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

Family Reunification and Marital Status under the Refugee Act 1996: The Supreme Court Decides

Question(s) at stake:

Whether the High Court Judge had erred in his interpretation of s 18(3)(b) of the Refugee Act 1996 concerning the recognition of foreign marriages for the purposes of family reunification.

Outcome of the ruling:

The Supreme Court upheld the decision of the High Court and, in dismissing the appeal, confirmed that the conclusion that the marriage was by proxy was not a valid ground for refusing recognition of the marriage, and that an incorrect test had been applied for the recognition of a subsisting marital relationship between the refugee and the spouse for the purpose of s 18(3)(a) of the Refugee Act 1996.

Topic(s):

- Immigration and Asylum
- Personal Status, Family and Inheritance

Keywords:

- Conditions of validity
- Country of origin information
- Family Reunification
- Marriage and partnership
- Proxy marriage

Tag(s):

- Recognition of foreign marriages
- Sharia

- Sudan
- Lex loci celebrationis

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Country:

Ireland

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Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform [2013] IESC 9

Link to the decision:

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ECLI:

No ECLI number / ECLI number unknown

Date:

20 February 2013

Jurisdiction / Court / Chamber:

Supreme Court

Remedy / Procedural stage:

Appeal

Previous stages:

High Court (Judgment dated 25 November 2010), Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform [2010] IEHC 427

Subsequent stages:

None

Branches / Areas of law:

Private international law, family law, constitutional law, immigration and asylum law

Facts:

This matter originally came before the High Court by way of judicial review and was heard together with *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2010] IEHC 426 as both raised similar legal issues. The factual circumstances and details of the High Court proceedings are set out in *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2010] IEHC 427. This was an appeal against the decision of Mr. Justice Cooke in the High Court which ordered that a decision of the Minister for Justice, Equality and Law Reform ("the Minister") refusing family reunification be quashed. The appeal was heard together with the appeal in *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8.

Mr. Hamza, the first named respondent, is a citizen of Sudan and arrived in Ireland in 1998. He applied for refugee status which was granted by the Minister in 2006. In 2007, as part of a family reunification application pursuant to s 18 of the Refugee Act 1996, Mr. Hamza applied to the Minister to permit the second named respondent, Ms. Elkhalifa, whom he claimed to have married in Sudan in 1990, their two children and his mother-in-law to enter and reside in the State. Section 18 of the Refugee Act 1996 provides that on receipt of an application for family reunification, the Minister is obliged to refer the application to the Office of the Refugee Applications Commissioner ("ORAC"). ORAC carried out an investigation and furnished a report to the Minister which set out the relationships between Mr. Hamza and the individuals listed in the application for family reunification. The Minister granted the application for family reunification in respect of the two children. The application in respect of Ms. Elkhalifa was refused on the basis that as it had been determined that the marriage had taken place by proxy, Ms. Elkhalifa did not fall within the definition of "member of the family" as

a spouse in family reunification proceedings pursuant to s 18(3)(b) of the Refugee Act 1996. The refusal to admit Ms. Elkhalifa was the subject matter of the judicial review proceedings. The Minister, in his response to the application for judicial review in the High Court, asserted that there were two separate and distinct reasons for refusing the application for family reunification in respect of Ms. Elkhalifa. The first was that he had concluded that marriage by proxy might not be recognized under Irish law. The second reason concerned the documentation that Mr. Hamza had submitted and noted that the various translations of the marriage certificate were contradictory. It was further noted by letter to the applicants' solicitors that it was open to the applicant to seek a determination as to whether the marriage could be recognized as valid under Irish law pursuant to s 29 of the Family Law Act 1995. It was also stated that should Mr. Hamza produce a section 29 declaration from the family law courts stating that this marriage is valid under Irish law, then the application for family reunification could be reviewed.

Mr. Justice Cooke in the High Court held that two errors of law had occurred; (i) in concluding that the marriage was a proxy marriage and as such was not valid in Irish law, and (ii) an incorrect test for the recognition of a subsisting marital relationship between the refugee and the "spouse" for the purpose of s 18(3)(b)(i) of the Refugee Act 1996 had been applied.

An order of *certiorari* was granted by the High Court to quash the refusal of the application made by Mr. Hamza, as a declared refugee, for his spouse to enter and reside in the State pursuant to s 18 of the Refugee Act 1996.

