Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Using Tort Action in Dutch Marital Captivity Cases in Order to Obtain a Foreign Divorce

Question(s) at stake:

Whether a spouse's refusal to cooperate with divorce proceedings under Iranian law, specifically by not appearing before the Iranian embassy after obtaining a civil divorce under Dutch law, may be considered wrongful towards the other spouse.

Outcome of the ruling:

The spouse's refusal to cooperate in the divorce may be considered wrongful depending on the balance of interests between the two parties. An important factor is the extent to which the spouse's freedom to remarry is impeded by the failure to obtain a divorce that conforms to Iranian law.

Topic(s):

- Foreign Laws, Decisions, Acts and Institutions
- Personal Status, Family and Inheritance

Keywords:

- Dissolution of marriage and partnership
- Divorce
- Right to marry and to found a family
- Right to respect for family life
- Right to respect for private life
- Situations created abroad
- Legal toolbox
- Rights and freedoms

Tag(s):

- Marital captivity
- Iranian marriage
- Iranian divorce law
- Tort

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Country:

Netherlands

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Link to the decision:

https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBNNE:2022:671

ECLI:

ECLI:NL:RBNNE:2022:671

Date:

09 March 2022

Jurisdiction / Court / Chamber:

District court

Remedy / Procedural stage:

First instance

Previous stages:

-

Subsequent stages:

-

Branches / Areas of law:

Private law; Family law; Tort law

Facts:

The parties to the dispute were married on 15 April 2010 in Tehran, Iran. On 7 October 2014, a Dutch court pronounced their divorce, which was registered with the municipality of The Hague on 17 July 2015. Under Iranian law, however, the parties are still married. Although both parties agree that they wish to be divorced under Iranian law, the dispute concerns *how* this ought to be done.

In the present proceedings, the woman requests the Dutch court to declare that the man's refusal to cooperate with an Iranian divorce is wrongful and that she is suffering damage as a result of being trapped in the Iranian marriage. She also requests that the Court declare that the man is obliged to perform the requested acts described in the summons. Lastly, she requests that the Court order the man to pay a penalty of €100 per day, up to a maximum of €15,000, for each day that he fails to cooperate with the main order.

The woman argues that without the man's cooperation, she cannot obtain a divorce that is valid under Iranian law. According to her, this constitutes tortious conduct. She argues that her freedoms are restricted because as long as she is still married to him under Iranian law, she cannot visit her family and friends in Iran without his consent and cooperation. She would also be committing a criminal offence under Iranian law if she were to enter into a marriage with another man.

On the other hand, the man fears that the disclosure of his personal data to the Iranian embassy in the Netherlands will lead to possible detection or prosecution by the Iranian authorities on the grounds of his conversion to Christianity, even though there was no requirement to declare his religious beliefs when filling in

the divorce forms. To support his case at the hearing, the man evoked the case of Saudi journalist Jamal Khashoggi, who was murdered at the Saudi consulate in Istanbul in 2018.

Furthermore, the man argues that the restrictions the woman contends to exist only concern future scenarios.

Lastly, according to the man, their Iranian marriage certificate contains a clause stating that the woman can unilaterally obtain an Iranian divorce. Therefore, he argued, his cooperation was not necessary.

Ruling:

The District Court declared that the man's refusal to cooperate with the Iranian divorce was unlawful and determined that the man was obliged to appear at the Iranian embassy in The Hague, as requested by the wife, in order for the divorce to take place.

In assessing the dispute, the Court used the judgement of the Supreme Court of 22 January 1982 (ECLI:NL:HR:1982:AG4319/*NJ* 1982, 489) as a frame of reference. In this judgement, the Supreme Court ruled that the husband's refusal to do what was necessary for a Jewish religious divorce to take place was contrary to the care which the husband should observe towards the wife in his social intercourse. Consequently, the Court held that the husband could be compelled to actively cooperate with divorce proceedings based on a fault liability (*onrechtmatige daad*), potentially subject to enforcement through a penalty, such as a fine (*dwangsom*).

Whether the husband's refusal to cooperate in the divorce constitutes wrongful conduct depends on the circumstances of the case. These circumstances include the extent to which the wife's further options in life are restricted in the absence of a divorce. Additionally, the nature and weight of the husband's objections to cooperation were also considered important. Finally, the costs involved in the husband's cooperation had to be considered, also in relation to the financial position of the parties and the wife's possible willingness to bear all or part of these costs.

In the present case, the Court acknowledged the restrictions imposed on the woman by the absence of a divorce under Iranian law: she cannot visit her family and friends in Iran without the man’s consent and cooperation; she would also be committing a crime under Iranian law if she were to marry another man.

