FAMILY COURT OF AUSTRALIA

TAFFA & TAFFA ***[2009] FamCA 85***

FAMILY LAW – DIVORCE – Divorce order – Where a divorce is alleged to have occurred in a foreign country – Consideration of s 104 – Determining who is the Applicant and Respondent for the purpose of a divorce application lodged in a foreign country

Family Law Act 1975 (Cth)

APPLICANT:	Ms Taffa
RESPONDENT:	Mr Taffa
FILE NUMBER:	SYF 5067 of 2000
DATE DELIVERED:	21 January 2009
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Le Poer Trench J
HEARING DATE:	19 August 2008 22 September 2008 17 December 2008

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Mr Sandroussi
SOLICITOR FOR THE APPLICANT:	AYS Legals
COUNSEL FOR THE RESPONDENT:	Ms Boyle
SOLICITOR FOR THE RESPONDENT:	Legal Aid Commission of NSW

ORDERS

(1) The wife's Application for Divorce filed 23 March 2007 is dismissed.

IT IS NOTED that publication of this judgment under the pseudonym *Taffa & Taffa* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth)

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: SYF 5067 of 2000

MS TAFFA
Applicant

And

MR TAFFA
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. Before the Court is an application for divorce filed by the wife on 10 October 2006. By that application, she seeks that the marriage solemnised in March 1973 in Kuwait between she and the Respondent husband be dissolved.

2. By his Response filed in Court on 18 January 2007, the husband opposes the divorce on the ground that the parties have already been divorced in Lebanon on 24 November 1998.

3. It is the wife's case that the divorce granted on 24 November 1998 should not be recognised by the Family Court of Australia because the provisions of s 114 of the *Family Law Act (Cth) 1975* which permits the recognition of overseas decrees would not have application in this case.

SHORT BACKGROUND FACTS

4. It is common ground that the parties were married in March 1973. During the 1990's there were a number of separations; however, it is asserted by the wife that the final separation took place on 3 March 1999 and by the husband that it took place in early 1996. The wife claims that there was an earlier separation in September 1998.

5. The parties had three children who are now adults. In 1985, the parties commenced to reside in Australia.

6. On or about 15 October 1998 the parties attended at the Z Islamic Centre. Although the husband obtained Australian citizenship in 1987, it is common ground that he remained a citizen of Lebanon (dual citizen).

7. On or about 4 November 1998 the parties attended the Lebanese embassy in Sydney and each executed a power of attorney to authorise their respective lawyers in Lebanon to proceed with the divorce application which had been filed in the Lebanon Civil Courts.

8. On 24 November 1998 the parties were divorced in Lebanon by Jaafarite Canonical Court. The translated version of the order of the Court shows that not only was the divorce granted but also, that there was an order made in respect of the parties' property.

9. It is the wife's case that the proceedings in the Lebanon court were for the sole purpose of confirming the divorce which had occurred in the religious ceremony in Sydney on 15 October 1998. She had apparently anticipated that there would be subsequent proceedings in respect of property.

10. Relying on the divorce, the husband has remarried.

11. Between December 1998 and mid-January 1999 the wife asserts that there was a reconciliation between the parties.

12. In about mid-2000 the wife appealed the divorce in the Lebanon court. That appeal was dismissed and the divorce granted on 24 November 1998 was upheld. The wife has lodged two further appeals, both of which appear to be unsuccessful. At the time of the hearing of this case, it is common ground that the orders made in the Lebanon court on 24 November 1998 still stand and have not been set aside.

13. A stated earlier, whether or not the wife's application for divorce can proceed in this Court is dependent upon whether this Court recognises the divorce granted in the Lebanon court on 24 November 1998.

