**[2010–12 Gib LR 330]**

## T v. T (Divorce Jurisdiction: Nationality and Domicile)

SUPREME COURT (Butler, J.): May 30th, 2012

*Family Law—divorce—jurisdiction—jurisdictional test in Council Regulation (EC) No. 2201/2003, art. 3.1(b) is domicile not nationality, as Gibraltar a "territorial unit" of United Kingdom for purposes of Regulation, by virtue of art. 66, although not in domestic or political sense—jurisdiction to hear divorce if parties domiciled in Gibraltar, or Gibraltar courts would never have jurisdiction under art. 3.1(b)*

The petitioner wife sought a divorce in the Supreme Court.

The parties had married in Gibraltar and were habitually resident in Spain, but were assumed by the court to be domiciled in Gibraltar and, being from Gibraltar, were British nationals. The respondent made no objection to the petition being heard in Gibraltar, save that, as a matter of law, he submitted that the court lacked jurisdiction to hear it by virtue of Council Regulation (EC) No. 2201/2003 ("the Regulation").

The respondent submitted that (a) the parties were not habitually resident in Gibraltar, but in Spain; (b) nationality could not be an avenue for Gibraltarian jurisdiction as there was no Gibraltarian nationality and the parties were British nationals; and (c) domicile could not be an avenue for Gibraltarian jurisdiction, as the parties were not domiciled in the United Kingdom but in Gibraltar, which was not a "territorial unit" within the "United Kingdom" for the purposes of arts. 3.1(a) and 66 of the Regulation.

The petitioner made no submissions about jurisdiction.

**Held,** dismissing the challenge to jurisdiction:

The court had jurisdiction to hear the divorce proceedings. Article 3.1(a) and (b) of the Regulation provided two approaches to jurisdiction: (a) habitual residence; and (b) nationality or, in the case of the United Kingdom, domicile. As the parties were habitually resident in Spain, the only avenue that could yield Gibraltarian jurisdiction was art. 3.1(b). The parties were assumed to be domiciled in Gibraltar and it was therefore unnecessary to deal with nationality (which for Gibraltarians meant British nationality), as domicile alone determined jurisdiction for those "within the United Kingdom." Such persons, for the purposes of art. 3.1(b), included those domiciled in Gibraltar, because art. 66 defined domicile in the "United Kingdom" to mean domicile in one of its "territorial units." Although Gibraltar was not, as in the case of Scotland or

Northern Ireland, part of the United Kingdom in a domestic or political sense, there was persuasive authority that, for the purposes of the Regulation, it was a "territorial unit" of the United Kingdom. Domicile therefore conferred jurisdiction on the courts of Gibraltar, by art. 3.1(b) of the Regulation. Were it to be held otherwise, the possibility of Gibraltarian jurisdiction based on domicile would be entirely excluded in proceedings to which the Regulation applied, which was unlikely to have been its legislative intention (para. 9; paras. 15–19; paras. 20–33).

**Cases cited:**
(1) *Chandler* v. *Chandler*, [2011] EWCA Civ 143, *dicta* of Thorpe, L.J. applied.
(2) *Matthews* v. *United Kingdom*, 1999–00 Gib LR 28; (1999), 28 E.H.R.R. 361, referred to.

**Legislation construed:**
Matrimonial Causes Act 1962, s.4(1): The relevant terms of this sub-section are set out at para. 3.
s.4(3): The relevant terms of this sub-section are set out at para. 5.

Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition of judgments in matrimonial matters and matters of parental responsibility (O.J. 2003, L. 338), art. 3: The relevant terms of this article are set out at para. 6.
art. 66: The relevant terms of this article are set out at para. 21.

*Miss J. Evans* for the petitioner;
*C. Simpson* for the respondent.

1 **BUTLER, J.:** The parties were married over 20 years ago in Gibraltar. They finally separated on June 11th, 2011. The petitioner has filed a petition for divorce which has been issued in this court. The respondent, whilst claiming to have no objection to the petition being heard in Gibraltar, suggests through his counsel that as a matter of law this court has no jurisdiction to hear it. The parties are and at the time of the filing and issuing of the petition were both habitually resident in Spain. For the purposes of this ruling, I assume that both are and were at all material times domiciled in Gibraltar. The point is of some general importance, particularly since there are many Gibraltarians who live just across the border in Spain for financial or other reasons and whose daytime lives, at least during the week, are in Gibraltar. They may work and have their families and friends here and retain very substantial connections with this country.

