to be involved in the divorce process” or “machinery established by the State, since existing religious machinery recognised by the State is sufficient”. However, if the pronouncement before witnesses is then recorded officially that will be sufficient; *El Fadl v Fadl* [2000] 1 FLR 175. See also *Quazi v Quazi* [1984] AC 744.

12. *Kellman v Kellman* [2000] 1 FLR 785. In that case the mail order divorce obtained in Guam was not, at *that* point, effective in other US States. However, it subsequently gained its “effectiveness” on the basis of equitable estoppel, and by not being contested – assisted by the res judicata doctrine, and the US doctrine of “full faith and credit”. Consequently, the wife’s UK divorce petition, in which she tried to contest its validity failed. The husband’s motion to strike out the proceedings was successful.
13. Gilles Cuniberti, “The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance and Efficiency”, *International & Comparative Law Quarterly* (2008) 57, 25–52.
14. Cuniberti, “French Muslims Getting Divorced Back Home”, *Journal of Private International Law* (2008): Cases, Family & Recognition Extracts. Protocol 7, art 5 provides: “Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution ...” In 2004 the Cour de Cassation ruled that features of the talaq divorce contravene French public policy requirements, and offend equality requirements. In 2007 it confirmed this in four further rulings.
15. The government indicated in 2000 that it would ratify Protocol 7, but that that this will “not be possible until a legislative vehicle is found by which certain minor amendments can be made to family law. There may also be a need for an interpretative declaration or reservation.” See the Interdepartmental Review of International Human Rights Instruments (July 2004, Dept. of Constitutional Affairs), Appendix 4.
16. These are dealt with under separate procedures; see FLA s 45(2). For a case where a judgment was not enforced because of concerns about the lack of a fair trial, see by *Maronier v Larmer* [2003] 3 All ER 848; [2003] QB 620, CA.
17. See *Rayden and Jackson on Divorce & Family Matters* (London: Lexis-Nexis, 18th ed, 2005), ch. 13, para 13.1.
18. “Overseas” does not include divorces within the EC, for which there are separate arrangements; see the FLA s 45(2), inserted by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310.
19. Mr Justice Munby said: “I have to give effect to the policy declared by Parliament in s 16(1) of the Divorces and Matrimonial Proceedings Act 1973 and now in s 44(1) of the Family Law Act 1986. This policy is that, irrespective of the parties’ domicile and religion, informal divorces obtained in this country, that is divorces obtained in this country otherwise than by proceedings in a court of civil jurisdiction, are not to be recognised. It is not for me to question this policy nor would I wish to do so. I merely add that the policy applies indiscriminately to all informal

- divorces, the religious as much as the non-religious, irrespective of the nature of the parties' religious or other beliefs." Cf. the procedure adopted, and outcome, in *Qureshi v Qureshi* [1972] Fam 173 where a unilateral divorce, sent by letter by the husband (who was domiciled in Pakistan), and then confirmed at a meeting at the Pakistan High Commission, was recognised in accordance with ancient (or substantive) Pakistan Law under the pre-1986 scheme.
20. Katharine Charsley, "Risk and Ritual: The Protection of British Pakistani Women in Transnational Marriage", *Journal of Ethnic and Migration Studies* (Vol. 32), No. 7, September 2006, 1169–1187.
 21. In practical terms, it is difficult for a UK-based decision-maker or tribunal, on appeal, to make such collateral determinations of "validity", as is readily apparent when appealing against a refusal of support. In some States like Tunisia there has been increasing regulation since as early as 1956; see the Code of Personal Status, Tunisia (1956). More recently, countries like Morocco have introduced greater regulation, notably under the Mudawwana laws (from 3 February 2004); see Stephanie Bordat and Saida Kouzzi, "The Challenge of Implementing Morocco's New Personal Status Law", *International Human Rights Law Group: Carnegie Endowment for International Peace Arab Bulletin* (2004) Vol. 2, No. 8. In Malaysia, divorce entry into new marriage is regulated by a combination of the country's general law and Islamic Law (the holy law of the Syariah, and the country's Syariah courts). For a useful discussion, see Michael Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton University Press, 2002) and M Peletz, *Reinscribing "Asian (Family) Values": Nation Building, Subject Making, and Judicial Process in Malaysia's Islamic Courts* (Erasmus Institute: Occasional Papers, No. 1).
 22. Polygamy payments to meet the extra needs and costs of polygamous marriages may be claimed and paid with benefits like Income Support, tax credits, and State Pension Credit – but ongoing eligibility is affected, for example when a party is divorced or a new wife joins the polygamous union.
 23. P Shah, "Attitudes Towards Polygamy in English Law" (2003) *International & Comparative Law Quarterly* 52(2) 369.
 24. See *The Route to Recognition: Potential Difficulties*, later in this article; and the sources footnoted.
 25. W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia & Africa* (Cambridge University Press, 2006, 2nd ed), p. 372.
 26. On the principles in Public Law that inform the difference between a "mandatory" procedure, and one that is merely "directory", see leading cases like *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities (AMA)* [1986] 1 All ER 164; and, generally, Lord Woolf, Jeffrey Jowell, Andrew Le Sueur, Catherine M Donnelly, *De Smith's Judicial Review* (London: Sweet & Maxwell, 2007, 7th ed); and

