

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Mark (Respondent)

v.

Mark (Appellant)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Phillips of Worth Matravers
Baroness Hale of Richmond

Counsel

Appellants:

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Philip Marshall
Deepak Nagpal

(instructed by Hughes Fowler Carruthers)

Respondents:

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Adedamola Aderemi
Razak Atunwa

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HOUSE OF LORDS

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE**

Mark (Respondent) v. Mark (Appellant)

[2005] UKHL 42

LORD NICHOLLS OF BIRKENHEAD

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond. For the reasons they give, with which I agree, I would dismiss this appeal.

LORD HOFFMANN

2. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

3. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with it, and for the reasons that she gives I would dismiss the appeal. I should like however to add a few comments of my own on the question whether, if a domicile of choice is to be acquired, a person must be lawfully present in the country where he or she intends to remain indefinitely.

4. The answer to this question is, I think, to be found in the distinction to which Lord Westbury drew attention at the start of his speech in *Udny v Udny* (1869) LR 1 Sc & Div 441, 457:

“The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend.”

5. Translated into language with which we are familiar today, the point that Lord Westbury was making was that cases where a question of public law is in issue must be distinguished from cases where the issue is one of private law. Public law issues raise questions which concern what Lord Westbury described as the person’s political status. The criteria by which status for the purpose of these questions is to be judged may differ from country to country, according to the rules that it lays down as to who may lawfully enter or lawfully remain there. Private law issues, on the other hand, are referred to the law of the person’s domicile. The criteria for the determination of a person’s domicile are governed by a single principle which ought to be capable of being applied universally. The importance of this distinction has not always been recognised.

6. As Mr Nicholls for the Queen’s Proctor observed in his written case, the proposition that to acquire a domicile of choice a person must be lawfully present in the country with the intention of remaining indefinitely can be traced back to the Roman jurists. In *Ex parte Donnelly*, 1915 WLD 29, a husband had been convicted of drugs offences

in South Africa and after serving a period of imprisonment was deported to the United States of America. The wife then applied in South Africa for leave to sue her husband for restitution of conjugal rights or for divorce. Holding that the court had no jurisdiction, Mason J said at p 30:

“A person, it is true, may select any place he likes as his domicile, provided, says the *Digest* (50, 1, 31), it has not been prohibited for him.

Now in the present case the husband cannot have a true domicile in fact in South Africa; he is liable to instant punishment and deportation if he returns.”

The decision in that case was followed, on similar facts, in *Ex parte Gordon*, 1937 WLD 35. In these two cases it was held that the effect of the husband’s deportation was to extinguish his domicile of origin. But the line of reasoning that was adopted would have prevented a domicile of choice from being acquired in the first place if the person was unable to enter the country lawfully: see *Solomon v Solomon* (1912) 29 WN(NSW) 68 in which was held that unlawful residence in New South Wales prevented the acquisition of a domicile of choice there.

7. The *Digest* 50, 1, 31, in a fragment attributed to Marcellus, does indeed state:

“*Nihil est impedimento, quo minus quis ubi velit habeat domicilium, quod ei interdictum non sit.* [There is no restriction on the place where a person may have his *domicilium*, so long as it is not prohibited for him.]”

But it is much less clear whether, when Marcellus used the word *domicilium* in this passage, he was talking about what Lord Westbury described as the person’s civil law status, which is the private law context in which we now use the expression “domicile”.

8. The chapter of the *Digest* in which the fragment appears is headed “*Ad municipalem et de incolis*”. A *municipium* in Roman law was a town, particularly a town in Italy, which possessed the right of Roman citizenship but was governed by its own laws. Chapter 50 deals with the rights of persons resident in a *municipium* and describes the

rules by which it was determined whether a person had a *domicilium* there. As for *incolae*, the following definition is provided: *Incola est, qui in aliqua regione domicilium suum contulit, quem Graeci πάροικον appellant*. [An *incola* is a person who has taken up his *domicilium* in a place, whom the Greeks call a *πάροικος*.]: Digest, 50, 16, 239. The Greek word *πάροικος* was regarded by Justinian as having the same meaning as the Latin word *colonus*: Justinian, 1, 34, 1. As Buckland, *A Textbook of Roman Law*, 3rd ed (1963) p 86, note 14 explains, persons resident in a community had widely different civil rights from the point of view of *civitas* according to their classification in society. These rights included the use of public facilities such as baths, and the right to invoke the civil jurisdiction of the magistrate. Leaving aside those residents who because they were *cives* were specially privileged, there were various other classes of residents such as *coloni*, or *incolae*, whose rights were more or less restricted according to the class in which the person was placed. These disabilities related to matters of public as well as private law. Persons resident in the Latin colonies, for example, were on a level with Romans in the ordinary relations of private law, but they could not serve in Roman legions or hold a Roman magistracy: Buckland, pp 92-93.