2 Jurisdiction in divorce proceedings within the European Community is governed by Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition of judgments in matrimonial matters and matters

of parental responsibility ("Brussels II Revised," which I shall refer to as "the Regulation"). Article 17 of the Regulation requires the court of a Member State seised of a case to declare, if it be the case, that it has no jurisdiction. The parties cannot confer jurisdiction by consent or by submission.

3 Section 4(1) of the Matrimonial Causes Act 1962 ("the Act") provides that this court—

> "shall have jurisdiction to entertain proceedings for divorce or judicial separation if—
>
> (a) the court has jurisdiction under [the Regulation]; or
>
> (b) no court of a Member State has jurisdiction under the Regulation and either party is domiciled in Gibraltar on the date when the proceedings are begun."

4 Since, as a result of the parties' habitual residence, the courts of Spain clearly have jurisdiction, s.4(1)(b) can have no application in this case. This court, therefore, has jurisdiction only if it is conferred by the Regulation. It is incumbent on this court to satisfy itself that it has jurisdiction before continuing with divorce proceedings. It is important to note that the Regulation takes precedence over national law. The Regulation came into force on March 1st, 2005, though in relation to matrimonial matters it carried forward almost unchanged the provisions of Council Regulation (EC) No. 1347/2000.

5 By s.4(3) of the Act, "Member State" means (for the purposes of the Act) all Member States of the European Community (then excepting Denmark and being "*deemed to include Gibraltar*"). [Emphasis supplied.] There is no provision in the Act to the effect that Gibraltar should be deemed part of the United Kingdom. Mr. Simpson, on behalf of the respondent, suggests that this was most probably an oversight on the part of the legislature, but that is not something which I am entitled to assume. On the contrary, I must assume (in the absence of good reason to suppose otherwise) that the omission of such a provision was deliberate, especially in the light of the express deeming of Gibraltar to be a "Member State" for the purposes of the Act. If Gibraltar is deemed to be a Member State itself, it is arguably inconsistent then to assume that the intention was to imply that it should also be regarded as part of another Member State, though the deeming provision is only for the purposes of the Act and must be interpreted, if possible, consistently with the Regulation.

6 Article 3 of Brussels II Revised provides:

> "1. In matters relating to divorce . . . jurisdiction will lie with the courts of the Member State
>
> (a) in whose territory:

— the spouses are habitually resident, or

— the spouses were last habitually resident, or

— the respondent is habitually resident, or

— in the event of a joint application, either of the spouses is habitually resident, or

— the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question *or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;*

(b) *of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.*

2. For the purpose of this Regulation, 'domicile' shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland." [Emphasis supplied.]

7 It is apparent that the Spanish courts have jurisdiction as a result of the parties' habitual residence there. Each of the indents in art. 3.1(a) depends upon habitual residence. Accordingly none of them confers jurisdiction on this court, which could only have jurisdiction under art. 3.1(b).

8 Mr. Simpson argues that even if Gibraltar were itself a Member State for these purposes (and there is no specific reference in the Regulation to Gibraltar being included as a Member State for the purposes of the Regulation) the parties are not nationals of Gibraltar and Gibraltar is not part of the United Kingdom.

**Nationality**

9 So far as nationality is concerned, there is no Gibraltarian nationality, since Gibraltar does not have nation status. Furthermore, Gibraltar is not independently a Member State of the European Union. The relevant Member State is "the United Kingdom." I am told that the parties are both British nationals. By virtue of a declaration lodged by the United Kingdom with the EEC in 1983, "UK National" is defined for EC purposes as British citizens, British subjects under Part IV of the British Nationality Act 1981 having the right of abode in the UK, *and British Dependent Territories citizens acquiring their citizenship from connection with Gibraltar.* Gibraltarians were to be counted as British nationals for the purposes of Community law and have therefore enjoyed European Union

citizenship. Gibraltarians have, accordingly, been recognized for these purposes as European nationals and the concept of UK nationality is recognized.