Although these are only potential future scenarios, as the man argued, the Court emphasizes that this does not mean that the woman should have to accept them, especially given that their divorce had been an established fact in the Netherlands for almost seven years. It was therefore considered reasonable for the woman to assert her right to remain unimpeded in her actions, free from any hindrance stemming from the continued existence of the Iranian marriage between the parties.

The Court determined that the man’s fear that the disclosure of his personal data could lead to his being detected or prosecuted by the Iranian authorities because of his conversion to Christianity was not sufficiently concrete and proven. Firstly, the man did not dispute that it was not necessary to declare his religious beliefs when filling in the forms for divorce. Secondly, the Court did not consider it credible that the man would be arrested or otherwise harmed at the Iranian embassy if his conversion became known there. The comparison he made during the hearing with the murdered Saudi journalist Jamal Khashoggi was not deemed valid, as it was neither stated nor shown that the man had been openly critical of the Iranian government or had previously come into contact with Iranian authorities. Finally, it had not been established that the wife would be able to obtain the Iranian divorce on her own. The onus was on the man to prove that the Iranian marriage certificate contained a clause giving her such power, but he was unable to provide any clarification on this point when asked about it at the hearing. Nor did the man disprove the woman’s contention that such a clause would still require the man’s cooperation.

In light of the above, the Court concluded that the wife’s interests must prevail. This made the man’s refusal to cooperate in the Iranian divorce by appearing (in principle once) in person at the embassy in The Hague unlawful towards the woman. Additionally, the Court ordered the man to pay the woman a penalty of

€100 for each day of non-compliance with the main order, up to a maximum of €15,000.

Main quotations on cultural or religious diversity:

- “In assessing this dispute, the Court takes as its frame of reference the Supreme Court ruling of 22 January 1982 (ECLI:NL:HR:1982:AG4319). In this case, it was accepted that the husband’s refusal to do what is necessary to obtain a (in that case, a Jewish religious) divorce may be unlawful if this refusal is contrary to the care which the husband should exercise in social intercourse towards the wife. The husband can be ordered in court to cooperate with the divorce on the basis of tort, possibly under penalty of a fine.
- Whether the husband’s refusal to cooperate in the divorce constitutes wrongful conduct depends on the circumstances of the case. Among those circumstances is the extent to which the wife’s future life options are restricted in the absence of a divorce. Also important is the nature and weight of the husband’s objections to cooperation. Finally, the costs involved in the husband’s cooperation must be taken into account, also in connection with the financial position of the parties and the possible willingness of the wife to bear these costs in whole or in part.” (para. 4.2)
- “In the present case, the woman has argued, without dispute, that her freedoms are restricted by the fact that she cannot visit her family and friends in Iran without the man’s consent and cooperation while she is still married to him there. She would also be committing a criminal offence under Iranian law if she were to unite with another man in marriage. Even if these were future scenarios, as the man argues, in the court's view, this does not mean that the woman has to take these restrictions on her freedom for granted. Especially since the divorce in the Netherlands has been a fact for almost seven years, the woman may reasonably demand that she is not or cannot be hindered in any way in her own actions by the continued

existence of the Iranian marriage between the parties." (para. 4.3)

- "The court considers the man's fear that the release of his personal data will lead to possible detection or prosecution by the Iranian authorities on account of his conversion to Christianity to be insufficiently concrete and proven [...] All things considered, the court concludes that the woman's interests must prevail. This makes the man's refusal to cooperate in the Iranian divorce by appearing (in principle once) in person at the embassy in The Hague unlawful towards the woman. The claims will therefore be upheld. A penalty payment will be attached to the order as further stipulated in the operative part below." (paras. 4.4–4.5)

Main legal texts quoted in the decision:

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Cases cited in the decision:

- Supreme Court, Judgement of 22 January 1982, ECLI:NL:HR:1982:AG4319 (Hoge Raad 22 januari 1982)

Commentary

Using Tort Action in Dutch Marital Captivity Cases in Order to Obtain a Foreign Divorce

Marital captivity refers to a situation in which a person who has entered into a civil or religious marriage wishes to end it but is unable to do so, for example, because the other spouse refuses to cooperate. In 1982, the Supreme Court recognized for the first time that the refusal of a spouse to cooperate in a religious – i.e., Jewish – divorce after a civil divorce had already been granted under Dutch law, was contrary to the care that a person should observe towards his or her spouse in social intercourse, and was therefore considered a tort (Supreme Court, Judgement of 22 January 1982, ECLI:NL:HR:1982:AG4319, analyzed in CUREDI026NL001). However, these cases have only recently gained more attention, starting with the case before the District Court of Rotterdam in

2010, where the framework as set out by the Supreme Court in 1982 was applied to determine whether the man's refusal to cooperate with the Islamic divorce after a Dutch civil divorce had already taken place was unlawful (District Court of Rotterdam, Judgement of 8 December 2010, ECLI:NL:RBROT:2010:BP8396, described in CUREDI026NL002).

