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

The Validity of Polygamous Marriages in Ireland

Question(s) at stake:

Whether Irish law requires or prohibits the recognition of polygamous marriages which are permissible according to the law of the third state in which such a marriage took place?

Outcome of the ruling:

This involves the application of the rules relating to the conflict of laws and, in particular, the nature of Irish public policy in relation to foreign polygamous marriages.

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

- Conflict of laws
- Marriage and partnership
- Recognition
- Polygamous marriage

Tag(s):

- Public policy
- Lex loci celebrationis

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Country:

Ireland

Official citation:

H.A.H v S.A.A. & Ors [2017] IESC 40

Link to the decision:

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ECLI:

No ECLI number / ECLI number unknown

Date:

15 June 2017

Jurisdiction / Court / Chamber:

Supreme Court

Remedy / Procedural stage:

Appeal

Previous stages:

- High Court (Judgment dated 4 November 2010)

Subsequent stages:

None

Branches / Areas of law:

Private international law, family law, constitutional law

Facts:

The appellant husband, originally from Lebanon, is a recognised refugee and naturalised Irish citizen. When domiciled in Lebanon he entered into two marriages, the first in 1975 and the second in 1988. The relationships subsisted and there are children of both marriages. All the parties are Lebanese Muslims

and both marriage ceremonies were valid under Lebanese law in respect of formalities and the capacity of the parties. Furthermore, under Lebanese law and Shariah, it is permissible for a Lebanese Muslim man to marry up to four women.

In 1998, the husband arrived in Ireland as an asylum seeker and was recognised as a refugee in 2000. Under the Refugee Act 1996, he applied to the Minister for Justice, Equality and Law Reform (hereinafter referred to as “the Minister”) to be joined by members of his family including his ‘spouse’. The application was in respect of his second wife, S.A.H. (who is the second notice party in these proceedings). The second wife was admitted to the State in 2001, with a number of minor children, on the basis that she is the wife of the husband. The second wife is now an Irish citizen.

The husband was granted Irish citizenship in 2002 and he thereafter made an application to have his first wife, S.A.A., admitted to the State. The Minister refused to admit the first wife into the State under the terms of the Refugee Act 1996. In an attempt to quash that refusal, the husband instituted judicial review proceedings. In 2006, prior to the proceedings, the first wife arrived in Ireland as an asylum seeker however she was unsuccessful in her asylum application. Nevertheless, she was subsequently granted permission to remain.

There are children of each marriage resident in the State. Some of these children are recognised refugees while others were admitted on the basis of family reunification.

The Refugee Act 1996 provides that a refugee has an entitlement to be joined by members of his or her family. Section 18 of the Refugee Act 1996 requires that the marriage be subsisting at the date of the application. At the time, any investigation concerning relationships was carried out by the Office of the Refugee Appeals Commissioner (ORAC). Thereafter, ORAC would submit a report to the Minister upon which a decision was made whether to grant permission to enter the State to the person in respect of whom the application had been made. In circumstances where the person was not regarded as a ‘spouse’ under Irish law, a practice had emerged to refer an applicant who was applying for family

reunification to seek a declaration under the Family Law Act 1995. Section 29 of the Family Law Act 1995 enables either spouse or any other person with a sufficient interest in the matter to make an application to the court seeking one or more declarations concerning marital status. The range of declarations include (1) that the marriage was at its inception a valid marriage; (2) that the marriage subsisted on a specified date; (3) that the marriage did not subsist on a specified date; (4) that a divorce, annulment or separation obtained abroad is entitled to recognition in the State; (5) and/or that such divorce, annulment or separation is not entitled to recognition. One or both spouses must be domiciled in the State or ordinarily resident for at least one year as of the date of application. The declaration is binding on the parties if granted. Additionally, where the Attorney General is added as a notice party to such proceedings the declaration is binding also on the State.

It should be noted that in the cases of *Hamza v. Minister for Justice* [2013] IESC 9 and *Hassan v. Minister for Justice* [2013] IESC 8, the Supreme Court deemed this practice by the Minister to refer such questions as inappropriate. In those cases, it was stated that it was the function of the Minister to decide such marital status questions under the family reunification provisions provided for by the Refugee Act 1996 and not to propose that such an applicant should instead seek a declaration under s.29 of the Family Law Act 1995. In the course of the litigation in the present case, this was accepted by all parties.

Nevertheless, in 2005, a compromise was agreed between the parties which resulted in a declaration being sought in the High Court pursuant to s.29 of the Family Law Act 1995. The declaration sought to confirm that the husband's marriage to the first wife was valid on the date of its inception on 3 January 1975. Within the context of these proceedings, it should be noted that the second wife supported the claim of the first wife, while also maintaining her own claim that she is validly married.