10 As a result of a challenge under the European Convention on Human Rights in the case of *Matthews* v. *United Kingdom* (2), it was declared that Gibraltarians and other EU nationals resident in Gibraltar were entitled to vote in elections for the European Assembly. As a result, Gibraltar was included in the UK South West regions for the European Parliament election in 2004. Spain's complaint against Gibraltar participating in EU elections was rejected.

11 Again, however, this begs the real issue, namely whether, though the parties may be British and UK nationals for these purposes, this court is a court of the Member State of which the parties are both nationals. If Gibraltarians are correctly regarded as UK nationals for these purposes, it must surely follow that the courts of Gibraltar should, for the same purposes, be regarded as UK courts. After all, the judges of this court are still Her Majesty's judges and they are appointed by The Queen, through the Governor of Gibraltar, upon the recommendation of the Judicial Appointments Commission. This is a vital part of the Gibraltar Constitution, which strives to ensure the independence of the judiciary (as it must do according to EC authority).

12 Nothing in the Act provides that Gibraltar is to be regarded as part of the United Kingdom. It is generally a separate jurisdiction from England and Wales or "the United Kingdom of Great Britain and Northern Ireland." It is a British Territory. When it joined the European Community in 1973 it did so as a European territory for whose external relations a Member State (the United Kingdom) is responsible. Article 355(3) TFEU (previously art. 299(4) EC) applies that Treaty to "the European territories for whose external relations a Member state is responsible." Application of the Treaty to Gibraltar in that way does not in itself make it a part of the United Kingdom. The jurisdiction of Gibraltar is separate from that of "the United Kingdom" (in so far as there is a jurisdiction of the United Kingdom) but the United Kingdom is responsible for its external relations.

13 I therefore look to the broader picture to discern whether *for these purposes* this court is a court of the United Kingdom. On the one hand, the effect of the 1983 declaration is to include Gibraltarians as UK nationals; on the other, the courts of Gibraltar are not generally regarded as courts of the United Kingdom.

14 It is pertinent to consider whether art. 3.1(b) should be read conjunctively or disjunctively. Does it mean that in all Member States save the United Kingdom the nationality of both spouses confers jurisdiction, but in the case of the United Kingdom it is domicile rather than nationality which does so? Or does it mean that in all cases (including the United

Kingdom) the nationality of both spouses suffices but in the case of the United Kingdom there is the additional qualifying limb of domicile?

15 My initial inclination is that the Directive should be interpreted as inclusively as possible. Why should the United Kingdom be the only Member State to be excluded from jurisdiction on the basis of the parties' nationality? On the other hand, what would be the reason for insertion of an additional route of domicile, applying solely to the UK? It has not been argued by Mr. Simpson that the disjunctive approach is correct. It is most probable that the United Kingdom wished to preserve in its case the additional qualifying test of domicile, which had been part of its law for so long.

16 I note that the *Practice Guide for the application of the new Brussels II Regulation* lists the alternative grounds of jurisdiction in matters of divorce, legal separation and marriage annulment in art. 3. Article 3.1(b) is listed as (at p.48(g))—"their common nationality (common 'domicile' in the case of the U.K. and Ireland)." The *Practice Guide* therefore seems to assume that the disjunctive interpretation is correct. In the absence of any other material before me on this issue, I find this persuasive and, with some reluctance, I accept that approach. It would have been easy, if the United Kingdom were intended to have an additional, rather than alternative, basis of jurisdiction, so to provide separately in an art. 3.1(c). Alternatively, the word "and" rather than "or" in art. 3.1(b) would have achieved that aim. The likelihood is that there was a compromise under which the United Kingdom was allowed domicile, rather than nationality, to be its test under art. 3.1(b).

17 In reaching the above conclusions I have considered Gibraltar's Civil Jurisdiction and Judgments Act 1993, s.39(1) of which provides that—"Gibraltar and the United Kingdom shall be treated as if each were a separate Regulation State for all purposes connected to the operation of . . . Regulation 2201/ 2003."

18 Section 39 is in Part V of the Civil Jurisdiction and Judgments Act, which is headed: "JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS BETWEEN THE UNITED KINGDOM AND GIBRALTAR." Again, s.39 does not alter the position in this case, since (a) it applies only as between the United Kingdom and Gibraltar; (b) if Gibraltar were to be treated as a separate Member State for present purposes, the parties are still not "nationals" of Gibraltar; and (c) the Regulation is directly applicable in Gibraltar and takes precedence over national law.

