

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 102/2021
[2021] NZSC 161**

BETWEEN RAHLA HUSSEIN AMIN HARDER
ALMARZOOQI
Applicant

AND RAFID MOHAMMED SALIH
Respondent

Court: William Young, Ellen France and Williams JJ

Counsel: J L W Wass and M Freeman for Applicant
M V Smith for Respondent

Judgment: 23 November 2021

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is granted.**
- B The application for leave to appeal is dismissed.**
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REASONS

Introduction

[1] The application for leave to appeal relates to the enforcement of the judgment of a foreign court, namely, an order of the Personal Matters Court in Dubai that the respondent, Mr Salih, pay the applicant, Ms Almarzooqi, a deferred dowry on their divorce. Ms Almarzooqi brought proceedings to enforce that judgment in New Zealand. The High Court declined the application because the Dubai court did not, as a matter of New Zealand law, have jurisdiction in that matter over Mr Salih.¹

¹ *Almarzooqi v Salih* [2020] NZHC 2441 (Associate Judge Johnston).

Ms Almarzooqi seeks leave to appeal from the decision of the Court of Appeal upholding the judgment of the High Court.²

Background

[2] The parties met online in 2010. At that point, Ms Almarzooqi was living in Australia and Mr Salih in New Zealand. She came to New Zealand in 2013 and they formed a relationship.

[3] The parties were married in Dubai under Islamic/Sharia law on 26 December 2013. Their contract of marriage was solemnised by order of the Dubai court. Amongst other matters, that order provided that Mr Salih would pay Ms Almarzooqi a deferred dowry of just over \$200,000 on the earlier of their divorce or his death (the Mahr).

[4] The parties separated in May 2014. By that point they were both living together in New Zealand. Ms Almarzooqi went back to Dubai to seek a divorce. The divorce was granted by the Dubai court on 1 November 2016 in Mr Salih's absence. The Dubai court ordered him to pay the Mahr, along with money for alimony and housing support.

[5] Both parties currently live in New Zealand. Ms Almarzooqi is a citizen of the United Arab Emirates (the UAE) and has residency in New Zealand. Mr Salih has Iranian and New Zealand citizenship.

[6] A copy of the Dubai judgment was served on Mr Salih in New Zealand on 29 June 2017. Ms Almarzooqi then began the proceeding in the High Court to enforce the Dubai judgment.

The Court of Appeal judgment

[7] In dismissing the appeal, the Court of Appeal rejected the argument that the New Zealand courts recognise the jurisdiction of a foreign court over a non-resident by reference to the principles, reflected in rr 6.27–6.29 of the High Court

² *Almarzooqi v Salih* [2021] NZCA 330 (Clifford, Brewer and Dunningham JJ) [CA judgment].

Rules 2016, in determining whether they have jurisdiction over a non-resident. The Court cited a passage from *The Conflict of Laws in New Zealand*, where the authors state:³

It is generally irrelevant, for the purpose of assessing whether the foreign court had international jurisdiction, that New Zealand courts would exercise jurisdiction in the same circumstances, since judgments are not enforced on the basis of reciprocity at common law.

[8] The Court also rejected the argument that the specific context, namely “matrimonial proceedings”, could alter the position. The Court noted that there was a limited recognition of jurisdiction on the basis of reciprocity in matrimonial proceedings. The Court also observed that this limited recognition overlapped what is “characterised as the recognition of jurisdiction in such proceedings on the basis of in rem principle”.⁴ However, the Court did not consider that this principle applied beyond the question of recognition of the divorce. The Court cited s 44 of the Family Proceedings Act 1980 and the reference to the exercise of jurisdiction on the basis of a person’s nationality or citizenship. But that only related to issues concerning the status and continued existence of the relevant marriage, and not to other matters. There was not a judgment in rem in relation to the enforcement of the Mahr.

The proposed appeal

[9] In seeking leave to appeal, the applicant asks the Court to reconsider the conditions under which New Zealand courts enforce the judgments of foreign courts. The current approach, she says, is inflexible and inconsistent with access to justice considerations. In place of the current approach, the argument is that the Court should recognise, as the Supreme Court of Canada has, that a foreign court may be competent to give a final judgment where there is a real and substantial connection between the case and foreign jurisdiction.⁵ It is also argued that on the facts the Dubai judgment is enforceable.

³ At [33], citing Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [5.96] (footnote omitted).

⁴ CA judgment, above n 2, at [40].

⁵ Relying on *Beals v Saldanha* 2003 SCC 72, [2003] 3 SCR 416.

[10] In opposing leave, the respondent says, amongst other matters, that the Canadian approach the applicant favours is an outlier.⁶ The respondent also makes various criticisms of the test, suggesting it would lead to uncertainty in a question of conflict of laws where certainty is important. Finally, the respondent submits that the applicant could sue in New Zealand where she is, and largely has been, resident since her marriage. But, instead, she chose to proceed in the UAE.

Our assessment

[11] We are not satisfied that the criteria for leave to appeal are met in this case.⁷ As the respondent says, there is some doubt as to whether or not adopting the real and substantial connection test would alter the outcome of this case. That indicates that this proposed appeal is not a good vehicle for us to address the point, even if we were disposed to do so. As to the latter, the current law in New Zealand is clear. The applicant says that the prospect of development by international agreement, in particular via the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters,⁸ should not dissuade the Court from granting leave. But, at least as matters stand, it is preferable for any development of the New Zealand position to be by international agreement rather than by this Court.

[12] Nor do we see any appearance of a miscarriage of justice in the assessment of the Court of Appeal in this case.⁹

Result

[13] Ms Almarzooqi filed her notice of application out of time. The delay is minimal and adequately explained and there is no objection from Mr Salih to us extending time. Accordingly, the application for an extension of time to apply for leave to appeal is granted, but the application for leave to appeal is dismissed.

⁶ The respondent submits the Irish Supreme Court did not follow this approach in *Re Flightlease (Ireland) Ltd (in voluntary liq)* [2012] IESC 12, [2012] 1 IR 722.

⁷ Senior Courts Act 2016, s 74(2).

⁸ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (concluded 2 July 2019, not yet in force). The applicant notes there are exceptions to the coverage of the Convention.

⁹ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

[14] The parties are to advise if the applicant is legally aided.

Solicitors:

Thomas Dewar Sziranyi Letts, Lower Hutt for Applicant