14. Section 104(3) of the Act is as follows:

> *(3) A divorce or the annulment of a marriage, or the legal separation of the parties to a marriage, effected in accordance with the law of an overseas jurisdiction shall be recognized as valid in Australia where:*
>
> *(a) the respondent was ordinarily resident in the overseas jurisdiction at the relevant date;*
>
> *(b) the applicant or, in a case referred to in paragraph (b) of the definition of applicant in subsection (1), one of the applicants, was ordinarily resident in the overseas jurisdiction at the relevant date and either:*
>
> *(i) the ordinary residence of the applicant or of that applicant, as the case may be, had continued for not less than 1 year immediately before the relevant date; or*
>
> *(ii) the last place of cohabitation of the parties to the marriage was in that jurisdiction;*

(c) the applicant or the respondent or, in a case referred to in paragraph (b) of the definition of applicant in subsection (1), one of the applicants, was domiciled in the overseas jurisdiction at the relevant date;

(d) the respondent was a national of the overseas jurisdiction at the relevant date;

(e) the applicant or, in a case referred to in paragraph (b) of the definition of applicant in subsection (1), one of the applicants, was a national of the overseas jurisdiction at the relevant date and either:

(i) the applicant or that applicant, as the case may be, was ordinarily resident in that jurisdiction at that date; or

(ii) the applicant or that applicant, as the case may be, had been ordinarily resident in that jurisdiction for a continuous period of 1 year falling, at least in part, within the period of 2 years immediately before the relevant date; or

(f) the applicant or, in a case referred to in paragraph (b) of the definition of applicant in subsection (1), one of the applicants, was a national of, and present in, the overseas jurisdiction at the relevant date and the last place of cohabitation of the parties to the marriage was an overseas jurisdiction the law of which, at the relevant date, did not provide for divorce, the annulment of marriage or the legal separation of the parties to a marriage, as the case may be.

15. As can be seen from the above section, it is important to know who was the Applicant and who was the Respondent in the divorce which was granted in the foreign country.

16. The term "Applicant" is defined as:

(a) the party at whose instance the divorce, annulment or legal separation was effected; or

(b) where the divorce, annulment or legal separation was effected at the instance of both the parties--each of the parties.

17. The term "Respondent is defined as:

a party to the marriage, not being a party at whose instance the divorce, annulment or legal separation was effected.

18. Each of the parties called experts to give evidence, inter alia, as to who was the Applicant and who was the Respondent in the proceedings in the Lebanon court. The wife called Sheikh I as her expert. He swore an affidavit on 13 February 2008 which was filed on 13 March 2008. A further affidavit was filed by Sheikh I, sworn 14 August 2008. The husband relied on Sheikh W as his expert. Sheikh W signed an affidavit on 14 August 2008. Each of those experts gave oral evidence and was cross examined.

TE EVIDENCE OF SHEIKH W

19. Sheikh W was engaged as an expert. He was provided with a letter of instruction which required him to address the following three matters:

> *"1. The requirements, legislative and otherwise, for a person of the Shiite Islamic faith to obtain a divorce in Lebanon, with specific reference to a Kholai divorce (being a divorce applied for and obtained by the wife);*
>
> *2. Whether the divorce issued by the Supreme Jaafarite Canonical Court in Lebanon on the 24th of November 1998 on the application of the wife, is a valid divorce in accordance with the requisite Shiite law in Lebanon;*
>
> *3. Any other matter which you consider relevant"*

20. Sheikh W provided the following evidence in answer to those questions.

> *Dear […],*
>
> *Re: your inquiry you raised about several aspects of* Kholaai *Divorce in accordance with the rules and traditions of Shiites Muslims.*
>
> *My name is Sheikh [W]. I am a learned Shiite scholar in Australia and a religious head serving the Arabic community in Australia for nineteen years. I came to Australia to act in the name of the Islamic Higher Shiites Council and currently holding the position [in] the Australian Islamic Shiites Association that takes care of Islamic Shiitte* [sic] *affairs in Australia and provides care and services to members of the Arabic Australian community.*
>
> *Having read the documents submitted to me in relation to the on going divorce case between Mr. [Taffa] and Mrs [Taffa], I am in* [a] *position to explain and confirm the following:*
>
> *1- A Canonical* Kholaai *divorce in accordance with the Shiite faith is a divorce applied for by the wife where the wife is seeking the divorce from a husband who is reluctant or unwilling to divorce his wife in the first place. However, if, at a later stage, the husband accept*[s] the *wife's demand for divorce in return for something he asks for, for example the husband may ask the wife to waive some of her rights or entitlements of something else he asks for in return for his acceptance of her demand, this divorce is (also) considered to be a Kholaai divorce as if the husband did not ask for anything (in return); that is to say, the divorce has taken place upon the request of the wife. Immediately upon the effect of such divorce, the wife is no longer lawful for her husband and the two are not allowed to know each other except after a new canonical marriage contract; this is called Baen and Kholaai divorce;* Bean: *a divorce that prevents the parties from knowing each other as man and woman again without a new marriage contract and;* Kholaai: *a divorce that was effected through confrontation and not by agreement.*
>
> *2- The (subject) divorce that took place at [Z] Islamic Centre at Sydney is deemed* kholaai *divorce and it took place upon the request of the wife and this is clear and obvious from the certificate of divorce.*