19 Having reached that conclusion, it is unnecessary for me to consider art. 66 of the Regulation (with which I deal below) in the context of nationality.

**Domicile**

20 I turn to deal with domicile under art. 3.1(b). At an earlier hearing in this matter I drew the attention of counsel to art. 66 of the Regulation and to the case of *Chandler* v. *Chandler* (1).

21 Article 66 addresses the problems arising from the fact that the United Kingdom is comprised of a number of countries, each with its own legal jurisdiction. It applies "with regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units." The United Kingdom is clearly a Member State "in which two or more systems of law or sets of rules concerning matters governed by [the Regulation] apply in different territorial units" (for instance Scotland and Northern Ireland). It may be that the systems of law do coincide in most or even all respects but they are nevertheless separate systems. That being so, art. 66 provides that—

> "(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
>
> (b) any reference to nationality or in the case of the United Kingdom 'domicile,' shall refer to the territorial unit designated by the law of that State;
>
> (c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;
>
> (d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked."

22 Again, this begs the more difficult question of whether, for this purpose, Gibraltar is a part of the United Kingdom. As a result of the 1983 Declaration, Gibraltarians are UK nationals for present purposes. It does not necessarily follow that Gibraltar is part of the United Kingdom or to be treated as such.

23 There are two possible interpretations of art. 66, each of which has support from different academic writers. Mr. Simpson has not found any judicial authority on the point. The question is whether art. 66 goes beyond cases in which there is an issue of jurisdiction between different Member States. It is not necessary for me to decide that point in this case, since there is here clearly a question of jurisdiction between two Member States.

24 Mr. Simpson acknowledges that the Regulation is directly applicable in Gibraltar as a result of the European Communities Act 1972, s.3 of which applies EU law to Gibraltar subject to specific exemptions which do not affect this point. He argues, however, that art. 66 does not apply because Gibraltar is not part of the United Kingdom and the laws of

Gibraltar do not form part of the United Kingdom, but are distinctly those of Gibraltar. The latter point has little force, in my view, bearing in mind that Scotland clearly has its own distinct laws and legal system but is part of the United Kingdom.

25 Mr. Simpson also points out that the United Kingdom has not designated Gibraltar or this court as a separate territorial unit for the purpose of determining jurisdiction for the purpose of the application of art. 66, though Gibraltar and this court have (by contrast, says Mr. Simpson) been listed for the purpose of arts. 21 and 29.

26 In *Chandler* (1) the wife had petitioned for divorce in England. The parties were habitually resident in Spain. It was said that there were doubts about the domicile of the husband although there was a strong leaning in favour of his English domicile of origin. The wife appealed from an order striking out her petition for want of jurisdiction. The issue was whether the wife was domiciled in the United Kingdom for the purposes of jurisdiction. It was held that the applicable law was that of the *lex fori*, namely England and Wales. Both Baron, J. and Sir Mark Potter (then President of the Family Division) held that she was not.

27 Thorpe, L.J. (probably the leading judicial authority on matters of international family law), referring to the submissions of counsel for the wife, said ([2011] EWCA Civ 143, at para. 2):

> "He quite rightly draws attention to Article 3 of Brussels II Revised where the broad jurisdictional basis for divorce is defined including the provision in Article 3.1(b) that an alternative basis for divorce is in the case of the United Kingdom and Ireland the domicile of both spouses. He draws attention to Article 66 which decrees that with regard to states that have two or more legal systems, any reference to 'domicile' shall refer to the territorial unit designated by the law of that state. He correctly points out that Gibraltar is a dependent territory. It is a member state of Europe as a dependent territory. It is part and parcel of the United Kingdom but applies its own system of law, just as Scotland applies its own system of law whilst being within the United Kingdom."

28 Thorpe, L.J. upheld the conclusion of Baron, J. that the *lex fori* was the law of England and Wales but he allowed the appeal against the striking out of the petition for want of jurisdiction, on the basis of the submissions of counsel for the wife.

29 I, therefore, cannot accept Mr. Simpson's submission in this case that Thorpe, L.J.'s findings in this regard were simply a repetition of counsel's submissions or that they were *obiter*. Mr. Simpson's submissions necessarily involve the proposition that Thorpe, L.J.'s conclusions were wrong. No doubt Thorpe, L.J.'s conclusions led to the statement in *Butterworths*

*Family Law Service* that Gibraltar is part of the United Kingdom for this purpose. I have not, of course, seen the judgments of Baron, J. or Potter, P. Nor do I know what contrary submissions were made on behalf of the husband. I note that he did not appear and was not represented at the Court of Appeal hearing.