According to the framework laid down by the Supreme Court in 1982, to determine whether the case is one of marital captivity and the spouse's non-cooperation constitutes a tort on the basis of Article 6:162 of the Dutch Civil Code (*onrechtmatige daad*), all the circumstances of the case must be taken into account. These include, in particular,

1. the extent to which the woman's potential future options in life are restricted in the absence of a divorce;
2. the nature and weight of the man's objections to cooperation; and
3. the costs involved in the husband's cooperation in relation to the financial situation of the parties and the wife's possible willingness to bear all or part of these costs.

However, in contrast to the 1982 case and the many cases of marital captivity that followed after 2010, the present case does not concern a refusal to cooperate for the purpose of obtaining a religious divorce via the religious authorities in the Netherlands, but rather a divorce abroad (i.e., in Iran) so that the divorce is recognized in the country of origin. In the present case, to obtain a divorce abroad, both parties had to appear physically at the Iranian embassy in The Hague. The husband, however, refused to do so. As a result, the woman was restricted in her freedom to remarry and to visit her family and friends in Iran. The District Court acknowledged that these circumstances could also amount to a case of marital captivity and that the 1982 ruling of the Supreme Court could also be applied in such a case, and therefore considered such neglect also unlawful towards the other spouse.

In similar cases where the cooperation of a “spouse” was required in order to obtain a foreign divorce, the Dutch court recognized this to be a tort (see District Court of Amsterdam, Judgement of 26 January 2022, ECLI:NL:RBAMS:2022:338 and District Court of Oost-Brabant, Judgement of 28 May 2020, ECLI:NL:RBOBR:2020:2823).

When weighing the interests of the parties to determine if the non-cooperation is unlawful, the following factors generally influence the court’s decision: not being able to visit family members and friends in the country of origin, the possibility of remarrying and starting a new family, possible prosecution in the country of origin, and even the possibility of children being taken away if the woman returns to her country of origin (Kruiniger 2018: 35–36).

In some cases, however, the interests of the non-cooperating party may lead to a different outcome. In the present case, the man argued that he feared that the release of his personal data would lead to possible detection or prosecution by the Iranian authorities because of his conversion to Christianity. However, the Court considered this fear to be insufficiently concrete and proven in the present case and concluded that the woman’s interest prevailed, also in light of the significant period of seven years that had elapsed since the civil divorce.

A recent bill aimed at combatting marital captivity or *Wet Tegengaan huwelijkse gevangenschap* (see *Staatsblad van het Koninkrijk der Nederlanden*, 2023, nr. 118) recognizes in law the duty of a spouse to cooperate in a religious divorce if the other party so requests unless this cannot reasonably be required in light of compelling interests (Article 1:68(2) of the Dutch Civil Code). Additionally, the bill explicitly provides for the possibility for a spouse to request cooperation to bring about a religious divorce on the basis of a tort during civil divorce proceedings (Article 827 of the (1)(e) Dutch Code on Civil Procedures).

This is how past developments in jurisprudence are being codified.

Additionally, the government, in response to raised questions about the proposed law, made specific reference to the case in which the spouse faces difficulties because the divorce pronounced in the Netherlands is not recognized by the

country of origin (Parliamentary Papers II 2019-2020, 35348, nr. 3). The proposed changes to Dutch civil (procedural) law will therefore also apply to cases such as the present one.

The new bill entered into force on 1 July 2023 (see *Staatsblad van het Koninkrijk der Nederlanden,* 2023, nrs. 84 and 118).

Literature related to the main issue(s) at stake:

Parliamentary documents

- Bill Combatting Marital Captivity and Other Topics (*Wetsvoorstel Tegengaan huwelijkse gevangenschap en enige andere onderwerpen*, *Parliamentary Papers 2019-2020, nr. 35348*).
- *Parliamentary Papers II 2019-2020, 35348, nr. 3*: 1–4, available at <https://zoek.officielebekendmakingen.nl/kst-35348-3.pdf> accessed 6 February 2024.
- *Parliamentary Papers I 2020-2021, 35348 A,* available at <https://zoek.officielebekendmakingen.nl/kst-35348-A.pdf> accessed 6 February 2024.
- *Staatsblad van het Koninkrijk der Nederlanden, 2023, nr. 84*, available at <https://zoek.officielebekendmakingen.nl/stb-2023-84.pdf> accessed 10 February 2024.
- *Staatsblad van het Koninkrijk der Nederlanden, 2023, nr. 118,* available at <https://zoek.officielebekendmakingen.nl/stb-2023-118.pdf> accessed 10 February 2024.

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