3- *The decision of the Jaaferite Shiitte* [sic] *Canonical Court issued by His Honour Judge Abdallah Dabouk on 24/11/1998 as well as the decision issued to explain the premises of this particular divorce, and all other matters and things relating to Judge Abdallah dabouk as well as the decision of the court of Appeal and the decision of judge Abdallah Shieto, all these decisions confirm that the divorce had taken place and that it was canonically lawful and in accordance to the laws and regulation of the Islamic Shiite faith. The Jaaferite* [sic] *Canonical Court had taken into consideration all aspects of the divorce and all level of laws, and in my opnion, those decisions issued by the Jaaferite Court are correct and valid and base on clear evidence and precedence well documented in our religion. In so far as the law is concern*[ed] *the Jaaferite court is the authority that has the jurisdiction to issue such decisions; and such decisions should be final. This is because the Jaaferite Court is considered to be the highest canonical and legal authority in the land (Lebanon). Some of the most important issues it deals with are divorces and relating matters.*

[Conclusion omitted]

21. Sheikh I was asked a series of eight questions in the letter of instruction to him.

22. I here set out the evidence of Sheikh I:

1. *I am a **Religious Director of [M] ISLAMIC CENTRE**. I* [was] *born in Kuwait in 1964 and in 1978 I migrated to Australia with my parents. I finished my High School at […] High and joint* [sic] *the University of Western Sydney. I completed a BA degree in Interpreting and Translation in the late 80's and Graduated from Al-Azhar University in the early 90's. After graduating from the faculty of Da'wah and Usool, I came back home to Australia and began my Religious work. I then went to Qum, Iran to modify my religious studies according to the Shia School of Thought. I kept going and coming to Qum over a period of about 6 years to complete the necessary study adjustments. I am currently the Imam & Religious Director of [M] Islamic Centre, […], and was the religious Director of [H Centre] from 2005-2007. I have also held a number of government interpreter/Translator in the Australian's Court System. Until recently I was the Head of Arabic and Islamic Studies dept in the […] Islamic College, Sydney. I am a Spokesman for the **ASMN** (Australia Shia Muslim Network) with the Media and Government Reps. I Participated in a number of International Conferences organised by various Islamic States on various topics including marriage and divorce issues facing the Muslim community worldwide. I edited a number of Islamic books, the latest being a book titled* **"[…]".** *I offer marriage and divorce counselling services for my community locally and internationally.*

2. *After having read all the materials and documents presented to me by your office in the matter of* [Mr Taffa and Mrs Taffa], *please find below response to the questions listed in your letter dated 18th July 2008.*

Q1. Definition of a Kholai divorce and A Ragii divorce that obtained to be recognized and validate Lebanon?

A1. <u>A Kholai divorce:</u>

Is the Divorce of a wife who develops an aversion towards her husband and harbours feelings of hatred for him, and surrenders to him her Mahr (dowry) or some of her property so that he may divorce her. the hatred must have reached a proportion where she would not allow him conjugal rights.

If the husband himself wishes to pronounce the formula of Khula' divorce and his wife's name is, say, Fatima, he should say after receiving the property: "I have given Khula' divorce to my wife Fatima in lieu of what she has given me, and she is free'. *And if the wife is identified, it is not necessary to mention her name in a Kholai divorce*

If a woman appoints a person as her representative to surrender her Mahr (Dowry) to her husband, and the husband, too, appoints the same person as his representative to divorce his wife, and if, for instance, the name of the husband is Muhammas and the name of the wife is Fatima, the representative must pronounce the formula of divorce as such: "In lieu of what my principal Fatima has given to my Principal Muhammad so that he would carry out A kholai divorce". *The Representative would then say immediately:* "The wife of my principal is granted Kholai divorce, she is free!"