30 In the case of *Matthews* v. *United Kingdom* (2), to which I have referred above, the ECHR recognized that Gibraltar does not form part of the United Kingdom "in domestic terms" (1990–00 Gib LR 28, at paras. 2 and 8):

> "2 Gibraltar is a dependent territory of the United Kingdom. It forms part of Her Majesty the Queen's Dominions, but not part of the United Kingdom. The United Kingdom parliament has the ultimate authority to legislate for Gibraltar, but in practice exercises it rarely." [Since then, of course, Gibraltar has moved on, has its own Constitution and is responsible for its own internal affairs and laws.]
>
> "8 Although Gibraltar is not part of the United Kingdom in domestic terms, by virtue of a declaration made by the UK Government at the time of the coming into force of the British Nationality Act 1981, the term 'nationals' and its derivatives used in the EC Treaty are to be understood as referring, *inter alia*, to British citizens and to British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar."

I do not think that these observations affect the situation in the present case.

31 A judgment of the Court of Appeal in England is of great persuasive authority in Gibraltar. A judgment of Thorpe, L.J., who has been intimately involved in all matters relating to divorce law within the European Community and is the Head of International Family Justice for England and Wales, is of particularly persuasive authority. Without more, I should be reluctant to depart or dissent from the conclusions expressed in *Chandler* (1). I am even more inclined to accept those conclusions for the following reasons:

(a) A contrary reason would, I believe, result in Gibraltar being the only part of the European Union which is excluded altogether from art. 3.1(b) on the basis of either nationality or domicile. It is difficult to accept that this was the intention.

(b) The parties' legal representatives in this case both concede that the likely intention of the legislature in Gibraltar was that Gibraltar should not be so excluded.

(c) Gibraltar is a unique jurisdiction with its own peculiar territorial, geographical and economic issues. Whilst it is not for me to suggest what the law should be in this regard, I observe that it would, in my opinion, be

surprising if the legislature were to have intended to exclude Gibraltar from art. 3.1(b).

(d) The law is complex but for the reasons which I have given above I need not be driven to disagree with Thorpe, L.J.'s conclusions.

32 I have considered and taken into account fully the written and oral submissions and material placed before me on behalf of both parties. Miss Evans, on behalf of the petitioner, expressly conceded in her skeleton argument that this court does not have jurisdiction on the basis of the parties' nationality in the absence of amendment to the Act. Virtually the whole of her submissions address the question of whether the parties are domiciled in Gibraltar, which I made it clear I would assume for this ruling in any event. She made no point concerning and did not dissent from any of the legal submissions made by Mr. Simpson and did not make substantive submissions in relation to whether domicile could confer jurisdiction. In fairness, she declared during her submissions that she was not an expert in this field. She emphasized that—

> "failing this being accepted, Gibraltarians are literally left with habitual residence in Gibraltar as the only ground for jurisdiction for the grant of divorce . . . Furthermore, in the event of the Gibraltar courts' finding that they do not have jurisdiction in these cases, that Spain will have jurisdiction to hear the divorce and it is agreed by both parties' solicitors that Spain will apply the laws of Gibraltar relating to divorce and financial relief as interpreted by the Spanish courts. Thus those persons born in Gibraltar maintaining almost daily and constant ties with Gibraltar despite their birth in Gibraltar will only be able to obtain a divorce in Spain conducted on the basis of Gibraltarian law administered second-hand by the Spanish courts, this is inequitable." [*sic*]

**Conclusions**

33 For the reasons which I have given earlier in this ruling, I conclude that *for present purposes*:

(a) Gibraltar is part of the United Kingdom.

(b) If the parties are domiciled in Gibraltar, they are also domiciled in the United Kingdom and/or by virtue of art. 66, art. 3.1(b) applies.

(c) This court is a court of the United Kingdom for these purposes and/or as a court of Gibraltar has jurisdiction by virtue of art. 66.

(d) This court therefore has jurisdiction because both parties are domiciled in Gibraltar.

*Orders accordingly.*