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

Family Reunification and Marital Status under the Refugee Act 1996

Question(s) at stake:

Whether a marriage lawfully concluded in a foreign country was in fact a proxy marriage, and whether such a marriage could be recognized as valid in Irish law.

Outcome of the ruling:

An order of certiorari was granted to quash the refusal of the application made by the first named applicant, as a declared refugee, for his spouse to enter and reside in the State pursuant to s 18 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

Official citation:

Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform [2010] IEHC 427

Link to the decision:

https://www.courts.ie/acc/alfresco/ef83826d-7d28-4a03-bdd3-e30291125d17/2010_IEHC_427_1.pdf/pdf#view=fitH

ECLI:

No ECLI number / ECLI number unknown

Date:

25 November 2010

Jurisdiction / Court / Chamber:

High Court

Remedy / Procedural stage:

Judicial Review

Previous stages:

None

Subsequent stages:

- Appeal to the Supreme Court (Judgment dated 20 February 2013), Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform [2013] IESC 9

Branches / Areas of law:

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

Facts:

This matter 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 first named applicant in this case, Mr. Hamza, is a citizen of Sudan. He arrived in Ireland in 1998 and applied for refugee status which was granted by the Minister for Justice, Equality and Law Reform ("the Minister") on 25 May 2006. In 2007, as part of a family reunification application, Mr. Hamza applied to the Minister to permit the second named applicant, 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. This application was made pursuant to s 18 of the Refugee Act 1996. The Office of the Refugee Applications Commissioner ("ORAC") carried out an investigation and a report was furnished setting 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 of the Refugee Act 1996. The refusal to admit Ms. Elkhalifa was the subject matter of the judicial review proceedings.

Ruling:

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

Main quotations on cultural or religious diversity:

- “13th May 2009: The FRS [Family Reunification Section of the Irish Naturalisation and Immigration Service] replied [to a letter from the solicitors for the applicants] pointing out that the new translation had not been received and then made the following points: ‘There are currently two versions of marriage certificate/marriage contract certificate on file both of which have been translated. One translation is from the Islamic Foundation of Ireland which seems to have been supplied by your client and the other is from Global Translations which was obtained by this department. It is this translation which suggests that your client’s marriage was conducted by proxy. Also, while the names of the persons married are both the same on both certificates there are several inconsistencies between the two translations. For instance, the witnesses listed are not the same on both certificates, the date of marriage is different, the person who conducted the marriage is not the same and the amount of the dowry is not the same. Perhaps you would like to have these issues clarified by your client before a review is carried out.’” (para. 10)
- “By letter of 3rd July, 2009, the FRS gave its decision on the requested review in the following terms: ‘I have decided to uphold the original decision not to grant family reunification in this case. It is not clear from the documentation submitted if this marriage is valid under Irish law. It is open to your client to seek a declaration from the Irish courts that this is in fact a valid marriage. Should such a declaration be produced by the applicant I will proceed to review the file again immediately.’” (para. 10)
- “By contrast, section 18(2) of the Act equips the Minister, with the assistance of the report from the RAC, presumably with the intention that the Commissioner should report on the relationship using the expertise and resources of the Office, to obtain and furnish such information as to local laws, customs and social conditions as may be required to assess the validity of the claim made and the authenticity of documents produced to

substantiate it; or to confirm that conditions are such in the country in question that the explanation given for the absence of formal proofs is credible or not. The relevance of these considerations is illustrated by the circumstances of the second case (*Hassan*) where the Somalian applicants have been unable to obtain any original documentary proof of their marriage due to the collapse of civil administration in that country." (para. 16)

- "In the first place, it is questionable whether the ceremony claimed to have been solemnised by the applicants in Sudan on 14th September, 1990, was, in fact, a proxy marriage in this sense. Both applicants were domiciled and resident in Sudan at the time and there is no evidence that either had ever been previously domiciled or resident elsewhere. Both were actually present at the place where the ceremony was performed. The only feature giving rise to doubt was that the second named applicant had remained away from the masjid (or mosque) in which the ceremony was performed and her consent was given by a male relative on her behalf. As already mentioned above, there are discrepancies in some of the details of the translations of the marriage certificate for that ceremony." (para. 20)
- "Notwithstanding these discrepancies, it is clear to the Court that the marriage in question took place according to the formalities of the Islamic rites of the Shari'ah and under Sudanese law. According to country of origin information submitted by DLCM [solicitors for the applicants] on the 26th May, 2009, where the marriage ceremony is performed in the masjid, the female spouse is not permitted to enter, but is represented by a male representative (usually a relative) who transmits her consent which is witnessed by the named witnesses. That the absence of the bride on the actual ceremony is an invariable formality of an Islamic marriage in Sudan is claimed to be confirmed by a brief statement from Dr. Mudafar Al Tawash dated 19th May, 2009, administrator of the Islamic Foundation of Ireland: 'This is to confirm that during marriage contract in Sudan, the bride is represented by male relations'." (para. 22)