And if a woman appoints a person as her representative to give something other than Mahr (Dowry) to her husband, so that he may divorce her, the representative should utter the name of that thing instead of the work "Mahraha" (her Dowry). For example, if the woman gives $500 he should say: bazalat khamsa mi'ati Dollar" She has given $500 dollars).

<u>A Ragii divorce:</u>

Is a divorce that is initiated on the part of the husband for the first time and has not been preceded by any other form of divorce.

In the case of a revocable divorce (Ragii divorce) a man can take back his wife in two ways:

1. *By telling her words to the effect that he wants her again as his wife.*
2. *By acting in a manner*

And taking her back will be established by sexual intercourse although the husband may not have intended it. but touching and kissing her, with or without intention of taking her back, is not sufficient. It is not necessary for taking her back that the husband should call any person to witness, or should inform his wife that he wants to.

On the other hand is he takes her back without any one else realising this, the Ruju' is in order. However, if the husband claims after the completion of Iddah (the waiting period of divorce) that he took his wife back during Iddah, he must prove it.

If a person who has given revocable divorce to is wife takes some payment from her, making a compromise with her that he will not make Ruju' to her, though this compromise is valid and it is obligatory on him not to 'return', yet he does not

forfeit the right to 'return'. And if he 'returns' to her, the divorce given by him does not become the cause of their separation.

If a man divorces a woman twice and takes her back, by Nikah (A marriage ceremony where new vows are exchanged), or takes her back after one divorce and returns her by Nikah after the second divorce, she becomes haraam (Unlawful) for him after the third divorce. But if she marries another man after the third divorce, she becomes halal for the first husband on fulfilment of five conditions, that is, only then he can marry her:

1. *The marriage with the second person should have been of permanent nature. If he contracts with her a temporary marriage for one month or a year, and then separates from her, the first husband cannot marry her.*
2. *The second husband should have had sexual intercourse with her, and the obligatory precaution is that the sexual intercourse should have taken place in the normal way.*
3. *The second husband divorces her, or dies.*
4. *The waiting period (Iddah) of divorce or Iddah of death or the second husband should have come to an end.*
5. *On the basis of obligatory precaution the second husband should have been Baligh (Reached the age of maturity, i.e. 15 years plus) at the time of intercourse.*

Q2. Steps required for divorce obtained in Australia to be recognized and validated in Lebanon.

A2. As an Authorized Marriage Celebrant, we are given strict guidelines by the NSW, Registry of Births, Deaths and Marriages that we are not to recite or execute any divorce and issue any legal Islamic **DEED OF DIVORCE** *to any husband and wife filing for an Islamic divorce until after the civil divorce has been issued by the Family Court of Australia.*

Having said that however, even if the Divorce have been recited or executed by a clergy from the Islamic Faith, and the couples wanted to confirm this divorce in Lebanon the procedure that is required by both the Consulate-General of Lebanon in Sydney and the religious Courts in Lebanon is that the Islamic Divorce must be annexed with the Australian Civil divorce provided that the marriage has been registered and filed with the NSW, registry of Births, Deaths and Marriages.

If however the marriage has not been registered in Australia, then in that case, both parties can register or confirm the divorce in the religious courts in Lebanon based on the divorce that has been recited or executed by a clergy from the Islamic Faith in Australia.

Q3. Whether the divorce granted by the Lebanese Jaafarite Canonical Court is a Civil Divorce or a Religious Divorce?

A3. The divorce that has been granted by the Lebanese Jaafarite Canonical Court is strictly a Religious Divorce.

The judiciary in Lebanon is divided into four main court systems, each having a multilevel hierarchical structure.

These systems are:

- *The Judicial court system known as kada'adli,*
- *The Administrative court system known as Majlis al-Shura,*
- *The Military court system, and*
- *The Religious court systems.*

The religious court system is composed of the court systems of the 18 recognized denominations pertaining to the three main religions of Christianity, Islam and Judaism. The jurisdiction, however, of these courts is limited to personal status and family law matters as authorized by law.

Q4. Whether the Lebanese Jaafarite Canonical Court has or is able to exercise Civil Jurisdiction?

