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ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

Editors-in-chief: Cecil L. Rotenberg Q.C. and Mario D. Bellissimo

Live-in Caregivers: When the Clock Runs Out . . .

Brenda Wong

Most live-in caregivers ("LIC") are drawn to Canada by the prospect of eventual permanent residence. In exchange for providing two years of in-home childcare, senior home support care, or care of a disabled person, LICs have the opportunity to apply for permanent residence from within Canada. The 'catch' is that the requisite two years of work must be completed within three years of the LIC's arrival in Canada. And while this may not seem overly onerous, there are participants in the Live-in Caregiver Program who cannot legally complete two full years of work within three years of their arrival, usually for reasons beyond their control.

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Foreign Divorces

Ed Corrigan

Citizenship and Immigration Canada, at least from two Visa Offices, has recently rejected Spousal Sponsorship Applications on the grounds that the "foreign divorce" does not comply with Canadian law as "the documents you provided fail to show that your sponsor or her spouse was in residency in [the country of the divorce] for a full year prior to the divorce". The argument for the rejection was based on s. 22(1) of the *Divorce Act* of Canada

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Focus — Processing

Query of the Month

ImmQuest asks the Department of Citizenship and Immigration Canada:

1. How many applications were made in Canada for an extension of work, study or visit permits in 2006?
2. How many were approved?
3. How many were refused?

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include:

- allowing LICs to complete the program in four years instead of three;
- issuing blanket Service Canada labour market opinions for three years and three months for all caregivers regardless of whether they change employers (which would extend the scope of the recent CIC Operational Bulletin 025 issued on January 3, 2007);
- processing work permit extensions more expeditiously; and/or
- providing formal policy guidelines which set out to CIC officers how to properly consider H&C submissions when assessing LIC applications for permanent residence.

The proverbial 'carrot' of permanent residence continues to be dangled before prospective caregivers from around the world because it is well recognized that there is a labour market shortage of live-in caregivers in Canada. It is important to ensure the integrity of this program not only for the many Canadians who benefit from live-in care, but, more importantly, to ensure fairness to those caregivers who provide extremely valuable and necessary services, often under difficult conditions.

Brenda Wong is an Associate Lawyer at Corporate Immigration Law Firm. She may be contacted at wong@cimmigrationlaw.com or (416) 368-2333.

Foreign Divorces

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Ed Corrigan

which deals with recognition of foreign divorces. Section 22 of the *Divorce Act* states:

Recognition of foreign divorce

22. (1) A divorce granted, on or after the coming into force of this Act, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.

Idem

(2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.

Other recognition rules preserved

(3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.[1]

It is this writer's submission that to reject the Sponsorship Application solely on the grounds of a foreign divorce where neither of the parties were ordinarily resident in the jurisdiction granting the divorce for "a full year prior to the divorce" is wrong in law.

The Canadian *Divorce Act* explicitly recognizes that other means exist for recognition of foreign divorces. Section 22(3) states: "Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act".

To quote the *Law Society of Upper Canada 42nd Bar Admission Course Materials on Family Law*, Chapter 3 "Recognition of Foreign Divorce Decrees":

> The 1985 provisions are not a complete code of recognition. Section 22(3) provides that the statutory provisions do not limit or restrict any existing rule of law applicable to the recognition of foreign divorces. If the principles of common law found in cases such as *Indyka* represent an "existing rule of law," which it is submitted they do, then the *Divorce Act* could be interpreted as incorporating an even broader scope of recognition than that set out in ss. 1 and 2. There are many situations in which someone could be said to have a "real sub-

1 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 22.

stantial connection" with a jurisdiction and not yet be ordinarily resident in that jurisdiction for a year. In such circumstances, the divorce would not be recognizable under s. 22(1), but might well fall within the meaning of s. 22(3).[2]

The divorce law that is relevant is the law in the country which granted the divorce and whether or not there is a "real and substantial connection" to the granting jurisdiction. In the case of a rejection of a Lebanese divorce, both parties were born in Lebanon, were Lebanese citizens and duly registered in Lebanon, they were married in Lebanon and accordingly they had a "real and substantial connection" to Lebanon and, following *Indyka v Indyka*,[3] are legally entitled to get divorced in Lebanon. A Notarized Declaration from an attorney in the granting jurisdiction would be helpful in confirming the legality of the divorce.