9. It would not be surprising to find that there was a rule in Roman law that a person had to be lawfully resident in the community before he could acquire a *domicilium* there, as the law did not distinguish between the public and the private law consequences of his presence in the community. But I think that the concept embraced by the word *domicilium* in Roman law is more accurately reflected today, as it is in civilian jurisdictions, by the words “home” or “residence” than by the word “domicile”. The word “home” in article 8(1) of the European Convention for the Protection of Fundamental Rights and Freedoms, for example, is expressed in other languages as “suo domicile”, “proprio domicile” and “suo domicilio”. With us the word “domicile” has acquired a narrower meaning. It refers to what Lord Westbury described as a person’s civil status for the purpose of determining various rights in private law.

10. In *Puttick v Attorney-General* [1980] Fam 1 the petitioner had been permitted to enter the United Kingdom. She sought a declaration that a marriage which she had celebrated following her arrival in this country was a valid and subsisting marriage, as she had acquired a domicile of choice in England. Sir George Baker P held that, as her leave to enter had been obtained by the fraudulent production of an invalid passport, she was barred from acquiring a domicile of choice

here. At p 19C-D he cited, in support of this view, the following passage in Dicey & Morris, *The Conflict of Laws*, 9th ed (1973), p 96:

“It has been held that a domicile of choice cannot be acquired by illegal residence. The reason for this rule is that a court cannot allow a person to acquire a domicile in defiance of the law which that court itself administers.”

11. This passage has been retained in the current edition: Dicey & Morris, *The Conflict of Laws*, 13th ed (2000), Vol 1, para 6-037. The editors cite *Puttick* as authority for it, as well as cases from Australia and South Africa. As Anton and Beaumont, *Private International Law*, 2nd ed (Edinburgh, 1990), point out, at p 140, however, these propositions are perfectly understandable where the issue is one of public law. But they find no similar justification in matters of private law. Dicey & Morris, para 6-037, states that it is an open question whether the courts of one country would hold that a person could acquire a domicile of choice in some other country by residence there which was illegal under the law of the second country. The better view would seem to be that, as our courts do not apply the public policy of a foreign state, the illegality of the residence under that state’s law would not be regarded here as inconsistent with the acquisition of a domicile of choice in that country.

12. In *Szechter (or se Karsov) v Szechter* [1971] P 286, Sir Jocelyn Simon P held that the parties, who had been given leave to stay in the United Kingdom for a limited period, had acquired a domicile of choice in England by residing here with the intention of making this country their permanent home. Following *Boldrini v Boldrini and Martini* [1932] P 9 and *Cruh v Cruh* [1945] 2 All ER 545, he said at p 294-G that it was immaterial that their intentions were liable to be frustrated by the decision of the Secretary of State for the Home Department as to permission for their continued residence here. This is a clear indication that, under our law, a domicile of origin is not lost if the residence becomes unlawful at some later date.

13. In my opinion illegality is relevant to the question whether the person intended to reside in a country with the intention of remaining there indefinitely, but not to the question whether the person is present here. Evidence that the person intended to reside there indefinitely despite the illegality would need to be carefully scrutinised. But the question whether a person is physically present in the country is not

affected one way or the other by the question whether he has entered the country legally or illegally. If the court finds that the requisite intention has been established by credible and reliable evidence, it would seem to be contrary to principle to decline to give effect to it by recognising that a domicile of choice has been acquired, as Lord Westbury put in *Bell v Kennedy* (1868) LR 1 Sc & Div 307, 320, immediately upon the person's arrival in that country.

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

14. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond. I agree with their reasoning in relation both to ordinary residence and to domicile and, for the reasons which they give, I would also dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

15. The issue before us is whether a person can be either habitually resident or domiciled in England and Wales if her presence in the United Kingdom is a criminal offence under the Immigration Act 1971. The immediate context is whether our courts have jurisdiction, under section 5(2) of the Domicile and Matrimonial Proceedings Act 1973, to entertain her divorce petition. But the domicile issue could arise in many other contexts, as a person can only have one domicile, whereas habitual residence may have a different meaning in different statutes according to their context and purpose.

Immigration control

16. It is worth remembering that the question could not arise until comparatively recently. As Ann Dummett and Andrew Nicol explain in *Subjects, Citizens, Aliens and Others* (1990), pp 39 – 40,

“It is taken for granted today that any state’s system of immigration control is permanent and universal. That is, a permanent legal framework exists for scrutinising all entrants and for determining which of them may stay, for how long, and under what conditions. . . Such permanent, universal control over immigration is of recent origin only. It would have been unthinkable in early twentieth century Britain; for one thing, it would have been regarded as a gross invasion of personal freedom; for another, it would have been physically impossible to enforce. Passports were not yet a general requirement. Modern controls depend upon universal documentation, telecommunications, a large bureaucracy, and greater powers to invade people’s privacy within the country than then existed.”