The application under s.29 of the Family Law Act 1995 to confirm the validity of the first marriage was refused in the High Court by Judge Dunne (*H.A.H. v. S.A.A.* [2010] IEHC 497). Judge Dunne held that to interpret the word 'marriage' as

including polygamous marriage was not compatible with the Irish constitutional understanding of marriage. In considering the nature of Irish public policy, Judge Dunne opined that the jurisprudence of the English courts was strongly influenced by the requirements of the commonwealth and was thus not of significant relevance in the Irish context. Rather, Judge Dunne noted that public policy in this jurisdiction was informed by the Constitution and legislation in addition to Irish culture and tradition, whilst simultaneously acknowledging that Ireland had become an increasingly multicultural and pluralistic society. Nevertheless, Judge Dunne concluded that the changes to the institution of marriage brought about by the introduction of divorce had not affected the basic meaning and constitutional understanding of 'marriage' and was therefore incompatible with polygamous marriage.

The matter was thus appealed to the Supreme Court to determine whether Irish law either requires or prohibits the recognition of one or both of the appellant's two marriages.

Ruling:

Under the rules of private international law, the State is required to recognise a marriage validly contracted under a foreign system of law unless such recognition is prohibited by the public policy of this State.

The Supreme Court held that a marriage that is potentially polygamous is capable of being recognised as legally valid in Ireland for the following reasons:

- The fact of a couple getting married under a system of law that permits polygamy does not in and of itself give rise to harm or a threat to public policy in circumstances where the couple was living in a monogamous relationship in Ireland.

- Furthermore, a refusal to recognise the validity of potentially polygamous marriages that are *de facto* monogamous would be likely to cause distress and confusion amongst a significant number of people living in the State.

- In the area of immigration, to refuse a spouse admission to the State because the marriage was potentially polygamous would damage the policy of family reunification with its aim of integration into the State.

- The recognition afforded to a potentially polygamous marriage should not be withdrawn if the husband contracts a further marriage, as the withdrawal of recognition would interfere unnecessarily with the rights of at least some of the individuals concerned. It would also go further than necessary for the protection of the institution of marriage. Therefore, it is not required by public policy.

The Court granted a declaration, as sought, that the marriage between the husband and the first wife was valid as of the date of its inception.

Regarding the status of the second marriage, the Court held that recognition of an actually polygamous marriage would be contrary to a fundamental constitutional principle and therefore contrary to public policy. The Court based that decision on the following:

- The model of marriage provided for in the Constitution is as a union between two people.

- To legally recognise polygamous marriage would be to give legal effect to discrimination and subordination in a relationship where the principle of equality is a constitutionally protected right per Article 41 in conjunction with Article 40.1

- It would also introduce a new discrimination against same-sex couples who would never have the legal capacity to enter into polygamous marriages as the structure is based on heterosexual relationships.

- Recognition of such marriages would also fail to uphold the principles of various international instruments providing for gender equality.

However, this did not necessarily mean that such a marriage could never have legal consequences. Judge O’Malley in the Supreme Court noted that this has been done in many instances in the courts of the UK and in the US where the parties to an actually polygamous marriage may be denied the right to cohabit in a State without prejudice to the possibility of recognition of the legitimacy of the

children and the economic interests of the spouses.

Concurring opinion of Judge Clarke:

Two issues were raised by Judge Clarke concerning:

(i) The role of public policy as an exception to the application of what might otherwise be regarded as the ordinary rules of recognition contained in private international law.

(ii) The need for legislation to address recognition of a foreign marriage for certain purposes. For example, in instances where a valid marriage occurs, in accordance with the laws of another jurisdiction, which might legitimately affect some rights and obligations of parties in Ireland even though Irish law would not afford recognition to the marriage in question.

Re (i), concerning the role of public policy, Judge Clarke noted that whilst equality is a fundamental aspect of marriage in Ireland, some distinctions arose between the rights and obligations of males and females in the marital context in other jurisdictions. As such, the fact that the laws of another jurisdiction may not fully reflect the concept of marriage in Ireland would not solely justify non-recognition. Rather, the public policy exclusion arises only where recognition would result in a fundamental variance to Irish legal norms.

Re (ii), concerning the need for legislation to address recognition of a foreign marriage for certain purposes, Judge Clarke emphasised the need for legislation to enable a court to have discretion in dealing with such cases. The purpose of such legislation would be to ensure that such matters were dealt with in a fair and considerate manner. Legislation should address the uncertainty concerning the various rights and obligations.