A4. The religious court system, to wit, the Lebanese Jaafarite Canonical Court, has no ability to excise [sic] *any Civil Jurisdiction* authorized by law.

Q5. Whether the Civil Courts in Lebanon have or are able to exercise a Canonical or religious Jurisdiction

A5. The Civil courts in Lebanon have no ability to excise [sic] *any Religious Jurisdiction as* authorized by law.

Q6. Whether the divorce pronounced by Sheikh [N] at [Z] Centre is a valid Divorce according to the Shi'ite Islamic faith?

A5. In accordance with what was detailed I the documents presented to me by your office such divorce will be deemed invalid as khalai divorce but it will be considered as a valid revocable one (ragii) under the [I]slamic Jaafarite sharia law. For one of the prime condition[s] of a khalai divorce is that the wife must have reached a level of hatred towards her husband to the extent that she is no longer capable of fulfilling her partner's matrimonial rights.

In light of the matter that have been raised this condition has not been met and therefore in accordance with Islamic law that divorce be pronounce by his Eminence [Sheikh N] will be deemed a revocable divorce from the Islamic legal Sharia point of view.

Q7. Accordingly, whether the subsequent divorce issued by the Jaafarite Canonical Court in Lebanon is a valid divorce?

A7. The subsequent divorce issued by the Jaafarite canonical Court in Lebanon will not be deemed a valid Khalai divorce from a legalistic point of view.

In light of the materials I received from your office, the divorce recited by [Sheikh N] is concluded and determined as a valid revocable divorce and not a Khalai divorce due to the fact that the wife did not reach a level of hatred towards her husband to the extent that she is no longer capable of fulfilling her partner's matrimonial rights. Accordingly, based on this, the

Jaafarite Canonical Court in Lebanon should have limited itself to basically endorse and confirm the divorce recited by his Eminence [Sheikh N] and not pronounce a fresh divorce proceedings for the obvious reason that the divorce has already been pronounced. Legally and Islamically no new divorce proceedings can take effect until the first divorce is deemed invalid or challenged on the basis of legitimacy.

23. The eighth and final question in the letter of instruction attached to the affidavit of Sheikh I reads: *"Any other matter which you consider relevant"*. Sheikh I did not address this in his affidavit.

24. Sheikh W gave oral evidence. He said that prior to coming to Australia he had lived in Lebanon. He had studied in the field of Sharia law in Lebanon and worked in his community doing everything to do with marriages, divorces and other problems. He had completed his studies in 1978 and arrived in Australia in 1989. He confirmed that on his knowledge of the Sharia law a wife can initiate a divorce application. A divorce initiated by the wife is called a Kholaai divorce. I noted that the interpreter spelt that particular type of divorce as "Khali". In the affidavit of Sheikh W the English translation has spelt that word "Kholaai" and in the evidence of Sheikh I it is spelt Kholai. It seems commonly that each of the witnesses was referring to the same thing.

25. Sheikh W was asked to look at the documentation evidencing the divorce of the parties in Lebanon said to have occurred on 24 November 1998. He was asked, *"From your examination of the documents relating to the proceedings on the 24th of November 1998 are you able to say who was the Applicant in those proceedings to the Court?"* The answer was, *"So all documents prove that it was under the Khali divorce which means that Khali divorce has to be initiated by the wife so she has the upper hand."*

26. In answer to questions asked by me, Sheikh W told me that a wife will not obtain a divorce unless her husband agrees to it.

27. Sheikh W told me from his experience of living and working in Lebanon that there were two ways in which a divorce might be granted in Lebanon. The parties may visit their local minister responsible for the area and he could grant them a divorce provided there were two witnesses present at the time. He would give them a paper which they would then take to the Court to make it legal and official. If there were other issues relevant at the time such as custody of children or settlement of property then that must be dealt with by the Court. Another option would be for the parties to go directly to the Court. In his experience where couples do not have any major issues such as custody of children or property settlement, they would generally approach the Sheikh first to obtain the divorce.

28. In cross-examination he confirmed that as he understood the process the parties had been validly divorced in the Islamic Centre in Sydney. They then appointed representatives in Lebanon to go to the Sharia Court and confirm the divorce.