17. Monarchs did from time to time seek to expel or exclude aliens, although whether this was an aspect of the royal prerogative is disputed. Blackstone put it this way (*Commentaries on the Laws of England*, vol 1, 2nd ed (1766) p 259): “For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the King’s protection; though liable to be sent home whenever the King sees occasion.” From time to time, temporary legislation was passed to meet a temporary crisis. Lord Grenville’s Aliens Act of 1793 was passed in response to the excesses of the French revolution. This sought to identify aliens on arrival, prohibit some from landing, and provided the machinery for removing those who were ordered to leave. It was renewed until replaced by further legislation in 1802 and again in 1803 which concentrated on identifying and removing aliens rather than prohibiting landing. This was to last until there was a peace treaty. In 1814 and again in 1815 Parliament reverted to legislation which had to be renewed from time to time. By 1826, the country must have felt sufficiently secure to replace the machinery for removal with a permanent system of registration. But after the French Revolution of 1848, it was once again thought expedient ‘for the due Security of the Peace and Tranquillity of this Realm’ to resort, for a limited period, to the earlier machinery for ordering aliens to depart: see Aliens Act 1848.

But the Crown also reserved the right to refuse to return aliens to their own countries if they would face persecution there. The calls for permanent controls on entry began towards the end of the 19th century in response to the arrival of large numbers of Jewish people escaping the pogroms in Eastern Europe. These culminated in the recommendations of the Royal Commission on Alien Immigration, 1903, Cd 1741. These were highly controversial and emerged, much watered down, in the Aliens Act 1905. This contained powers to refuse entry to, and to deport, defined types of ‘undesirable’ aliens. Immigration inspectors, the forerunners of the modern immigration service, were appointed to do this. But the Act was comparatively easily evaded. The Aliens Restriction Act 1914 was rushed through the day after war was declared, allowing Orders in Council to be made imposing much more severe controls over all aliens in times of war, imminent national danger or great emergency. After the war, however, it was continued and extended by the Aliens Restriction (Amendment) Act 1919, which also repealed the 1905 Act. It was renewed annually until superseded by the Immigration Act 1971.

18. The Aliens Acts did not apply to the inhabitants of the British Empire. They were not aliens. Mostly they were British subjects owing allegiance to the Crown, although the British Nationality Act 1948 drew a distinction between Citizens of the United Kingdom and Colonies and citizens of the independent members of the Commonwealth. All were entitled to come here freely until the first Commonwealth Immigrants Act of 1962. This regulated the entry of Commonwealth citizens coming here for a variety of purposes. The main effect was to restrict the numbers coming here to work; family reunion was still allowed. During the 1960s, entry clearance officers were established in Commonwealth countries to process dependants’ applications for entry and under the Immigration Appeals Act 1969, prior entry clearance became a legal requirement. The Commonwealth Immigrants Act 1968 extended controls to United Kingdom citizens unless they, a parent or grandparent had been born here. The 1962 Act made it an offence for a Commonwealth citizen subject to immigration control to enter or remain within the United Kingdom without the leave of an immigration officer.

19. The Immigration Act 1971 brought everyone under the same system of control. It abolished the distinction between aliens and British subjects and introduced the distinction between patrials with the right of abode, who were not subject to immigration control, and non-patrials who were subject to immigration control. Under section 24 of the 1971 Act a person commits a criminal offence, among other things, “if, having only a limited leave to enter or remain in the United Kingdom,

he knowingly either - (i) remains beyond the time limited by the leave; or (ii) fails to observe a condition of the leave” (s 24(1)(b)).

This case

20. The parties are both Nigerian nationals, born in Nigeria in 1948 and 1950 respectively, and thus having a domicile of origin in Nigeria. They were married according to the local customary law in the River State of Nigeria in 1979. This was a valid polygamous marriage, the husband having married two or possibly three wives before this one, and possibly two afterwards. This couple have four children, David, born in 1980, Katie, born in 1982, Monica, born in 1984, and Christopher, born in 1985. All four children were born here. The two eldest, being born before the British Nationality Act 1981 came into force, are United Kingdom citizens with British passports. The two youngest were originally Nigerian citizens, but were granted British citizenship in 2000. All four children began their education in Switzerland, but were mainly educated at boarding schools and Universities or colleges here. They spent their holidays either in London or Nigeria or in other places abroad.

21. The husband had a distinguished career in the Nigerian army, rising to the rank of General, and occupying a variety of government posts after the military coup in 1983. He amassed a very considerable fortune during this period. In 1990 he was posted to Washington. The wife had qualified as a lawyer and practised in Nigeria. When the husband was posted to Washington she enrolled for an LL.M. at Queen Mary College in London, thereafter dividing her time between this country, visits to her husband in the United States, and to Nigeria. She was granted multiple entry visas which allowed her to enter this country for periods of up to six months at a time until March 1997.