Main quotations on cultural or religious diversity:

- ‘It must also be acknowledged from the outset that almost any decision in this difficult area, touching as it does upon fundamental aspects of people’s lives, is likely to reach a conclusion that is capable of causing distress and

indeed unfairness to some private individuals and their families. That is a result of the fact that legal systems around the world differ greatly in the manner in which they regulate, or attempt to regulate, human relationships.' (para. 4)

- 'There is not at present a universal consensus on the nature of marital relationships or how they should be regulated, and any national legal system that is called upon to make a judgment as to what marital arrangement it will or will not accept must determine the matter in accordance with its own rules. Those rules, in this jurisdiction, are currently found in the body of common law principles known as private international law or conflicts of laws.' (para. 4)
- 'It may be noted that some commentators have criticised the deployment of public policy in this area. For example, in an article entitled "Rationality and cultural pluralism in the non-recognition of foreign marriages" (2000) 49(3) I.C.L.Q. 643, Murphy suggests, firstly, that there is "a capacity for the mask of 'public policy' to be seen as judicial cultural imperialism rather than as adherence to some widely accepted social value or norm." Secondly, he suggests that the term conceals a series of particular concerns, only some of which are relevant to the adjudicative process. He argues that the denial of recognition to a bigamous marriage "disguises the fact that it is the preservation of the institution of monogamy within the country of recognition that is at stake.' (para. 54)
- 'In my view *Hyde v. Hyde* [1866] can no longer be considered as defining marriage for the purposes of Irish law. That judgment, delivered 160 years ago, was based on a principle (the identification of legal marriage with Christian marriage) and on policy considerations (the difficulty of applying the then matrimonial law remedies to a potentially polygamous marriage) which cannot be said to fit into the current constitutional or legislative landscape. The term "Christendom" is itself rather old-fashioned, but whether or not it would be appropriate to describe Ireland as a Christian

State is not the issue – the question before us is a matter of law. The assumptions that underlie the decision in *Hyde v. Hyde*, and the constituent elements of its definition of marriage, have been cut away to the extent that it serves no useful purpose.' (para. 97)

- 'For the same reason, it seems to me that some of the more recent authorities from the 1980s and 1990s have been overtaken by the amendments to the Constitution. The combination of the introduction of no-fault divorce and, in particular, the amendment of the Constitution providing for the introduction of same-sex marriage have resulted in a legal institution of marriage that cannot be described in terms of traditional Christian doctrine.' (para. 98)
- 'This does not mean that the concept of marriage no longer has a legal meaning, or that the legal meaning is a concept flexible enough to accommodate any variation no matter how different to the traditional model. Despite the factual reality that many couples do not choose to marry, marriage remains a central feature of Irish life for the majority. The constitutional pledge to guard the institution of marriage with special care remains in place and must be accorded full respect.' (para. 99)
- 'In my view the defining characteristic of marriage as envisaged by the Constitution in this era is that it entails the voluntary entry into mutual personal and legal commitments on the basis of an equal partnership between two persons, both of whom possess capacity to enter into such commitments, in accordance with the requirements laid down by law. (This is not a case in which questions of voluntariness and capacity, which might in the case of some foreign marriages raise issues of approbation or retrospective consent, need consideration)….' (para. 101)
- '…According to the last census figures there are over 60,000 Muslims living in the State. It can be presumed that a significant proportion of this population is made up of married couples, and that many of the marriages

took place under a law that permits polygamy. There are likely to be other persons here who may have contracted marriages under a customary or personal law that permits polygamy, but who live monogamously. However, going by the responses to the Court's questions from the State authorities, it does not appear that there are many instances of actually polygamous households in this State. In those circumstances, it seems to me that a refusal to recognise the validity of potentially polygamous marriages that are de facto monogamous would be likely to cause distress, disruption and confusion amongst a significant number of people living in the Irish community. I cannot see that there is a corresponding gain in terms of the protection of marriage.' (para. 106)

- '…Importantly, in the area of immigration, to refuse admission to a spouse simply because the marriage was potentially polygamous would damage the policy of family reunification with the aim of successful integration into the State.' (para. 107)
- 'In the area of immigration, which is where this litigation has its roots, it may well be desirable to have some regard to the reality of familial bonds. I note that it is the policy of the Department of Justice, when considering an application for family reunification in respect of the children of a refugee, to disregard the marital status of a child's parents. That is in my view entirely correct. I would simply add that there is probably scope, having regard to the powers of the Minister, for a discretionary approach to the question whether the mother of a child should be admitted even where she is not recognised as a wife of the applicant. However, I stress again that these are policy matters which are, primarily, for the Oireachtas [the legislature of Ireland] to consider.' (para. 118)