The standard form letter for "recognizing foreign divorces in Ontario" explicitly provides for this option. Here is an excerpt from the Standard Form Letter on providing opinions on foreign divorces:

1. On the basis of a real and substantial connection between (state name of which party or both parties, if applicable) and the granting jurisdiction at the time of the commencement of the divorce proceedings.

2. Set out the facts which, in your opinion, are sufficient to establish a real and substantial connection for recognition of the divorce, and support this opinion with reference to relevant case law.

NOTE: Specify which spouse was resident in the jurisdiction at the time the proceedings were commenced and the duration of the residency.

I am satisfied that the (court of other authority) that granted the divorce had jurisdiction to do so according to its own law. Furthermore, there is no evidence of fraud or of a denial of natural justice concerning the granting of the Divorce.[4]

Section 22(3) of the *Divorce Act* provides that the provisions for recognizing foreign divorces in subsections (1) and (2) do not interfere with or limit the common law rules for recognition of foreign divorces. The main common-law rule is set out in the House of Lords decision in *Indyka v Indyka*. According to that ruling, which has been adopted in Canadian law, "our courts will recognize foreign decrees granted by a jurisdiction with which the petitioner or respondent has a 'real and substantial connection'".

According to Canadian common law, a foreign divorce will be recognized if the party concerned has "a real and substantial connection" to the place where the divorce was pronounced and if the divorce was legal pursuant to the laws of that jurisdiction. The relevant law is that of the granting jurisdiction and provided that there is a "real and substantial connection" and that there is no evidence of fraud. The quicky Reno divorces where there is no "real and substantial connection" to the granting jurisdiction are, however, not recognized.

The following is an excerpt from a decision of the Supreme Court of Canada, *Powell v. Cockburn*:[5]

16 Counsel for the wife submitted that domicile is not the sole test for recognition of foreign divorce decrees (*LeMesurier v. LeMesurier*, [1895] A.C. 517) and that our courts will recognize foreign decrees granted by a jurisdiction with which the petitioner or respondent has a "real and substantial connection": *Indyka v Indyka*, [1969] 1 A.C. 33, [1967] 2 All E.R. 689.

17 In *Indyka*'s case the Law Lords discussed at length the various grounds upon which foreign divorce decrees may be accorded recognition in English courts. In that case, a Czechoslovakian divorce decree granted to a wife resident in Czechoslovakia was given recognition in England. The husband, a Czech national, at the time of the divorce had acquired an English domicile. Subsequently, he married his second wife in England. When she petitioned for divorce, he cross-petitioned for nullity, arguing that the Czech divorce would not be recognized in England, the domicile of the parties. It is difficult to extract a *ratio decidendi* from the judgments in *Indyka*; their Lordships held for a variety of reasons that the foreign decree had dissolved the first marriage for the purposes of English law. Various alternative grounds for extending recognition to foreign divorce decrees were considered, including domicile, the place of the matrimonial home, the residence of one or both parties, the country of

2 *Law Society of Upper Canada 42nd Bar Admission Course materials on Family Law*, Chapter 3 "Recognition of Foreign Divorce Decrees" at page 3-3.

3 [1969] 1 A.C. 33, [1967] 3 W.L.R. 510, [1967] 2 All E.R. 689, (1967) 111 S.J. 456.

4 See Sample Form Letter from the Marriage Office of the Registrar General, Ministry of Consumer and Corporate Affairs on Foreign Divorces dated January 1995.