22. In November 1993, there was a further military coup in Nigeria, and the husband was opposed to the new ruler, General Abacha. He was compulsorily retired from the army and went into exile in this country. The parties established a matrimonial home here. In April 1994, the husband was granted a four year work permit expiring on 30 April 1998 and given leave to remain here until that date. The wife at first relied upon her multiple entry visa to come and go, but was eventually given limited leave to remain until 30 April 1998 as the dependent spouse of a work permit holder. Shortly before that date, the husband applied for and was granted indefinite leave to remain for himself and the two

youngest children. At the time, the wife was in Florida attending a bible study course and she was not included in the application. She returned on 29 April and was given leave to enter for one day, until her limited leave expired on 30 April. After that she became an over-stayer and her continued presence here was an offence under sections 24(1)(b) and 24A of the Immigration Act 1971. She has since been granted indefinite leave to remain but only after these proceedings were begun.

23. General Abacha died in June 1998 and the husband decided to return to Nigeria to take up a political career. He did so in September 1998 and soon became a Senator in the Upper House of the Nigerian Parliament. He continues to visit this country and to stay in the former matrimonial home where the wife still lives. At some time over the following year, the wife abandoned any hope of returning to Nigeria as the husband's principal wife and formed the intention of remaining indefinitely in this country.

24. On 17 July 2000, at the invitation of the husband's solicitor, the wife issued a divorce petition and application for ancillary relief in the Principal Registry of the Family Division. At that date she relied only upon her habitual residence here over the previous 12 months to found the jurisdiction of the court, but her petition was later amended to include a claim that she had acquired a domicile of choice here. The husband initially admitted that the English court had jurisdiction, but in February 2001 he applied for a stay of the English proceedings on the basis that he had initiated proceedings in Nigeria. This application eventually came before Hughes J in March 2002. He dismissed it in a reserved judgment dated 14 March 2002. Thus, provided that the English court has jurisdiction, it is appropriate for that court to exercise it.

25. By that time, however, the husband had taken the point that the court did not have jurisdiction because the wife's presence here during the 12 months up to and including the issue of her petition had been unlawful. The issue was tried by Hughes J in June 2002. In a reserved judgment dated 14 August 2002, he held that the wife could not rely upon her unlawful presence as a basis for establishing habitual residence here but that she could rely upon it as a basis for the acquisition of a domicile of choice. Accordingly the court had jurisdiction. On 19 February 2004, the Court of Appeal dismissed the husband's appeal on the ground that the wife had not only acquired a domicile of choice here before July 2000 but also had been habitually resident here throughout the previous 12 months.

26. It is not now disputed that the wife would be habitually resident and domiciled here were it not that her presence in this country was, at the material time, unlawful. The issue, therefore, is the impact of that illegality on the jurisdictional requirements set out in section 5(2) of the Domicile and Matrimonial Proceedings Act 1973. This has since been amended to give effect to the Council Regulations EC No 1347/2000 and EC No 2201/2003, but at the material time, it read as follows:

“The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (but only if) either of the parties to the marriage –

- (a) is domiciled in England and Wales on the date when the proceedings are begun; or
- (b) was habitually resident in England and Wales throughout the period of one year ending with that date.”

Habitual residence

27. The principal authority on this issue is the decision of this House in *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309. At issue was the interpretation of the requirement in the Local Education Authority Award Regulations 1979 (SI 1979/889), reg 13, that, in order to qualify for a mandatory student grant, an applicant had to have been ‘ordinarily resident’ in the United Kingdom for the previous three years. The five applicants had lived here for at least three years while attending school or college. All five were subject to immigration control, four had entered as students with limited leave to remain for the duration of their studies, and the fifth had entered with his parents for settlement and had indefinite leave to remain. This House held that the natural and ordinary meaning of ordinary residence had been settled by two tax cases, *Levene v Inland Revenue Commissioners* [1928] AC 217 and *Inland Revenue Commissioners v Lysaght* [1928] AC 234. Lord Scarman, with whose opinion all the other members of the committee agreed, said this, at p 343:

“Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that ‘ordinarily resident’ refers to a man’s abode in a particular place or country which he has

adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.”

28. This was “ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind” (p 344). Parliament must have deliberately chosen this simpler test rather than the “difficult” concept of domicile, “dependent upon a refined, subtle and frequently very expensive judicial investigation of the devious twists and turns of the mind of man” (p 345). The lower courts had erred in attaching decisive significance to the immigration status of the five students. It might throw light on the question, but would be “of little weight when put into the balance against the fact of continued residence over the prescribed period” (p 349).

29. Lord Scarman did, however, acknowledge one exception to this straightforward factual question, at pp 343 – 344:

“If a man’s presence in a particular place or country is unlawful, eg in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence (even though in a tax case the Crown may be able to do so): *In re Abdul Manan* [1971] 1 WLR 859 and *R v Secretary of State for the Home Department, Ex p Margueritte* [1982] 3 WLR 753, CA. There is, indeed, express provision to this effect in the Act of 1971, section 33(2). But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully.”