- see the discussion of the characteristics of the MFLO, regarded in the main as merely “directory” rather than “imperative” in *Quereshi v Quereshi*, discussed later in this article.
27. *Eroglu v Eroglu* [1994] 2 FCR 525. For an example of a case where recognition was refused, see *Kendall v Kendall* [1977] 3 All ER 471.
 28. Law Com 132.
 29. FLA s 55(1)(a), (b).
 30. FLA s 55(1)(c). The provision refers to subsistence on a “date specified” in the application.
 31. FLA s 55(1)(d) and (e), respectively.
 32. Section 7, Talaq: “(1) Any man who wishes to divorce his lie wife shall, as soon as may be after the announcement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.”
 33. FLA s 45(2).
 34. In that case the Court of Appeal made it clear that it would be contrary to public policy to enforce a judgment obtained in breach of the requirements of a “fair trial”. It accepted that recognition should not be withheld where public policy was being raised to enable an issue of substantive law to be reconsidered. However, it observed, “There is, however, a distinction in principle between a decision that resolves an issue of substantive law and a decision reached by a procedure that violates the fundamental human right to a fair trial.” The court considered, among other things, the principle that proceedings must be conducted in a way that enables both sides to be present and to be heard; and cases like *Krombach v Bamberski* (Case C-7/98) [2000] TLR 247 and *Hendrikman v Magenta Druck* (Case C-78/95) [1997] QB 426.
 35. On these points, and other features of marriage in Islamic law, see Ayesha Hasan, “Marriage in Islamic Law”, *Family Law* 19 (164) (March 1999). For other valuable sources and commentary, see D Pearl and W Menski, *Muslim Family Law* (London: Sweet and Maxwell, 1998, 3rd edn); C Mallat and J Connors (ed.), *Islamic Family Law* (London: Graham and Trotman, 1990); J Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964).
 36. According to the commentary of one of Pakistan’s leading marriage and divorce firms, Tahseen Butt & Associates on its website (www.tahseenbutt.com/divorcelawyers_pakistan.html), the failure to notify could invalidate a talaq until the 1970s and early 1980s. Then the introduction of Pakistan’s Zina Ordinance, allowing “scope for abuse as repudiated wives were left open to charges of *zina* (extra-marital sex and adultery) if their husbands had not followed the requirements and registered”, led the courts in Pakistan, since the 1980s, to regard the talaq as *effective* in such circumstances, notwithstanding the failures to comply with the MFLO.