29. Sheikh W was shown the decision of the Jaafarite Court in Lebanon dated 24 November 1998. He confirmed that the document listed Mr Taffa (the husband) as the first party and Ms Taffa (the wife) as the second party. Sheikh W said that it is the Court's system that the husband's name would always be put first on the application, even if it is the wife who initiates the proceedings. He said that as soon as the word "Khali" divorce appears in the document that gives the implication that the wife is the Applicant.

30. Sheikh W was asked whether it was possible for both parties to be the applicants. He said, *"If both names were mentioned as joint applicants the name would have changed, it would have been called Mrbarati divorce, to Khali divorce."* He said, *"That means both applicants are in the same situation, both wanting to proceed with the divorce. If that had been the case the Judge would have mentioned this was a Mrbarati divorce instead of a Khali divorce."*

31. Sheikh W said that according to the documents he had inspected, the wife was the Applicant; firstly, because the divorce was called Khali divorce and secondly, the husband had to give his permission to divorce if he agreed on the wife's request. Sheikh W was asked whether, in the circumstances where the Lebanese Sharia Court was being asked to confirm a divorce which had already been granted, it was possible for the parties to jointly apply. He said that legally it was possible. The details of the kind of divorce, however, needs to be included; that is, whether it was a Khali divorce or a Mrbarati divorce. That would consequently indicate who the Applicant was.

32. Sheikh I gave oral evidence. He confirmed that a Khali divorce is a divorce which is initiated by the wife. He further confirmed that a Khali divorce is one where the wife must request the divorce from the husband. He said that Khali divorce has prerequisites; one of the prerequisites is that the wife has to basically either bequeath or waive something, or offer something in exchange for the divorce. Sheikh I was then asked, *"When it comes however to go into the Sharia Court to apply to confirm that divorce, who is the one that applies to that Court?"* He answered, *"The onus is on the husband."* He said, *"From a legalistic Islamic point of view the right to a divorce is given to a man and it can only be waived by a man himself."* He was then asked, *"And therefore, in this situation, even if the wife had initiated the process of divorcing her husband in front of the Sheikh or in front of the Court, the Jaafarite Court, the husband was the one that applies?"* Sheikh I answered, *"Yes indeed, yes."* He said that it was possible for the parties to be joint applicants for confirmation of a divorce in the Lebanese Sharia Court.

33. In answer to questions from myself, Sheikh I confirmed that the document from the Lebanese Court dated 24 November 1998 clearly indicated that the case was a *"confirmation of divorce"*. Sheikh I agreed that the judges hearing the case would clearly have understood that and therefore, clearly understood that they were not granting a fresh divorce.

34. In cross-examination, Sheikh I confirmed that in the document from the Z Islamic Centre evidencing the religious divorce between the parties on 15 October 1998 the divorce is described as a Khali divorce. He also confirmed that in the document from the Jaafarite religious Court (the Lebanon Court) dated 24 November 1998 confirming the divorce, it was described as a Khali divorce. He then confirmed that in such a divorce, the wife is the Applicant.

35. As referred to earlier the wife has sought to appeal the decision of the Jaafarite Canonical Courts made 24 November 1998 on two occasions. Her last appeal was filed 18 October 2001 in the Jaafarite Canonical Courts and was finally determined on 29 December 2004 after many adjournments. Her appeal was dismissed.

36. The wife's appeals have been against that part of the order of 24 November 1998 which *"declared that neither party has any financial rights or liabilities towards the other."*

37. A copy of the judgment of the appeal determined on 29 December 2004 is exhibited to the affidavit of the husband filed 16 May 2007. That decision sets out the findings of the Court. On page 2 of the judgment the following appears:

