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

Family Reunification and Religious Marriage 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 marriages for the purpose of family reunification.

Outcome of the ruling:

The Supreme Court dismissed the appeal and, whilst upholding the decision of the High Court, also made obiter dicta comments concerning the recognition of common law marriages.

Topic(s):

- Immigration and Asylum
- Personal Status, Family and Inheritance

Keywords:

- Conditions of validity
- Country of origin information
- Evidence
- Family Reunification
- Religious marriage

Tag(s):

- Recognition of foreign marriages
- Common law marriage
- Documentary evidence
- Lex loci celebrationis

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Country:

Ireland

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Hassan and Saeed v Minister for Justice, Equality and Law Reform [2013] IESC 8

Link to the decision:

https://www.courts.ie/acc/alfresco/74b8fd98-9cfd-4da0-acab-704ad36f9366/2013_IESC_8_2.pdf/pdf#view=fitH

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), *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2010] IEHC 426

Subsequent stages:

None

Branches / Areas of law:

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

Facts:

This matter originally came before the High Court by way of judicial review and was heard together with *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 as both raised similar legal issues. The factual circumstances and details of the High Court proceedings are more fully set out in *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2010] IEHC 426. 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 first named applicant, Mr. Hassan, fled Somalia and arrived in Ireland in 2003 and was subsequently granted refugee status in 2004. In 2005, Mr. Hassan made an application pursuant to s 18 of the Refugee Act 1996 to the Minister for permission for the second named applicant, his niece, and his nephew to enter and reside in the State. The present proceedings concern only the second named applicant, Ms. Saeed, who had apparently been living in Ethiopia as a refugee for a number of years. Mr. Hassan claimed that the marriage had been solemnized in Somalia in December 1998, however he was unable to furnish any documentary evidence to this effect. The religious ceremony was conducted by a *sheik* who had issued them with a certificate which they no longer had in their possession. Due to the conflict in the country, it was not possible to register the marriage as there was no civil registration system.

The Family Reunification Section ("FRS") of the Irish Naturalisation and Immigration Service refused the application on the basis that the applicant had failed to furnish sufficient documentary evidence in support of his claim. The FRS noted that as the marriage was a religious one, it was not recognized under Irish law, and it was open to the applicant to seek a declaration of validity under s 29 of the Family Law Act 1995. The applicants challenged the refusal by way of judicial review proceedings.

Mr. Justice Cooke in the High Court held that two errors of law had occurred; (i) the decision was based on a mistaken view that a foreign marriage contracted in a religious ceremony was incapable of recognition in Irish law, and (ii) an incorrect interpretation of the test for the recognition of a subsisting marital relationship for the purpose of s 18(3)(b) 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. Hassan, as a declared refugee, for his spouse to enter and reside in the State pursuant to s 18 of the Refugee Act 1996.

The Minister appealed this decision and raised a key issue concerning “common-law marriage”.

Ruling:

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

- The Minister was not entitled to refuse the application on the basis that the marriage was religious.
- The Minister failed to take sufficient account of the explanation provided in respect of the applicants’ inability to produce a marriage certificate from Somalia in the circumstances of that country at the relevant time.

Main quotations on cultural or religious diversity:

- “Mr. Hassan provided answers in relation to his marriage to Ms. Saeed. He said that she was of Somalian nationality, that her place of birth was Mogadishu, which was also her current address. One question asked whether the marriage was Legal, Religious or Traditional with the indication: ‘please tick all that apply.’ Mr. Hassan ticked only the box opposite ‘Religious.’ He answered ‘no’ to the question whether the marriage had taken place by proxy and to the question as to whether it was a polygamous marriage. However, in response to the requirement that he provide evidence in the

form of a civil or religious certificate, Mr. Hassan provided no documentary evidence. In reply to a letter from ORAC relating to family documentation generally, Mr. Hassan wrote to say that he was not in a position to provide documents on account of the on-going conflict in Somalia." (para.9)