- “This approach brings into play an area law of considerable complexity and uncertainty, due not only to the absence of a detailed judicial consideration of the conflict rules in this jurisdiction in modern times, but also to the historical, cultural, religious and legislative differences which influenced Irish law on these issues as compared with other common law jurisdictions during the 19th Century.” (para. 29)
- “In the judgment of the Court, it must be at least questionable whether the Oireachtas [the Irish legislature], in providing for family reunification of refugees in s. 18, intended that the recognition of their marital relationships should be dependent upon such arcane and uncertain rules. Clearly, it is inevitable that the circumstances which will give rise to applications under the section will frequently involve situations in which formal proof of a marriage ceremony will either be non-existent or impossible to obtain. Almost by definition, the refugee will be somebody who has been forced to flee from a country or region which is in the throes of war or civil strife and in which public or municipal administration may have broken down and records been destroyed.” (para. 29)
- “It is to be noted, first, that s. 18(3)(b)(i) of the 1996 Act, does not require that the Minister be satisfied that the refugee and spouse be parties to a marriage which is recognisable as valid in Irish law, or that any particular documentary proof of the foreign ceremony be produced. It requires, merely, that the refugee and spouse are married and that the marriage is subsisting at the date of the application. It does not define the term marriage’.” (para. 30)
- “In the judgment of this Court, the better view of the general conflict of laws issue is that a foreign marriage validly solemnised in accordance with the *lex loci* may be recognisable as valid in Irish law, even if it was potentially polygamous according to that law, provided neither party was domiciled in Ireland at the time and neither has also been married to a second spouse, either then or since.” (para. 42)

- “If, on reconsideration of the application in the light of this judgment, the Minister can be satisfied, on acceptable alternative evidence, that the second named applicant is the mother of those children, the Minister would be entitled, in the view of the Court, to grant the application in respect of the second named applicant, provided he is also satisfied that the marriage has been and remains *de facto* a monogamous marriage and that the first named applicant has now acquired a domicile of choice in the State.” (para. 45)

Main legal texts quoted in the decision:

Relevant Irish legislative provisions:

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

Relevant EU legislative provisions:

- Council Directive 2003/86/EC of 22 September, 2003 on the right to family reunification (OJ L 251/12 of 3 October, 2003), Recital 4, Article 4.1, Article 4.3, Article 5.2, Article 16.1.

Relevant US legislative provisions:

- Restatement (Second) of Conflict of Laws § 283(1)

Relevant international instruments:

- Conclusions of the UNHCR Executive Committee on Family Reunification of 21 October 1981
- UNHCR Guidelines on Reunification of Refugee Families (1983)
- UNHCR Resettlement Handbook (2004)

Cases cited in the decision:

Relevant Irish case law:

- *Conlon v Mohammed* [1987] ILRM 172

Relevant UK case law:

- *Apt v Apt* [1948] P 83
- *Berthiaume v Dastous* [1930] AC 79
- *Hyde v Hyde and Woodmansee* [1866] LR 1 P & D 130
- *Sottomayor v De Barros (No. 1)* [1877] LR 3 PD 1

Commentary

Family Reunification and Marital Status under the Refugee Act 1996

This case was heard together with *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2010] IEHC 426 as both cases raised similar legal issues concerning fundamental aspects of family reunification under the Refugee Act 1996. Nevertheless, the circumstances of the two cases differed significantly; the *Hassan* case focused on whether a religious marriage lawfully concluded in a foreign country could be recognized as valid in Irish law, whereas the question at the centre of the *Hamza* case was whether the marriage was a proxy marriage, and consequently whether the second named applicant, Ms. Elkhalifa, fell within the definition of “member of the family” as a spouse in family reunification proceedings pursuant to s 18 of the Refugee Act 1996.

