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

Family Reunification and Religious Marriage under the Refugee Act 1996

Question(s) at stake:

Whether a religious marriage lawfully concluded in a foreign country 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
- Evidence
- Family Reunification
- Religious marriage

Tag(s):

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

Author(s):

- Flynn, Michelle (Max Planck Institute for Social Anthropology, Department Law and Anthropology, Germany)

Country:

Ireland

Official citation:

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

Link to the decision:

https://www.courts.ie/acc/alfresco/6ac28b8d-f1ae-4974-8d09-8b719bac217c/2010_IEHC_426_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), *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8

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 *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 as both raised similar legal issues.

Both applicants in the *Hassan* case were Somalian citizens. The first named applicant, Mr. Hassan, fled Somalia and arrived in Ireland in 2003 and was subsequently granted refugee status in 2004. The second named applicant, Ms. Saeed, who had apparently been living in Ethiopia as a refugee for a number of years, was the subject of the application for family reunification as the "spouse" of Mr. Hassan. In 2005, Mr. Hassan made an application to the Minister for Justice, Equality and Law Reform ("the Minister"), pursuant to s 18 of the Refugee Act 1996, for permission for the second named applicant, his niece and his nephew, to enter and reside in the State. The proceedings concern only the second named applicant.

Mr. Hassan claimed that the marriage had been solemnized in Mogadishu, Somalia, in December 1998, however he was unable to furnish any documentary evidence. 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, but 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.

The application for judicial review claimed that:

“(a) in the circumstances of their case, they were entitled to a presumption that their marriage in Somalia was valid;

(b) that, even if their marriage was, in some way, procedurally defective, they are a de facto couple and that s 18 of the Refugee Act 1996 should be interpreted in the light of Article 8 of the European Convention on Human Rights such that a de facto spouse should be interpreted as being a spouse regardless of compliance with procedural requirements”. (para. 18 of *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8).

Ruling:

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.

Main quotations on cultural or religious diversity:

- “The country of origin information submitted on behalf of the applicants to the Minister demonstrates in detail a fact which is apparent to the general public from frequent news broadcasts, namely, that for more than a decade Somalia has been a failed State in which central and local government and administration have collapsed and where there is no functioning judicial system.” (para. 2)
- “The ceremony was a religious one performed by a sheik who had issued them with a certificate which they no longer possessed because it was left behind when they left Somalia. The marriage could not be registered because of the absence of any civil registration system due to the conflict in the country. That this explanation was credible and well founded in the circumstances prevailing in Somalia since 1991, was subsequently confirmed

by the country of origin information submitted by the applicants' solicitors by letter of 6th October, 2009, towards the end of an extensive exchange of correspondence with the Family Reunification section ("FRS",) of the INIS [Irish Naturalisation and Immigration Service] in relation to the original refusal of the application and its subsequent reconfirmation." (para. 3)

- "This documentation confirms that, prior to the collapse of the Somalia state in 1991, there had existed a centrally administered system for the appointment and registration of persons authorised to perform marriages under the aegis of the Ministry of Justice and Religious Affairs. This system was discontinued in 1991, but local Sharia courts 'have, to a certain extent, retained some form of oversight and control over those authorised to perform marriages. Marriage certificates have also been issued by Sharia courts in Mogadishu and other towns after 1991'. It also points out, however, 'no national or local registers containing information on marriages certified by these courts exist, and the Sharia courts have only invariably kept possession of copies of the issued certificates, hence, it is very difficult or impossible to verify such certificates. Civil marriages have never been performed in Somalia'." (para. 3)
- "The report furnished by the ORAC dated 22nd August, 2006, confined its comments in relation to the second named applicant to these: 'Mr. Hassan states that he married his wife on 5/12/98 and were married 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 ongoing difficulties in Somalia. The information in relation to his wife during this F.R. application is entirely consistent with that submitted during his asylum process.'" (para. 5)
- "It might appear somewhat surprising that the report limits itself in this way. The purpose of the Oireachtas [the Irish legislature], in requiring such

applications to be referred first to the ORAC, is, presumably, because that office has the experience and expertise, together with resources such as the access to country of origin information, necessary to assess conditions in the regions from which refugees come, in order to assess the accuracy of facts relied upon and the credibility of explanations or claims that are made. It is, therefore, surprising and, in the view of the Court, regrettable, that the Office did not feel it necessary or appropriate to undertake any further enquiry or research into the circumstances of this application. It would, presumably, have been at least as easy for the Office to have verified the two points made in the above information quoted at paragraph 3, namely, that all marriages in Somalia are solemnised by a religious ceremony and that the applicants' claim that documentary proof of the particular marriage was unobtainable had a basis in the conditions prevailing in that country." (para. 6)