- "ORAC in its report to the Minister on 22nd August 2006 stated: 'Mr. Hassan states that he married his wife on 5/12/98 and were married (sic) in a religious ceremony in Somalia. The refugee has not provided documentation to attest to his relationship with his wife nor to her identity or nationality. He has submitted passport type pictures of the person he states is his wife. In a written submission he states he does not possess original documents due to the ongoing difficulties in Somalia. The information in relation to his wife during his FR application is entirely consistent with that submitted during his asylum process.'" (para.9)
- "Mr. Hassan's solicitors in their letter of 3rd July 2009 took issue with the statement that 'a religious marriage does not enjoy automatic recognition under Irish law.' They pointed out that a religious marriage celebrated in the State, e.g. a Roman Catholic wedding ceremony, is entitled to legal recognition once registered. The solicitors asked to be furnished with any guidelines used by the FRS in determining whether a marriage is lawful under Irish law for the purpose of granting family reunification. It then stated: 'Regarding our client's marriage, we are instructed that this marriage was conducted by Islamic religious ceremony and subsequently registered, in accordance with Somali law. As such, this marriage is legal in Somalia.'" (para. 13)
- "These are large and complex issues of law and fact. There may be good reason for adopting a broad and flexible approach to proof, where the very difficult personal circumstances of a refugee so requires, of the fact of a marriage ceremony. But the considerations which prompt such openness to proof of marriage do not suggest, at least not necessarily, that such proof can be dispensed with entirely in favour of ehat [*sic*] the judge called 'the

reality of the conjugal relationship.’” (para. 29)

- “However, as the Minister observes in his submissions, the applicants did not seek recognition of a ‘common law marriage,’ certainly not in the colloquial sense. They did argue for an interpretation that would take account of the fact that it was difficult if not impossible for them to produce a certificate of their marriage in Somalia, a country in which all law and order and legal systems had effectively ceased to exist. At all times, they maintained that they were married at a religious ceremony conducted in Somalia on 5th December 1998. Their solicitors, on their behalf, maintained that it was ‘an Islamic religious ceremony and subsequently registered, in accordance with Somali law,’ which was ‘legal in Somalia.’” (para. 33)
- “The essential problem in the present case is one of evidence. The respondents say that they were married in an Islamic ceremony in Somalia in 1998, but that they are unable to produce any evidence of that ceremony beyond their own assertion of the fact.” (para. 35)
- “The learned High Court judge suggests that the marriage might be recognised in Irish law as a common-law marriage, in the sense in which that term has been applied at common law for a long time and which was considered by Barron J. in Conlon v Mohamed [*sic*]. In that case, the plaintiff wife, an Irish citizen, and the defendant husband, a citizen of South Africa, participated in an Islamic religious marriage in South Africa. The expert evidence was that such a marriage was not recognised as valid in South Africa on the ground that it was potentially polygamous. It is not clear whether it would have been valid in law in that jurisdiction apart from that fact and leaving aside its inter-racial character. The marriage between the parties would not have been valid in law at that time in South Africa, since the parties were of different races. The parties intended to be married in a later civil ceremony in Dublin, but that never took place. Barron J. traced the history of the notion of common-law marriage through a number of authorities and concluded, at page 179 of the report, that ‘the existence of a

valid common law marriage must be determined by the nature of the ceremony and the intention of the parties in relation to that ceremony and not as to their belief as to its effect.' Accordingly, since the parties intended to be married, the validity of the marriage would not be affected by their belief that they could not be legally married in South Africa. In the final analysis, Barron J. held that the marriage could not be recognised in Irish law since it was potentially polygamous. But for that fact, however, it is clear that the marriage would have been capable of recognition as a valid common-law marriage." (para. 36)

- "I am not convinced that the possibility of recognition of a common-law marriage is necessarily of particular assistance on the facts of the present case. Essentially, it permits recognition of a marriage lacking in usual form, where there is evidence of intention to contract a marriage. That is not really the problem here. The marriage alleged is one which is alleged to comply in all respects with Shari'ah law and the laws of Somalia. Thus, the question will remain as to the evidence of that ceremony." (para. 48)

Main legal texts quoted in the decision:

Relevant Irish legislative provisions:

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

Academic Texts:

- *Dicey, Morris & Collins on The Conflict of Laws* (14th edn, Sweet & Maxwell 2006).
- *Rayden & Jackson on Divorce and Family* Matters (16th edn, Butterworths 1991).
- *The Oxford English Dictionary* (2nd edn) vol. 9.