As none of these applicants was unlawfully present, these words were strictly *obiter dicta*. Furthermore, as Hughes J pointed out, the point was conceded on behalf of the students in the course of argument. But he regarded it as an integral part of the reasoning, particularly as to the limited relevance of immigration control where presence was lawful. Understandably, therefore, he considered that he should follow the principle stated in *Shah*.

30. In the Court of Appeal, there was much debate about whether the principle was one of statutory construction – implying the word ‘lawfully’ before ‘ordinarily resident’ – or whether it was one of public policy – under which a person is unable to benefit from his own illegal act. But the policy reasons for denying the benefit might be the same as those leading to the conclusion that Parliament did or did not intend that the residence be lawful in the particular statute under consideration. Thus, for example, in a statute which confers jurisdiction where *either* party is habitually resident in this country, there seems no good reason to deny the petitioner the benefit (if such it be) of bringing proceedings here on the basis of the *respondent’s* habitual residence even if that residence is unlawful. The petitioner is not to be blamed for that. Ultimately, however, the Court of Appeal concluded that the principle stated in *Shah* could not be an absolute rule in the light of the Human Rights Act 1998, and the right of access to a court guaranteed by article 6 of the European Convention on Human Rights.

31. My Lords, I do not consider that there is any need to found our decision upon the Human Rights Act. It is quite clear that Lord Scarman regarded the question he was answering as one of statutory construction. On the meaning of ‘ordinary residence’ he relied upon the earlier tax cases. Yet it is also quite clear that the legality of a person’s residence is completely irrelevant for tax purposes. A person who has taxable income or assets here is liable to United Kingdom tax irrespective of his immigration status. The two cases cited by Lord Scarman in support of the proposition that residence must be lawful were both immigration cases. In *Re Abdul Manan* [1971] 1 WLR 859 the applicant was a Pakistani seaman who had deserted from his ship and so his presence here was unlawful under the Commonwealth Immigrants Act 1962. He nevertheless claimed to be entitled to enter and remain as a person who had been ordinarily resident here for two years. In rejecting that claim, Lord Denning MR said this, at p 861:

“The point turns on the meaning of ‘ordinarily resident’ in these statutes. If this were an income tax case he would, I expect, be held to be ordinarily resident here. But it is not an income tax case. It is an immigration case. In these statutes ‘ordinarily resident’ means *lawfully* ordinarily resident here. The word ‘lawfully’ is often read into a statute: see, for instance, *Adlam v Law Society* [1968] 1 WLR 6. It should be read into these statutes.”

32. Indeed, it is scarcely surprising that, in giving immigration rights to people ordinarily resident here, Parliament should exclude those who were here in breach of immigration control. The same applies to the other case relied upon by Lord Scarman, *R v Secretary of State for the Home Department, Ex p Margueritte* [1983] QB 180. The applicant first came here from Mauritius in 1972, and was given limited leave to enter for a few months. He over-stayed until June 1974 when he paid a short visit to France. On return he was given one month's leave to enter, but again overstayed. In 1978 he married a woman who was settled here and as a result was granted indefinite leave to remain. In 1979 he applied to register as a United Kingdom citizen, on the basis of five years' ordinary residence here, in accordance with a provision inserted into the British Nationality Act 1948 by the 1971 Act. As Lord Scarman mentioned, the 1971 Act contains an express provision, in section 33(2), that a person is not to be treated for the purposes of any provision in that Act as ordinarily resident in the United Kingdom at a time when he is there in breach of the immigration laws. It is scarcely surprising, therefore, that the Court of Appeal construed the new provision in the British Nationality Act in the same way.

33. It is common ground that habitual residence and ordinary residence are interchangeable concepts: see *Ikimi v Ikimi* [2001] EWCA Civ 873; [2002] Fam 72. The question is whether the word 'lawfully' should be implied into section 5(2) of the 1973 Act. I see no reason to do so. The purpose of the 1973 Act was to provide an answer to the question "when is the connection with this country of the parties and their marriage sufficiently close to make it desirable that our courts should have jurisdiction to dissolve the marriage?": see the Law Commission's *Report on Jurisdiction in Matrimonial Causes* (1972, Law Com No 48), para 5. The Commission went on to point out, at paras 6 and 7, that:

"If the members of a broken or separated family are so closely associated with our country that it is concerned with the welfare and financial needs of the spouses and their children and the regularisation of any subsequent unions, it may be desirable that our courts should be able to exercise jurisdiction...

The job of law reform is therefore to formulate bases of jurisdiction which meet the interests of the state and of those who genuinely 'belong here', without allowing access to our courts to transients, 'forum-shoppers', and others with no real connection with the country. A subsidiary but important task is to ensure that the bases of

jurisdiction are such that our decrees will be recognised abroad.”