Concurring opinion of Mr. Justice Clarke:

'O'Malley J. has quite rightly emphasised that it is a fundamental aspect of marriage in the Irish legal order that it is a coming together of equals. But the

laws of many jurisdictions contain some distinctions between the rights and obligations of males and females in the marital context. The fact that the laws of another jurisdiction may not precisely define those rights and obligations in the same way as in Ireland would not, in and of itself, mean that such a marriage would be at such fundamental variance from marriage as it is considered in Ireland to justify non recognition.' (para. 2.13)

- '…It is only where recognition would require that a marriage be held to exist in Ireland which was at fundamental variance to Irish legal norms that the public policy exclusion is likely to come into play.' (para. 2.14)
- 'In the absence of legislation the courts will have to do the best they can and decide, on a case by case basis, whether any rights in any particular category can be recognised in the case of persons who are regarded as married in the eyes of a relevant foreign jurisdiction but whose marriage is not recognised in Ireland. Similar questions have arisen in other jurisdictions not least the United Kingdom, France, and Germany. Each of those jurisdictions has, of course, a significant Muslim population and the practical questions which arise, as to the rights of persons in marriages which are polygamous but lawful in the country in which the marriage was contracted, have obviously had to be dealt with by the courts as best they can. Doubtless the Irish courts will play a similar role if and when such questions arise but I do not think it can be too strongly emphasised that the role of the courts will be all the more difficult and the results almost certainly less satisfactory, in the absence of legislation.' (para. 3.5)

Main legal texts quoted in the decision:

Constitution of Ireland 1937:

- Article 40.1
- Article 41

Irish Legislative Provisions:

- Family Law Act 1995
- Refugee Act 1996

International Law:

- EU Directive on Family Reunification (2003/86/EC).
- The European Convention on Human Rights and Fundamental Freedoms, Article 8 and Article 5 of Protocol 7
- The International Covenant on Civil and Political Rights, Article 3 and Article 23.4
- The United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Article 5, Article 15 and Article 16

Relevant comparative law:

- United States of America: Second Restatement of Conflict of Laws, 1971 s.284

Cases cited in the decision:

Relevant Irish Case Law:

- *Conlon v. Mohamed* [1989] ILRM 523.
- *Hamza v. Minister for Justice* [2010] IEHC 427.
- *Hamza v. Minister for Justice* [2013] IESC 9.
- *Hassan v. Minister for Justice* [2010] IEHC 426.
- *Hassan v. Minister for Justice* [2013] IESC 8.
- *Zappone v. The Revenue Commissioners & Ors.* [2006] IEHC 404.

Relevant UK Case Law:

- *Hyde v. Hyde* [1866] LR 1 P. & D. 130.

European Commission of Human Rights:

- *R.B. v. United Kingdom (App. No. 19628/92)* (Unreported, European Commission of Human Rights, 29 June 1992).

Commentary

The Validity of Polygamous Marriages in Ireland

This is a landmark decision concerning the issue of recognition of foreign polygamous marriages in Ireland. Indeed, the genesis of this particular case reveals the seismic change in attitudes concerning religion and culture in Ireland in recent years. In 2010, Judge Dunne in the High Court held that polygamous marriage was not compatible with the Irish constitutional understanding of marriage. Reliance was placed upon the decision in *Zappone and Gilligan v. The Revenue Commissioners & Ors.* [2006] IEHC 404 where marriage, in accordance with the Constitution, was confined to persons of the opposite sex. Precedent case law was noted including *T.F. v. Ireland* [1995] 1 I.R. 321 which adopted the definition of marriage under the Constitution given by Judge Costello in *Murray v. Ireland* [1985] I.R. 532 at p. 535 and stated that:-

"…the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special lifelong relationship."

In 2010, when this case was before the High Court, Judge Dunne noted that Ireland had become an increasingly multicultural and pluralistic society and considered that public policy in this jurisdiction was informed by the Constitution and legislation, in addition to Irish culture and tradition.

By the time the appeal was decided by the Supreme Court in 2017, same-sex marriage had been passed by referendum in Ireland. Some of the public policy issues had changed considerably in the seven years between the High Court decision and the appeal to the Supreme Court. Indeed, the Supreme Court concluded that the combination of the introduction of no-fault divorce in 1996 and the introduction of same-sex marriage in 2015 had resulted in a legal institution

of ‘marriage’ that could no longer be described in terms of traditional Christian doctrine. Nevertheless, marriage under the Constitution was a union between two people and thus prohibited polygamy.