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
- *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2010] IEHC 426
- *Ussher v Ussher* [1912] 2 IR 445

Relevant UK case law:

- *Penhas v Tan Soo Eng* [1953] AC 304
- *Wolfenden v Wolfenden* [1946] P 61

Commentary

Family Reunification and Religious Marriage under the Refugee Act 1996: The Supreme Court Decides

This case came before the Supreme Court as 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; *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2010] IEHC 426 [INSERT link to CUREDI021IE010]. The High Court judgment was appealed to the Supreme Court and was heard together with the appeal in *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2013] IESC 9.

In the *Hassan* case, Judge Cooke in the High Court held that two errors of law had occurred; (i) the decision was based on a mistaken view that a foreign marriage contracted in a religious ceremony was incapable of recognition in Irish law, and (ii) an incorrect interpretation of the test for the recognition of a subsisting marital relationship for the purpose of s 18(3)(b) of the Refugee Act 1996 had been applied. The Supreme Court dismissed the appeal and confirmed that the two errors of law had been correctly identified by Judge Cooke. The Supreme Court also confirmed, as it had held in the case of *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2013] IESC 9, 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. Furthermore, the Minister could not delegate this function and therefore 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 the Refugee Act 1996.

Of particular interest were the comments made by the Supreme Court, albeit *obiter dicta*, concerning “common law marriages”. In the High Court, Judge Cooke had stated that “even if the formal requirements of the lex loci have not been complied with, or it is now impossible to establish what those formalities were, or whether they were, in fact, complied with, the marriage may still be capable of recognition as valid in Irish law as a common law marriage.” (para. 18, *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2010] IEHC 426).

Notwithstanding that Judge Cooke had decided the case on other grounds, the question of recognition of a “common law marriage” was brought into focus as part of the appeal to the Supreme Court. In concluding that an incorrect interpretation of the test for determining the existence of a marital relationship pursuant to s 18(3)(b) of the Refugee Act 1996 had been applied, Judge Cooke stated that “Where a refugee is in a position to prove by alternative means that, since the date of the claimed marriage ceremony, a real marital relationship based on cohabitation and exclusivity in the relationship has subsisted between the two parties in question over a substantial period, the Minister may be entitled to consider that the requirement of s. 18(3) is satisfied.” (para. 20, *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2010] IEHC 426). The Supreme Court clarified that: “This statement [by Judge Cooke] should not be understood as requiring the Minister to recognise a ‘common-law marriage’ in the modern colloquial sense of a cohabiting relationship where there has been no marriage ceremony. The learned judge did not suggest that marriage, for the purposes of the section should be held to include a relationship based on cohabitation and no more. His decision was based on the proposition of Barron J. in his judgment in Conlan v Mohammad [1987] ILRM 172 [*sic*] that ‘a marriage contracted in a foreign jurisdiction without compliance with local requirements as

regards form, may be recognized as valid as a common law marriage.'" (para. 26, *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8). The Supreme Court noted, however, that in *Conlon v Mohammad* recognition of a common law marriage was refused as the marriage was potentially polygamous.

The Supreme Court acknowledged that the principal concern of the Minister during this appeal related to the issue of recognition of a "common-law marriage". Counsel for the Minister submitted that the test to be applied under s 18 of the Refugee Act 1996 is governed by the Irish rules of conflict of laws. Counsel further submitted that the High Court Judge had erred in law in taking into account circumstances where formal proof of a marriage ceremony would be either non-existent or impossible to obtain. Nevertheless, counsel also noted that courts may accept alternative evidence of the celebration of marriage or a presumption of marriage may be applied.