34. With the possible exception of the last, none of these considerations points to a requirement that habitual residence here for this purpose should be lawful. Quite the reverse. As Waller LJ pointed out in the Court of Appeal, at para 57,

“ . . . there must be a very large number of extremely longstanding but unlawful residents in this and other countries whose only real links are with their adopted country and whose personal affairs should properly be governed by the laws of that country, whether to their advantage or their disadvantage.”

Furthermore, at para 67:

“Third parties, such as children, may be affected if the court declines jurisdiction on the ground that one party is relying on his own illegal residence.”

35. If there are also proceedings in another jurisdiction which is in the circumstances more appropriate than this, then the proceedings here can be stayed, on the usual *forum non conveniens* grounds. Alternatively, as happened in this case, if this is the appropriate jurisdiction, the respondent may be enjoined from continuing the proceedings elsewhere.

36. I conclude, therefore, that residence for the purpose of section 5(2) of the 1973 Act need not be lawful residence. The question of whether the residence is habitual is a factual one which should be answered by applying the test, derived from the 1928 tax cases, laid down by Lord Scarman in *Shah* [1983] 2 AC 309. It is possible that the legality of a person’s residence here might be relevant to the factual question of whether that residence is ‘habitual’. A person who was on the run after a deportation order or removal directions might find it hard to establish a habitual residence here. But such cases will be rare, compared with the large numbers of people who have remained here leading perfectly ordinary lives here for long periods, despite having no permission to do so. The husband’s first reaction, to admit that the wife

was habitually resident here for the purpose of these proceedings, was obviously correct on the facts of this case. There will, however, be other statutory provisions, in particular those conferring entitlement to some benefit from the state, where it would be proper to imply a requirement that the residence be lawful.

Domicile

37. Habitual residence is simply an expression used in a variety of statutes for a variety of purposes and may thus have a different meaning according to the statutory context. Furthermore, a person may be habitually resident in more than one place at a time, or may have no habitual residence at all. Domicile, on the other hand, is a concept of the common law (although the same word is sometimes used in civilian systems to denote something more like habitual residence). A person must always have a domicile but can only have one domicile at a time. Hence it must be given the same meaning in whatever context it arises.

38. As the Hong Kong Law Reform Commission explain, in their recent Consultation Paper on *Rules for Determining Domicile* [2004] HKLRCCP 1, para 1.2, “a person’s domicile connects him with a system of law for the purposes of determining a range of matters principally related to status or property”. Thus, for example, it governs capacity to marry or to make a will relating to moveable property; it is one of the factors governing the formal validity of a will; the domicile of the deceased also governs succession to moveable property and is the sole basis for jurisdiction under the Inheritance (Provision for Family and Dependants) Act 1975; legitimacy, to the extent that it is still a relevant concept, is governed by the law of the father’s domicile; domicile is one of the bases of jurisdiction, not only in matrimonial causes but also in declarations of status or parentage under the Family Law Act 1976; it is the sole basis of jurisdiction to make an ordinary adoption order under the Adoption Act 1976, s 14, or a parental order under the Human Fertilisation and Embryology Act 1990, s 30. This is not an exhaustive list but it shows the particular importance of domicile as a connecting factor in family law.

39. An adult can acquire a domicile of choice by the combination and coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely: see the joint report of the Law Commission and the Scottish Law Commission, *The Law of Domicile* (1987, Law Com No 168, Scot Law Com No 107), para 2.6.

There is a long line of cases showing that an alien may acquire a domicile of choice in this country even though he might be required to leave at any time by executive action with no right of appeal: see *Boldrini v Boldrini and Martini* [1932] P 9, CA; *May v May* [1943] 2 All ER 146; *Cruh v Cruh* [1945] 2 All ER 545; *Zanelli v Zanelli* (1948) 64 TLR 556; *Szechter v Szechter* [1971] P 286. Indeed, as already seen, aliens were always in that precarious position, and could otherwise never have established a domicile of choice here. In *May v May* the principle was applied to a German Jew who had been given only limited leave to land here in 1939. In *Cruh v Cruh*, Denning J applied the principle to a man of Austrian or German origin who had been recommended for deportation following a conviction for conspiracy and whom the Home Secretary intended to deport as soon as it became practicable to do so. Until the recommendation was actually effected, the domicile of choice remained. Once that happens, however, the domicile is lost.

40. But what if the residence here is not only precarious but actually unlawful? As already seen, this is a relatively recent phenomenon. There was no authority in England and Wales on the point until *Puttick v Attorney General* [1980] Fam 1. However, there was Commonwealth authority, on the basis of which Dicey and Morris, *The Conflict of Laws*, 9th edition, 1973, at pp 96-97, “submitted that an English court would hold that a person who was illegally resident in this country could not thereby acquire an English domicile of choice”. This was adopted by Baker P in *Puttick*, albeit *obiter*, as he had already held that the *proposita*, the notorious German terrorist Astrid Proll, did not have the requisite *animus manendi*, being on the run and ready to leave the moment the police caught up with her. Nor were the Commonwealth authorities upon which the text was based produced to him.