Judge O’Malley in the Supreme Court set out a comprehensive overview of the common law authorities on the recognition of polygamous marriages stretching back as far as the case of *Hyde v. Hyde* [1866] LR 1 P. & D. 130 and the Matrimonial Proceedings (Polygamous Marriages) Act 1972 enacted in the UK. It was noted that English courts have recognised a marriage that was initially potentially polygamous but was ‘converted’ into a monogamous marriage by some external event, such as the introduction of legislation prohibiting polygamous marriages subsequent to the marriage taking place.

The relevant authorities on polygamous marriage were considered, including Irish legal authorities, public policy issues, European Union law, the European Convention on Human Rights, and international legal instruments. Judge O’Malley noted that there were no directly relevant Irish authorities. The case of *Conlon v. Mohamed* [1989] ILRM 523 concerned the issue of whether there had been a valid ‘common law’ marriage, and both the High Court and the Supreme Court in that case found it unnecessary to address any submission relating to polygamy. Nevertheless, *Conlon v. Mohamed* was cited in the judgments of the Supreme Court in the relatively recent cases of *Hamza v. Minister for Justice, Equality and Law Reform* [2010] IEHC 427, [2013] IESC 9 and *Hassan v. Minister for Justice, Equality and Law Reform* [2010] IEHC 426, [2013] IESC 8 404. The issue of polygamy was not the central issue in either case; *Hassan* concerned the validity of a religious marriage and *Hamza* concerned a marriage by proxy. Nevertheless, the Supreme Court in those cases regarded the basis for the decision in *Conlon v. Mohamed* as confirming that Irish law would not recognise a marriage which was polygamous.

In determining public policy, Judge O’Malley noted that bigamy was an indictable offence in Ireland under the Offences Against the Person Act 1861. Recently enacted legislation was, however, noted as being an indicator of policy which was highly relevant.

Specific legislative provisions were noted including s.2(2) of the Civil Registration Act 2004 which provides that an impediment to marriage arises if one or both of the parties is already married. Within the area of family law, certain reliefs such as barring orders (under the Domestic Violence Act 1996) or lump sum maintenance payments under the Family Law (Maintenance of Spouses and Children) Act 1995 are more accessible to spouses than to non-married persons.

Interestingly, the Supreme Court raised questions to the Attorney General concerning the attitude of State authorities in various contexts to issues arising from polygamous marriages. Concerning the status of spouses in actual or potentially polygamous marriages for the purposes of family reunification, the practice of the Minister for Justice, Equality and Law Reform had been to admit the spouse in respect of whom the first application in point of time was made. The refugee was entitled to choose which wife he wanted to join him and, thereafter, the marriage was treated as monogamous. However, this policy had changed and the current practice, at the time of the hearing of this case, was to recognise neither spouse. Admission could also be refused to a spouse from a marriage that was actually polygamous at any time in the past, even if it was now monogamous in practice such as in the instance of divorce.

It was also noted that the Department of Social Protection operates on the assumption that couples are validly married unless there is reason to believe otherwise. It does not concern itself with the marital status of a child’s parents, or whether a father has legal guardianship rights. Rather, the Department of Social Protection makes payments in respect of a dependent child to the parent with whom the child resides.

Whilst it was noted that Ireland has not adopted the EU Directive on Family Reunification (2003/86/EC), the Court nonetheless referred to certain provisions of that Directive. Reliance was placed upon the European Convention on Human Rights and Article 8, in addition to Article 5 of Protocol 7, were considered. Furthermore, reference was also made to the case of *R.B. v. United Kingdom* (Application No. 19628/92). Article 3 and Article 23.4 of the International Covenant on Civil and Political Rights and Articles 5, 15 and 16 of the United

Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) were also considered.

Judge Clark, in his concurring opinion, stressed the urgent need for legislation to enable a court to have discretion in cases of this nature to ensure that the courts were equipped to deal with such matters in a fair and considerate way in addition to bringing certainty as to the various rights and obligations.

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

- Cryan, Avril, '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' [2018] 21(2) I.J.F.L. 36.
- Cryan, Avril, 'Changing Demographics: Legal Responses to Polygamy and the Challenges Ahead for Ireland' [2016] 19(4) I.J.F.L. 82.
- Götzelmann, Christina, 'The Implementation and Administration of Family Reunification Rights in Ireland' (2016) 55 The Irish Jurist 75.
- Ní Shúilleabháin, Máire, 'Marriage, Divorce and Stagnation in the Irish Conflict of Laws' (2014) 52 (2) The Irish Jurist 68.
- Walsh, Kieran, 'Polygamous Marriages and Potentially Polygamous Marriages in Irish Law: A Critical Reappraisal' (2013) 36(1) D.U.L.J. 249

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