The fundamental legal question in *Hamza* concerned the application of the rules of conflict of laws within the Irish legal system. Mr. Justice Cooke noted that formal validity of a marriage is governed by the law of the jurisdiction where the marriage is solemnized, the *lex loci celebrationis*. The Judge observed that the marriage in this case had adhered to the formalities of sharia and was in accordance with Sudanese law. The Judge placed reliance upon the country of origin information submitted by the solicitors for the applicants which stated that a female spouse is not permitted to enter the mosque during a marriage ceremony, rather a male representative conveys the consent of the female spouse before two named witnesses. Reliance was also placed upon the confirmation by the Islamic Foundation of Ireland that this practice was in

accordance with sharia and Sudanese law. Judge Cooke noted, however, that it was not necessary to make a definitive finding as to whether this particular marriage was by proxy. Under Irish law, a proxy marriage lawfully concluded in a foreign state will be recognized as valid provided (i) the parties had the capacity to enter into a marriage contract at the time, and (ii) recognition is not contrary to public policy. Judge Cooke concluded that, in accordance with both the rules of conflict of laws and Irish law, the formal validity of a marriage is governed by the *lex loci celebrationis*. Whilst the potentially polygamous character of an Islamic marriage did not arise in this case, it should be noted that this issue nevertheless arose in the subsequent Supreme Court case of *H.A.H. v S.A.A.* [2017] IESC 40.

The Court concluded that it would not be "competent or appropriate" for the Minister for Justice, Equality and Law Reform ("the Minister") to require a declaration as to marital status, pursuant to s 29 of the Family Law Act 1995, as a condition for exercising his decision-making powers concerning an application for family reunification pursuant to s 18 of the Refugee Act 1996. Judge Cooke noted that the Minister had sole authority to grant or refuse permission on the basis of the report furnished by the Office of the Refugee Applications Commissioner ("ORAC"); thus, the Minister cannot delegate this decision-making function as to whether the person comes within the definition of "member of the family". The Judge acknowledged the onerous requirements placed upon refugees by the rules of conflict of laws in terms of requiring formal proof of a marriage ceremony noting that: "Almost by definition, the refugee will be somebody who has been forced to flee from a country or region which is in the throes of war or civil strife and in which public or municipal administration may have broken down and records been destroyed". (para. 29).

There was express reference to various legal instruments of the UNHCR which encourage each Contracting State Party to recognize and respect the "essential right" of refugee family reunification. Whilst Ireland has opted out of Council Directive 2003/86/EC on the right to family reunification, the Court referred to the rationale of family reunification within that Directive. Despite the acknowledgment of the non-binding nature of these legal instruments, Judge

Cooke deemed that it was desirable nonetheless that as far as statutory interpretation permits, s 18 of the Refugee Act 1996 should be construed and applied in a manner which is consistent with these policies. With reference to s 18 of the Refugee Act 1996, Judge Cooke noted that where a refugee is able to demonstrate the existence of a subsisting marital relationship with the person in respect of whom the application has been made, there should be recognition of that marriage for the purposes of family reunification unless it would be contrary to public policy. Judge Cooke emphasized that, even in the absence of documentary evidence, certain factors should be given "due weight" such as the demonstration of the existence of a subsisting relationship over many years, the consummation of the marriage, and where there are children of the relationship for whom the refugee is a parent.

Crucially, the Court held that s 18(3)(b)(i) of the Refugee Act 1996 does not require the Minister to be satisfied that the refugee and spouse are parties to a marriage that is recognizable as valid in Irish law. Furthermore, it is not required that any particular documentary proof of the foreign ceremony be produced. Rather, the Act requires that the refugee and spouse are married, and that the marriage is subsisting at the date of the application. It was also noted that "marriage" is not defined within the Refugee Act 1996. The pragmatic approach adopted by the Judge to the factual circumstances of this case is striking. This judgment was appealed to the Supreme Court, *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2013] IESC 9 , and was heard together with the appeal in *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8.

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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Suggested citation of this case-law comment:

Flynn, Michelle (2026): Family Reunification and Marital Status under the Refugee Act 1996, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI021IE008, https://www.doi.org/10.48509/CUREDI021IE008.