> *"It was ascertained that the defendant had stated that the (new) divorce was correct and carried out in accordance with the canonical laws. The court contacted the applicant (the wife) by telephone and then she sent a fax by handwritten statement in her own handwriting to that effect on the 25th of November 1998.*
>
> *It was also ascertained by the Court after receiving the abovementioned decision that Judge Dabouk said that on the 25th of November 1998 a fax was received from the wife in which she said that she was "chaste" (not pregnant and not expected to be pregnant) and legible* [sic: eligible] *for divorce and that she has no objection for the divorce to go ahead. Judge Dabouk said "I have listened to her directly through the phone and saw that there was no impediment to issue a divorce decree.*
>
> *It was ascertained by the Court that the applicant had indeed sent a fax in her own longhand and bearing her photograph; this fax ran: "I hereby state that since my divorce from my husband by the virtue of the decision of the Jaafarite Court of Beirut issued on the 24th of November 1998, I remain pure and chaste and eligible for divorce, that is, I am not pregnant nor have any suspicion of being pregnant and had sexual intercourse." This fax bore the signature of the applicant and when she initiated the explanatory case mentioned above, she did not mention anything about the illegality of the divorce that was issued on the 24th of October 1998* [sic] *on the ground*

that it had been preceded by another divorce; all this despite the fact that the subject decision was issued on the 13th of July 2000 and was appealed by the applicant and on the 10th of July 2001 the appeal was declined and the original decision was upheld."

38. It seems to me that the document which is relied upon by the husband as the evidence of the dissolution of the marriage is the document to which this Court should pay the greatest attention. That is, the decision of the Jaafarite Canonical Courts dated 24 November 1998. That document makes it clear that the divorce was applied for by the wife. The evidence of the experts confirm that a Khali divorce is applied for by the wife.

39. I find on the balance of probabilities that the husband was the Respondent for all practical purposes and for all legal purposes in the proceeding which gave rise to the judgment of 24 November 1998 and to the confirmation of the dissolution of the parties' marriage. I find that the religious event which took place at the Z Islamic Centre on 15 October 1998 could not dissolve the parties' marriage. I find that the parties clearly understood that the event which occurred at the Z Islamic Centre on 15 October 1998 did not lawfully divorce the parties. It was in recognition of that fact that the parties had their divorce lawfully proclaimed by the Jaafarite Canonical Court on 24 November 1998.

40. Turning then to s 104(3) of the Act, it is subparagraph (d) which brings the overseas divorce into the province of recognition by this Court. That subsection is as follows:

> *"(d) The Respondent was a national of the overseas jurisdiction at the relevant date"*

It is a common fact that the Respondent held dual nationality which included his being a national of the state of Lebanon as at 24 November 1998.

41. The Respondent argues that pursuant to s 104(4) the divorce ought not be recognised. To establish this ground, the wife must prove that she had been denied natural justice or that the recognition would manifestly be contrary to public policy.

42. In addressing the question of "manifestly contrary to public policy", the wife settled upon that part of the decree of 24 November 1998 which is as follows: *"declared that neither party has any financial rights or liabilities towards the other"*. It was submitted by the wife that such a finding has the effect of prohibiting the wife from pursuing property proceedings against the Respondent. As such, it would be contrary to public policy.

43. It is common ground that the parties have no property of consequence in Australia. Any order for division of property pursuant to s 79 of the Act would be an order in personam which would then have to be enforced in Lebanon if that was possible.

44. The parties in this case have sought to bypass the law applicable to the dissolution of marriage in this country and chose the forum of the Lebanese Jaafarite Canonical Courts to legally sanction their divorce. The parties had lived in Australia for many years and, on the evidence before this Court, could not have applied for and/or obtained a divorce on 15 October 1998 which is the date the parties obtained a religious divorce from the Z Islamic Centre in New South Wales. The parties thereby deliberately bypassed the Australian legal system.

45. The wife continues to pursue legal action in Lebanon against the husband in relation to property matters. On the face of it, it seems sensibly that as the only property available for distribution between the parties is situated in Lebanon that is the place where the parties ought to litigate about their property.

46. Even assuming that the wife was successful in having this Court refuse to recognise the divorce of the parties from Lebanon there would, no doubt, be a contest about forum. The husband has made it clear that his case would be that any legal proceedings in relation to property disputes between the parties ought to be conducted in Lebanon. Without deciding that matter it certainly appears that there is an argument of real substance to support the view of the husband.

47. Having regard to all the matters set out herein I find that this Court recognises the divorce of the parties through the judgment or decree made in the Jaafarite Canonical Court on 24 November 1998.

48. As a consequence of that, the wife's application for dissolution of marriage is to be dismissed as the marriage she wishes to dissolve has already been dissolved.

I certify that the preceding forty-eight (48) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Le Poer Trench

Associate:

Date: 21 January 2009