The Supreme Court confirmed that the primary test to be applied was that which was correctly outlined by Judge Cooke in the related case of *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 [INSERT link to CUREDI21IR008]; a marriage contracted in a foreign country which complies with the laws of that country, the *lex loci celebrationis*, will be recognized as valid under Irish law unless it conflicts with fundamental requirements relating to validity based on either the domicile of the parties or public policy.

Counsel for the Minister noted that the applicants had not sought recognition of a "common law marriage". Rather, it was the applicants' case that they were married by way of a religious ceremony conducted in Somalia, and the issue at the centre of the case related to their inability to furnish documentary evidence of their spousal relationship as Somalia's legal and administrative systems had collapsed.

Whilst the Supreme Court found it unnecessary to rule on the precise meaning and relevance of the concept of "common law marriage" for the purpose of applications pursuant to s 18 of the Refugee Act 1996, it acknowledged that this issue could arise before the Minister. The Supreme Court outlined the history of

common law marriage and referred to the Irish case of *Ussher v Ussher* [1912] 2 IR 445 wherein Lord O'Brien stated that: "Marriages that were made without formalities [...] but by the mere consent of the parties, were at one time regarded by many as Common-Law marriages." (p. 481) The Supreme Court noted however, that these matters were now regulated by statute in Ireland and common law marriage, such as that which arose in *Ussher v Ussher*, was no longer possible.

Concerning the recognition of common law marriages contracted overseas, the Supreme Court cited *Rayden & Jackson on Divorce and Family Matters* (16th edn, 1991), wherein it stated that "Common law marriages cannot now take place in England; but they can be validly contracted in any place abroad where the English Common law prevails, and where either local law is inapplicable or cannot be complied with, or the local law does not invalidate such a marriage [...] Further, since a British subject takes abroad to a colony only so much English law as is applicable to his situation, the provision of the common law that the marriage, to be valid, must be celebrated before an episcopally ordained clergyman of either the Church of England or the Church of Rome does not apply: Solemnisation before any minister in holy orders is sufficient. Indeed, probably the only essentials are that both have the capacity to marry and that they accept one another per verba de praesenti. It is not essential that one party is British." (p. 158)

With reference to the English case of *Wolfenden v Wolfenden* [1945] 2 All ER 539, the Supreme Court concluded that it was implicit that the initial consideration had to be the extent to which the common law applied in the country that the marriage took place. Whilst a common law marriage may be recognized despite irregularities of form, there must have been a marriage ceremony coupled with the consent of the parties and intention to be married. Nevertheless, the Supreme Court observed that the applicants in this case were relying on a ceremony which had no connection with the common law and where neither of the parties alleged to have been a subject of the common law in Ireland or elsewhere. Therefore, the possibility of recognition of a common law marriage was deemed not to be of

assistance in the present case. It was noted that should a relevant case arise in the future, the recognition of a common law marriage in Ireland would be determined according to Irish statutory law and the constitutional framework.

Regarding proof of marriage within private international law, the Supreme Court referred to *Dicey, Morris & Collins on The Conflict of Laws* (14th edn, 2006), which states that alternative evidence of the celebration of marriage may be received by the courts or a presumption of marriage may be applied. Two forms of rebuttable presumptions were noted; (i) where a couple took part in a ceremony of marriage, and thereafter lived as man and wife, and (ii) where a couple cohabit with the reputation of being married in accordance with law.

The Supreme Court concluded that it was for the Minister to make an assessment based on the evidence and with the assistance of the report from the Office of the Refugee Applications Commissioner ("ORAC"), however any conclusion on credibility must also consider the reasons offered in respect of the inability to produce documentary evidence of a marriage. Thus, the Minister should consider evidence that the parties provide about their cohabitation as a married couple. Nevertheless, none of these considerations were deemed to be decisive.

The two Supreme Court judgments in *Hassan* and *Hamza* 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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