Fourteen grounds of appeal were lodged which raised the following issues:

"1. The learned judge erred in his interpretation of s. 18(3)(b) of the Refugee Act 1996 and finding that the marriage might not have been a proxy marriage, and that, in the absence of supporting affidavit of laws, or of compliance with the requirements of the Islamic rites of Shariah law, that it complied with the lex loci celebrationis;

2. The learned trial judge erred in holding that the validity of the marriage could not be established by way of a declaration pursuant to s. 29 of the Family Law Act, 1995;

3. The learned judge also erred in his interpretation of s. 18(3)(b) of the Refugee Act in holding that a marriage for that purpose should extend to cases of common law marriage or where the refugee could demonstrate the existence of a subsisting and real marital relationship and, in particular, by taking account of a Council Directive to which the State was not a party;

4. The learned judge also erred in concluding that it was not necessary to resolve difficulties and doubts arising out of the discrepancies identified in the translations of the documentation submitted by Mr. Hamza." (para. 43)

Ruling:

The Supreme Court, in upholding the decision of the High Court and dismissing the appeal, held the following:

- The conclusion that the marriage was by proxy was not a valid ground for refusing recognition of the marriage.
- An incorrect test had been applied for the recognition of a subsisting marital relationship between the refugee and the "spouse" for the purpose of s 18(3)(a) of the Refugee Act 1996.

It was for the Minister to determine whether an individual was the spouse of a refugee, and a declaration of marital status pursuant to s 29 of the Family Law Act 1995 was not an alternative means of satisfying the requirements of s 18 of the Refugee Act 1996.

Main quotations on cultural or religious diversity:

"In his answers, Mr. Hamza said that he had been married to Ms. Elkhalifa, whom he had known since childhood, in Sudan on 14th September 1990. He said that he had previously been divorced and gave details. He ticked the box describing the marriage as 'legal' rather than other options, 'religious' or 'traditional.' He

answered ‘no’ to a question as to whether the marriage had taken place by proxy. He said that the marriage was a normal relationship between husband and wife, that Ms. Elkhalifa was his only wife and that she was the mother of their two children. He said that he had last resided with Ms. Elkhalifa in 1998. He submitted what he described as an original marriage certificate.” (para. 12)

“Mr. Hamza submitted a translation dated 25th June 2007 from Global Translations Ltd. of a marriage certificate from the Al Kamleen Civil Status Court in Sudan of the marriage between himself and Ms. Elkhalifa. That certificate, as translated, states that insofar as Ms. Elkalifa was concerned the marriage was ‘by the proxy of Al Omar Ismail.’ A separate translation from the Islamic Foundation of Ireland uses different language. Opposite the name of Ms. Elkalifa, it states: ‘who was represented in the marriage

contract by Omer Ismail.’” (para. 13)

“ORAC duly reported to the Minister on 12th July 2007, summarising the information provided by Mr. Hamza. The report said that the information provided by Mr. Hamza ‘in relation to his wife is consistent with that given in his initial application for Asylum in 2005’ and that ‘throughout the asylum process, the refugee consistently mentioned his wife and children and did not proffer any contradictory statements with regard to them.’ It said that the passport of Ms. Elkalifa was consistent in both design and form with the characteristics of Sudanese passports. The report added, however, that the Commissioner could not verify the authenticity of the documents submitted.” (para. 14)

“The [applicants’] solicitors also said that marriage was ‘not a proxy marriage as we would understand it in Ireland’ and contending that proxy marriages are marriages which take place while one of the parties is outside the State. They explained the practice that, in Muslim marriages, the bride is not permitted to be present in the mosque during the marital ceremony, but rather is represented by a male relative.” (para. 21)

“They [the applicants’ solicitors] submitted, by way of explanation, an article by Ahmed Fazel Ebrahim entitled ‘Islamic Marriages,’ which stated: ‘Generally, since

the Islamic marriage is preferably solemnised in the Masjid, while the female spouse preferably remains at another place or residence, a person is nominated to act as her representative while two persons act as witnesses to that representation. Thus, in the case of a marriage in the Masjid or any other venue where the 'female spouse to be' is absent, the representative of the bride who would transmit her consent to the marriage as well is to witnesses to the representation, and two other witnesses to the solemnised edition of the marriage are a minimum requirement.'" (para. 21)

"The FRS [the Family Reunification Section] did not respond to the extensive explanation of the system of 'taleq' divorce and made no suggestion that the explanations were not being accepted. Instead, it wrote on 3rd July 2009 conveying the second decision. It said that the FRS had

'decided to uphold the original decision not to grant Family Reunification in this case,' adding that: 'it is not clear from the documentation submitted if this marriage is valid under Irish law.'" (para. 24)

The learned judge pointed out that the primary reason given by the Minister for refusal of family reunification of Ms. Elkhalifa with Mr. Hamza was that it was a case of 'a marriage by proxy.' Marriage by proxy was, he said, a system 'much favoured by the monarchs and nobility of Europe.' It was also, as he pointed out 'provided for by law in a number of countries, either generally or as a facility in specific circumstances such as the inability of one partner to be present because of absence on foreign military service.'" (para. 32)

"However, the learned judge reached a very clear conclusion that the respondents to this appeal were married 'according to the formalities of the Islamic rites of the Shari'ah and under Sudanese law.' He rightly held that 'it is well settled, both as a matter of rules of conflicts of laws and of Irish law, that the manner in which consent to marry (as opposed to the fact of the consent) is given is a matter of form and the formal validity of a marriage is governed exclusively by the lex loci celebrationis." (para. 54)