37. J Rehman “The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq” *International Journal of Law, Policy and the Family*, Vol. 21, No. 1 (April 2007), 108–127.
38. See the exchanges on 24 October 1986 between the Solicitor-General and Mr Nicholas Brown MP in the House of Commons (HC Deb 24 October 1986 vol. 102, cols 1439–44).
39. F Khan, “Divorce by SMS Cases Heard in Selangor Syariah Court since 1999” *New Straits Times*, 3 October 2003.
40. See the comments of Mr Justice Hughes in *El Fadl* on the ineffectiveness of a “telephone” pronouncement given the way that Sharia law, in combination with civil laws, operate in Lebanon.
41. “Cellular Phone Divorces: Malaysia Permits Husbands to Divorce their Wives via Text Message”, *Rutgers Journal of Law & Religion: New Developments* (October 2005), www.lawandreligion.com/new_devs/RJLR_ND_75.pdf.
42. Malaysia Islamic Family Law Act 1984, Part 5.
43. Datuk Seri Shahrizat Abdul Jalil is a member of Malaysia’s United Malays National organisation (UMNO) and a leader of the Wanita (Women’s) wing of UMNO, part of the ruling national coalition. She is a powerful force in Malaysian politics, and in March 2008, despite losing a by-election, became Special Adviser to the Prime Minister for Women and Social Development Affairs, with Cabinet member status, and with a remit that extends to family law issues as they impact on women’s and children’s rights.
44. Particularly in areas like Kelantan and Terengannu. In KL, and in other more “liberal” centres, the outrage against the rulings, particularly among women’s groups and some of the other faiths in Malaysian society, seemed intense. In neighbouring Singapore, talaq divorce by SMS is reportedly no longer permitted, and other restrictions are being developed following the *Latif* case.
45. For valuable insights, see Sharifah Zaleha Syed Hassan and Sven Cederroth, *Managing Marital Disputes in Malaysia: Islamic Mediators and Conflict Resolution in the Syariah Courts* (Nordic Institute of Asian Studies: NIAS Monographs in Asian Studies 75) (Richmond: Routledge-Curzon, 1997). The text provides practitioners who are new to the subject a fine explanation of the institutionalization of Syariah law, and its impact on family and kinship rights and duties; and the functioning of the important resolution role within the Syariah Court system.
46. G Pandev, “Muslim Women Fight Instant Divorce” (BBC, 2007). Geeta Pandev is BBC correspondent in Delhi.
47. *M v L (Financial Relief after Overseas Divorce)* [2003] 2 FLR 425.
48. Purchas J in *Holmes v Holmes* [1989] 2 FLR 364 at 373.
49. *Hewitson v Hewitson* [1995] 1 FLR 241, CA. *Per* Butler Sloss LJ: “In my judgment it would be wrong in principle and contrary to public policy to

- extend the narrow compass of an Act designed to meet limited objectives to cover a wider and unintended situation.”
50. Information on such support is in the Annual Report accessible at: www.eastlondonmosque.org.uk/uploadedImage/pdf/AnnualReport2007.pdf
 51. I am most grateful to the Director of the East London Mosque and Muslim Centre, Dilowar Hussain Khan, for the opportunity to gain information about the subject, and this aspect of the mosque’s work during a visit (when it was possible to sit in on advice sessions and employment advice work) in November 2007.
 52. See the information that is publicly available at the site, accessible at: www.islamic-sharia.org/divorce-talaq/talaq-bain.html. There are various authoritative sources on this important phase in the divorce, but broadly, as links from the Islamic Sharia site indicate, the talaq-e-baa’in is when the husband has issued a divorce, and it has become irrevocable. The effect is that the nikaah (marital bond) is terminated. The couple may reconcile within the iddah (idaat) period, i.e. the period after her husband has divorced her, during which a woman may not marry. However, even after the divorce is completed the couple may enter into a *new* nikaah.
 53. See “Information about Reasons for Divorce & Dowry”: www.islamicsharia.org/divorce-talaq/information-about-reasons-for-divorcedowry.html. Answer: “In Islam, if a husband initiates the divorce, he has to pay the full dower amount to his wife. But if the woman initiates it, then it would be the opposite; she has to return the dowry to him (only if she received it) or forsake her right in it (if she did not receive it). All other matters, like his betrayal of you, his illicit relations with the woman are counted as sins for which he has to stand answerable in the court of Allah because he has taken the advantage of living in a non-Muslim country where such relations are not considered as crimes. You are right in seeking divorce from such a person. You should not worry about the money. Allah would compensate you. This is a promise by ALLAH. ‘The one who fears Allah, He will make a way out for him and gives him sustenance in a way he cannot even imagine’. (Sura Al-Talaq) You should apply for civil divorce along with Islamic divorce to have a clean separation from your husband.”
 54. Rhonda Hammond-Sharlot and Penny Booth “Islamic Law in the UK” [2008] Family Law 362.
 55. On divorce law and custom and practice, see the information and guidance provided by Sharia Councils in the UK, as well as sources on marriage, and divorce, and the expectations of faith communities, like D Pearl and W Menski, *Muslim Family Law* (London: Sweet and Maxwell, 1998, 3rd edn); J Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964); and C Mallat and J Connors (eds), *Islamic Family Law* (London: Graham and Trotman, 1990).