5 68 D.L.R. (3d) 700, [1977] 2 S.C.R. 218, 22 R.F.L. 155, 8 N.R. 215, 1976 CarswellOnt 114, 1976 CarswellOnt 403 (S.C.C. Apr 01, 1976).

> nationality, "domicile" defined in a less exacting manner, the predominant country with regard to the spouses, the place of celebration of the marriage, and a place with which there is a real and substantial connection. The decision might have rested on the application of the reciprocity rule in *Travers v. Holley*, [1953] P. 246, [1953] 2 All E.R. 794, but the Court, in discussing the multifarious grounds for recognition, chose to make the scope and effect of the decision much broader. The judgment has been interpreted, in my view correctly, as deciding (i) *LeMesurier* is no longer good law insofar as it holds that recognition will be extended only to divorce decrees granted in the domicile, for that is only one of several bases for jurisdiction; (ii) an English court should recognize a foreign decree "whenever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction": Cheshire, Private International Law, 8th ed. (1970), p. 363.[6]

The Supreme Court concludes in *Powell v. Cockburn* on the validity of foreign divorces:

> 32 The grounds upon which a decree of divorce granted by one state can be impeached in another state are, properly, few in number. The weight of authority seems to recognize, however, that if the granting state takes jurisdiction on the basis of facts which, if the truth were known, would not give it jurisdiction, the decree may be set aside. Fraud going to the merits may be just as distasteful as fraud going to jurisdiction, but for reasons of comity and practical difficulties, in the past we have refused to inquire into the former. Even within the limited area of what might be termed jurisdictional fraud there should be great reluctance to make a finding of fraud for obvious reasons.[7]

It is clear that under common law, which is generally binding under Canadian law, provided that there is a "real and substantial connection" to the granting jurisdiction, Canada recognizes foreign divorces which are legal. Accordingly, the rejection of a Spousal Sponsorship solely on the basis that the foreign divorce does not comply with s. 22(1) of the Canadian *Divorce Act* which requires one year residency in the granting jurisdiction is wrong in law.

The correct legal test is to determine whether there is a "real and substantial connection" to the granting jurisdiction. If either one of the parties was born in the granting jurisdiction, is a citizen or permanent resident of the granting jurisdiction, duly registered in the granting jurisdiction and married in the granting jurisdiction, he or she has a "real and substantial connection" to the granting jurisdiction and is legally entitled to get a divorce in that foreign jurisdiction. If there is a "real and substantial connection" to the foreign jurisdiction and the foreign divorce is valid in law, it must be accepted by Canada unless fraud is proven. Section 22(3) of the *Divorce Act* supports this finding.

If the sole grounds for rejection of a Spousal Sponsorship Application is that a foreign divorce does not comply with the one year residency requirement set out in s. 22(1), this has no validity in law. Consideration of s. 22(3) of the *Divorce Act* must also be undertaken to determine if there is a "real and substantial connection" to the granting jurisdiction, which would bring the foreign divorce under *Indyka* and the common-law rule for accepting a foreign divorce as being legal in Canada in the absence of any fraud.

Edward C. Corrigan, BA, MA, LL.B is a lawyer certified as a Specialist in Immigration Law and Immigration and Refugee Protection by the Law Society of Upper Canada. He can be reached at corriganlaw@linkd.net or at (519) 439-4015.

6 *Ibid.*, para. 16-17.

7 *Ibid.*, para. 32.

The Rise and Fall of Human Dignity

Cecil L. Rotenberg

Part III

The Last Remaining Family Member Guideline (con't)

What if you were told that you could never go to visit or live with the only family you have ever known? When you asked why this was so, what if you were told that because you had friends, an underpaid job, and that your elderly parents could fly halfway across the world to visit you, the adjudicator didn't have enough compassion for your case?

Now suppose you knew that under the law, the discretion exerciser is supposed to have compassion for people precisely in your