41. The first of these is the New South Wales case of *Solomon v Solomon* (1912) 29 WN (NSW) 68, in which Gordon J observed, at p 70, that “It is a curious proposition that a Court of Justice in New South Wales should hold that a man has acquired a domicile in New South Wales when the laws of the land forbid that man to be here.” The result was that his Australian wife was unable to obtain a divorce from her husband, who was currently serving a prison sentence for rape, because he was a South Sea Islander who had come to and remained in Australia in defiance of laws which prohibited South Sea Islanders from doing so, and indeed had been on his way to be deported when he committed the offence for which he was then in prison.

42. A similar injustice was done in the only other case cited by Dicey and Morris which is directly in point, *Smith v Smith* 1962(3) SA 930, a decision of the Supreme Court of the Federation of Rhodesia and Nyasaland. The husband, a fugitive from justice in England, had entered Southern Rhodesia on a false passport and his entry and residence had at all times been unlawful under the Immigration Act. The wife obtained a declaration of nullity, but on the husband's appeal, the court itself raised the issue of jurisdiction. Briggs ACJ conducted a full review of the authorities. He distinguished the cases of precarious residence and condoned residence, and found more helpful some South African cases on the statutory concept of domicile in their Immigration Act (which was deliberately distinguished from the common law concept in another case cited by Dicey and Morris, *Parker v Principal Immigration Officer* [1926] CPD 255) and the cases holding that a domicile of choice acquired during precarious residence was destroyed by actual deportation, at least where there was also a prohibition on return (including *Ex parte Macleod* [1946] CPD 312, the last of the cases cited by Dicey and Morris; see also *Ex parte Donnelly* 1915, WLD 29; *Ex parte Gordon* 1937, WLD 35). He concluded as follows, at p 936:

“I should formulate the proposition in this way. Acquisition of a domicile of choice requires both residence and animus manendi. Not every kind of de facto residence will suffice. It must usually be residence of one's free will, or at least, if it is not, the residence can be of no value as evidence of an animus manendi. The animus manendi must be both genuine and honest. An intention to persist indefinitely in a course of unlawful conduct may be genuine: but it cannot be honest. Fears that the worst may happen do not necessarily preclude a sufficient animus. But knowledge that one is residing only in defiance of the law, and will so continue indefinitely, makes it impossible to have an animus manendi of the requisite quality. I think also that the matter may properly be put in another way. The animus manendi, though it does not require an absolute intention to reside permanently, must at least be an unconditional intention to reside for an indefinite period. . . . In this case, the intention of the appellant, putting it at the highest, can only have been,

‘I will stay in Rhodesia if I can escape the attention of the authorities whose statutory duty is to deport me, and who will at once do so if they learn the true facts about me.’

I think a conditional or provisional intention of this kind cannot in law amount to the *animus manendi* necessary to establish a domicile of choice.”

Thus it will be seen that, although Briggs Ag had earlier, at p 473, referred to the general principle that one “cannot acquire a domicile of choice ‘in the teeth of the law’” the principle which he formulated was concerned with the conditions for forming the necessary *animus*.

43. On the other hand, in *Jablonowski v Jablonowski* (1972) 28 DLR (3d) 440, Lerner J in the Ontario High Court did not find either *Solomon* or *Smith* persuasive. He found that the petitioner had met both the residence and animus requirements despite having entered Canada illegally. *Jablonowski* was followed by McQuaid J in the Prince Edward Island Supreme Court in *Wood v Wood* (1977) 4 RFL (2d) 182.

44. My Lords, these authorities do not disclose a long-standing and consistent approach to the issue such that we might be reluctant to depart from it. It is necessary, therefore, to consider the matter as one of principle. The object of the rules determining domicile is to discover the system of law with which the *propositus* is most closely connected for the range of purposes mentioned earlier. Sometimes that connection will be an advantage to him. Sometimes it will not. As Hughes J put it, at para 73:

“the concept of domicile is not that of a benefit to the *propositus*. Rather, it is a neutral rule of law for determining that system of personal law with which the individual has the appropriate connection, so that it shall govern his personal status and questions relating to him and his affairs.”

Recognising that connection despite the illegality of his presence here does not therefore offend against any general principle that a person cannot be permitted to acquire a benefit from his own criminal conduct.