56. See, for example, *Mohammed Ahmad Khan Shah Bano Begum* AIR 1985 SC 985. “These ayats leave no doubt that the Qur’an imposes an obligation on the Muslim husband to make provision for, or provide maintenance to, the divorced wife ...”; and cf. observations by Sharifah Zaleha Syed Hassan and Sven Cedderoth (note 45).
57. K Puttick, *Child Support Law. Parents, the CSA & the Courts* (XPL/EMIS), pp. 3–11, tracking the evolution of such a duty since Blackstone’s *Commentaries*, Book I, ch. 16, and commentary on early sources since Roman law.
58. This is evident from the debates and consultations that preceded Morocco’s Mudawwana laws (they were introduced from 3 February 2004). Among other things, the post-2004 Mudawwana Laws “establish the right to divorce by mutual consent and place polygamy and repudiation (unilateral divorce by the husband) under strict judicial control” according to S Bordat and S Kouzzi, *The Challenge of Implementing Morocco’s New Personal Status Law* (Rabat, Morocco: Arab Bulletin Vol 2(4), 2004, Carnegie Foundation). Closer regulation has also been a feature of reforms to divorce law in Malaysia since the Malaysia Islamic Family Law Act 1984, Part 5.
59. Katharine Charsley, “Risk and Ritual: the Protection of British Pakistani Women in Transnational Marriage” *Journal of Ethnic and Migration Studies* (Vol. 32), No. 7, September 2006, 1169–1187. The same commentator has also suggested that the popularity of marriage between trusted close relatives is at least in part a reaction to the various risks involved in selecting suitable spouses, as well as helping to strengthen connections between kin divided by migration (in a paper for the British Sociological Association Conference “Risk, Trust, Gender and Transnational Cousin Marriage among British Pakistanis”: York: 22 March 2005).
60. Cuniberti, above.
61. P Shah, “Attitudes towards Polygamy in English Law” (2003) *International and Comparative Law Quarterly* 52(2) 369.
62. K Puttick, “Social Security, Tax Credits and Child Support” in Andrea Woelke (ed.), *Civil Partnership* (London: Law Society/Law Society Publishing, 2006).
63. Housing Benefit Guidance Manual (DWP, Amendment, 16 June 2008, para 1.11). See, for example, *Bibi v United Kingdom*, 29 June 1992 (Dec): Appl. 19628/92 where the Commission upheld the State’s right to introduce restrictions as a legitimate aim and within ECHR art 8(2).
64. Income Support (General) Regulations 1987, SI 1987/1967, Schedule 1B, para 1. That route has now become more restrictive following the changes recently made to the lone parent category by the Social Security (Lone Parents and Miscellaneous Amendment) Regulations 2008, SI 2008/3051 (see the *Statutory Instruments* section in this issue).
65. SI 1987/1967, Sched. 1B, reg 71(1).

66. SI 1987/1967, Sched. 1B, reg 55.
67. SI 1987/1967, Sched. 1B, reg 18.
68. Tax Credits Act 2002 ss 8, 9; and the Child Tax Credit Regulations 2002, SI 2002/2007.
69. SI 1987/1967, Schedule 3.
70. See, in particular, the State Pension Credit Act 2002, s 12 and regulations. The key requirements are that the claimant is a husband or wife by virtue of a marriage entered into under a law which permits polygamy; either party to the marriage “has for the time being any spouse additional to the other party”; and “the person in question, the other party to the marriage and the additional spouse are members of the same household”. In the context of divorce, eligibility may end; e.g. if as a result of a unilateral divorce they *cease* to have spousal status. For decision-makers the question, typically, is whether a divorce is legally effective, and whether the person is in the “same household”. If a divorce is not effective, and the person still resides in the same household, she may well maintain her right to payments. Even if she is not, she may be eligible for other benefits such as Income Support.
71. Tax Credits Act 2002 s 3(5A).
72. Tax Credits Act 2002 s 3(5A).
73. The full text of the *Ibrahim* judgment may be accessed online (www.bailii.org/ew/cases/EWCA/Civ/2008/386.html).
74. See, for example, Ihsan Yilmaz, “The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England” (2002) 28(2) *Journal of Ethnic and Migration Studies*, 343–354; Sonia Nûrîn Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (London: Nuffield Foundation, 2001); Zaki Badawi, “Muslim Justice in a Secular State”, in M. King (ed), *God’s Law Versus State Law. The Construction of an Islamic Identity in Western Europe* (London: Grey Seal, 1995); Lucy Carroll, “Muslim Women and ‘Islamic Divorce’ in England” (1997) 17(1) *Journal of Muslim Minority Affairs* 97 *et seq*; Pearl and Menski, *Muslim Family Law*, 77–80, 393–8.