Main legal texts quoted in the decision:

Relevant Irish legislative provisions:

- Family Law Act 1995, s 29
- Refugee Act 1996, s 18

Cases cited in the decision:

Relevant Irish case law:

- *Conlon v Mohammed* [1987] ILRM 172
- *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2010] IEHC 427

Relevant UK case law:

- *Apt v Apt* [1948] P 83
- *Berthiaume v Dastous* [1930] AC 79

Commentary

Family Reunification and Marital Status under the Refugee Act 1996: The Supreme Court Decides

This was an appeal against the decision of Mr. Justice Cooke in the High Court which ordered that a decision of the Minister for Justice, Equality and Law Reform ("the Minister") refusing family reunification be quashed; *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 [INSERT link to CUREDI021IE008]. The High Court judgment was appealed to the Supreme Court and was heard together with the appeal in *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8 [INSERT link to CUREDI021IE011].

In the *Hamza* case, Judge Cooke in the High Court had adopted quite a pragmatic approach in determining whether the second named respondent, Ms. Elkhalifa, could fall within the definition of "member of the family" as a spouse in family reunification proceedings pursuant to s 18 of the Refugee Act 1996. Judge Cooke had focused his judgment on the application of *lex loci celebrationis* in the recognition of foreign marriages and had noted that the marriage had adhered to

the formalities of sharia and was in accordance with Sudanese law. In short, a proxy marriage lawfully concluded in a foreign country will be recognized as valid under Irish law provided that (i) the parties had the capacity to enter into a marriage contract at the time, and (ii) recognition was not contrary to public policy.

The Supreme Court upheld the decision of the High Court and, in dismissing the appeal, held that the conclusion that the marriage was by proxy was not a valid ground for refusing recognition of the marriage, and confirmed that an incorrect test had been applied for the recognition of a subsisting marital relationship between the refugee and the spouse for the purpose of s 18(3)(a) of the Refugee Act 1996. Of particular note was that the Supreme Court confirmed that it was for the Minister to determine whether an individual was the spouse of a refugee within the context of s 18 of the Refugee Act 1996, and the Minister could not delegate this function. Therefore, a declaration confirming marital status pursuant to s 29 of the Family Law Act 1995 was not an alternative means of satisfying the requirements of the Refugee Act 1996.

The Supreme Court noted that Judge Cooke had made express reference to various legal instruments from the UNHCR and Council Directive 2003/86/EC on the right to family reunification, and that he had applied a purposive interpretation to s 18(3)(b) of the Refugee Act 1996. Thus, a refugee who can demonstrate the existence of a subsisting and real marital relationship with the person who is the subject of the application is entitled to have the marital relationship recognized for the purposes of family reunification under s 18 unless there are reasons of public policy to prevent its recognition. Regarding the broader question of proof of marriage, the Supreme Court held that this question would be decided in the case of *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8 . These two Supreme Court judgments*, Hamza* and *Hassan*, were subsequently relied upon in the case of *H.A.H v S.A.A.* [2017] IESC 40 wherein Judge O’Malley in the Supreme Court noted that the judgments were clear in stating that it is for the Minister to determine whether an applicant is married to the person he or she wishes to have admitted as a spouse within the

context of family reunification provisions pursuant to the Refugee Act 1996. (para. 16) More recently, in August 2020, both Supreme Court judgments in *Hamza* and *Hassan* were reaffirmed by the Court of Appeal in *I.H. (Afghanistan) v Minister for Justice and Equality* [2020] IECA 241.

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

General legal literature on the topic:

- Cryan, Avril. 2016. “Changing Demographics: Legal Responses to Polygamy and the Challenges Ahead for Ireland”. *Irish Journal of Family Law* 19 (4): 82-91.
- Cryan, Avril. 2018. “Polygamy and Human Rights: The Failure of International Human Rights Instruments to Acknowledge the Harms Caused by the Application of Cultural Relativism to the Issue of Polygamy”. *Irish Journal of Family Law* 21 (2): 36-41.
- Enright, Máireád. 2013. “Preferring the Stranger? Towards an Irish Approach to Muslim Divorce Practice”. *The Irish Jurist* 49 (1): 65-97.
- Götzelmann, Christina. 2016. “The Implementation and Administration of Family Reunification Rights in Ireland”. *The Irish Jurist* 55: 75-111.
- Murphy, Cliodhna. 2011. “Immigration and Family Life: Reunification in Irish Law”. *Dublin University Law Journal* 34 (2): 221-241.
- Ní Shúilleabháin, Máire. 2014. “Marriage, Divorce and Stagnation in the Irish Conflict of Laws”. *The Irish Jurist* 52 (2): 68-89.
- Walsh, Kieran. 2013. “Polygamous Marriages and Potentially Polygamous Marriages in Irish Law: A Critical Reappraisal”. *Dublin University Law Journal* 52 (2): 249-276.

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