45. Unlike some of the purposes for which habitual residence may be important, the State has no particular interest one way or another. Indeed, insofar as it does have an interest, this will probably lie in accepting that those who intend to remain here permanently have

acquired a domicile here, whatever their immigration status. The actual results in *Solomon* and *Smith*, in denying relief to the innocent party to a matrimonial dispute, did no-one any good. While it might be said that the injustice stemmed, not from the principle under discussion, but from the common law's insistence that a wife was domiciled where her husband was domiciled, it would still have been in everyone's interests that the affairs of such long term residents were governed by the laws of the country with which they were so closely connected. The supposed principle served only to separate them from the most appropriate legal system to govern their affairs.

46. As a matter of principle, that connection is established by the coincidence of residence and the *animus manendi*. If a person has chosen to make his home in a new country for an indefinite period of time, it is appropriate that he should be connected to that country's system of law for the kind of purposes for which domicile is relevant. It would be absurd if this wife's capacity to make a will, succession to her moveable property, and her children's right to make a claim under the Inheritance (Provision for Family and Dependents) Act against her estate were not to be governed by the law of this country.

47. If there is no reason of public policy to deny the acquisition of a domicile of choice in such cases, can it nevertheless be said that legality is an essential element in residence (as it appears that Dicey and Morris regarded it) or in the formation of the *animus manendi* (as Briggs Ag in *Smith* regarded it)? Both, however, are issues of fact. As we have already seen, one can be resident in a place where one has no right to be. One can also form an intention to remain in a place despite considerable uncertainty as to whether this will be possible. English law requires only that the intention be *bona fide*, in the sense of being genuine and not pretended for some other purpose, such as getting a divorce to which one would not be entitled by the law of the true domicile.

48. A further problem in regarding legality as an essential element, touched on by Hughes J, is the shifting nature of immigration status. An asylum seeker, for example, may commit a criminal offence by entering this country illegally. But on making his claim to the authorities, he may be granted temporary admission. His presence is no longer illegal, but under section 11(1) of the Immigration Act 1971 he is deemed not to be here at all. Is he then to be prevented from acquiring a domicile of choice here, although he undoubtedly has no intention of returning to his country of origin? Furthermore, a person's presence here may at times be lawful and at times unlawful. She may not even know what it is or

think that it matters very much. She may enter for a limited purpose and be given limited leave to remain which then expires but is routinely renewed a short time later or the status changed. This is what happened in the Australian case of *Lim v Lim and Titcomb* [1973] VR 370, where there were gaps between the series of temporary permits, although at the material time the *propositus* was lawfully present in Australia (see also *In the marriage of Salacup* (1993) 116 FLR 137). In the present case, it so happens that the wife formed her intention of remaining here permanently after her limited leave had expired and presented her petition before her position had been regularised. But the reality of her presence and intention, the merits of her case, and the quality of her connection with the laws of this country are no different from what they would have been had she formed her intention to remain just before her limited leave ran out in April 1998.

49. Hence, my lords, it seems to me that there is no reason in principle why a person whose presence here is unlawful cannot acquire a domicile of choice in this country. Although her presence here is a criminal offence, it is by no means clear that she will be required to leave if the position is discovered. Her position is in reality precarious in the same way that the aliens' presence was precarious in the *Boldrini* line of authority. In fact, it was always much less likely that this wife would ever be removed from this country than it was that the *propositus* in *Cruh* would be removed.

50. This is not to say that the legality of a person's presence here is completely irrelevant. As in the precarious residence cases, it may well be relevant to whether or not she had formed the required *animus manendi*. But this is a question of fact and not, as it was held to be in *Smith*, a question of law. Nor is it, as at times the Court of Appeal appeared to be saying, a matter of discretion or, as it is put in *Rayden and Jackson on Divorce and Family Matters*, 17th ed (1997), at para 2.16, of the court being 'hostile' to the assertion of a domicile of choice by an illegal entrant or resident. Either a person has acquired a domicile of choice in this country or she has not. If she has done so, she is not to be denied it because the court considers her case unmeritorious or tainted with moral or legal turpitude. If she has not done so, she is not to be granted it because the court considers her virtuous. It is a matter of fact whether she had the required intention at the relevant time.

51. For those reasons, I would, with great respect, differ from the proposition of law stated by Dicey and Morris and decline to follow the authorities cited in its support. The judge was, in my view, correct in

holding that the wife had acquired a domicile of choice here by the time that she presented her petition for divorce.

Conclusion

52. It follows that I would hold that the courts of this country had jurisdiction to entertain the wife's divorce petition, both on the basis of her habitual residence for the previous 12 months and on the basis of her domicile here. Accordingly, for these and the further reasons given in the opinion of my noble and learned friend, Lord Hope of Craighead, with which I agree, I would dismiss this appeal. I would also express the fervent hope that the parties can now arrange their affairs with the minimum of resort to further arguments in court. This is benefiting no-one but the lawyers, and certainly not the parties, or their children, or even their wider families, who all have an interest in preserving as much as possible of the family's assets for their own benefit rather than that of others.