- "DLCM [the applicants' solicitors, Daly Lynch Crowe and Morris] again took issue with the rejection and particularly with the proposition that the marriage could not be recognised as valid because it was a religious one. The F.R.S. responded by letter of 31st July, 2009, explaining:
- 'In his family reunification application, he (the first named applicant) stated that his marriage was religious. Therefore, it is unclear whether the marriage is valid in this jurisdiction. The marriage may be recognised as valid in Ireland if, under the law of the State in which it took place, the formal requirements for a valid marriage have been complied with.'" (para. 10)
- "Finally, in a letter of 6th October, 2009, DLCM sought to persuade the Minister otherwise, and to challenge the requirement for the declaration under section 29. They said, *inter alia*: 'Regarding ORAC's investigation into our client's marriage, in particular, we note that in its questionnaire, various questions relating to the nature of his marriage were put to our client. Mr. Hassan indicated therein that he married his wife in a religious ceremony in Somalia on 5th December, 1996 (sic). He confirmed that it was not a

polygamous marriage, nor did it take place by proxy. In its report into its investigation dated 22nd October, 2006, the ORAC raised no issue with the legality of its marriage or its validity under Irish law.'" (para. 12)

- "As the present case indicates, due to the collapse of civil administration in Somalia, a refugee will frequently be in a position where it is difficult to prove the particular rules of formality in the lex loci (because the legal system does not exist) or to produce any documentary evidence that the formalities were complied with as regards the presence of witnesses and so forth (because the administrative system has collapsed)." (para. 15)
- "It follows that the bare statement contained in the letter of 4th June, 2009, to the effect that the marriage in Somalia was not recognised under Irish law because it was a religious one is mistaken. The modification of that view in the letter of 31st July, 2009, may be more understandable but is, nevertheless, incomplete. There, it is merely stated that it was 'unclear whether the marriage is valid in this jurisdiction' with the explanation that it might be recognisable as valid if 'under the law of the State in which it took place, the formal requirements for a valid marriage have been complied with'. The statement is incomplete in 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)
- "However, for the reasons explained in greater detail in the judgment in the *Hamza* case, the Court also considers that a different approach should be adopted to the concept of a 'subsisting marriage' in the cases of applications by refugees under section 18. 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. Whether the necessary corroboration might be forthcoming in the circumstances of the present case remains to be seen and it would be inappropriate for the Court to comment." (para. 20)

- "For the avoidance of doubt, however, the Court would observe that the refusal to accept the documentary material purporting to originate from the Somali Embassy in Ethiopia on various dates in 2008 and 2009, would appear to be well founded, having regard to the country of origin information as to the absence of any sources of official information within Somalia at material times and the lack of explanation as to the basis upon which such documentation was issued by the Embassy in question. This does not however preclude the applicants seeking to establish the reality of a subsisting marital relationship by other means." (para. 20)

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

Commentary

Family Reunification and Religious Marriage under the Refugee Act 1996

This case was heard together with *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2010] IEHC 427. Both cases concerned fundamental aspects of family reunification under the Refugee Act 1996. The circumstances of the two cases differed significantly; the question at the centre of the *Hamza* case broadly concerned proxy marriages, whereas the *Hassan* case focused on whether a religious marriage lawfully concluded in a foreign country could be

recognized as valid in Irish law.

There are three particularly interesting aspects in the *Hassan* judgment. The first is the clarification that it provides in respect of religious marriages concluded in a foreign country for the purposes of family reunification pursuant to the Refugee Act 1996. The second relates to the reiteration, following the case of *Hamza*, that there had been 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. The third aspect concerns the requirement to provide documentary evidence to prove a spousal relationship for the purpose of family reunification applications under the Refugee Act 1996.

With regard to the first aspect concerning religious marriages, it was the position of the Family Reunification Section ("FRS") of the Irish Naturalisation and Immigration Service that a religious marriage could not be recognized under Irish law. The FRS noted that it was "open" to the applicant to seek a declaration from the Irish courts, pursuant to s 29 of the Family Law Act 1995, that the marriage in question was a valid marriage. Throughout their correspondence with the FRS, the solicitors for the applicants argued that a marriage may be recognized as valid in Ireland, once the formal requirements for a valid marriage have been complied with in accordance with the law of the state in which the marriage took place. The solicitors also highlighted that it would take up to two years to get a declaration to this effect from the Circuit Court. Regarding the obtaining of a declaration as to the validity of a marriage in Irish law pursuant to s 29 of the Family Law Act 1995, Judge Cooke reiterated that this was an incorrect test to be applied under s 18(3) of the Refugee Act 1996, as had been held in the related case of *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 [INSERT link to CUREDI21IR008]. Judge Cooke confirmed that the view that a marriage could not be recognized as valid because it was a religious marriage was mistaken. Thus, the reason for the refusal of the application was erroneous and therefore quashed.

With regard to the second aspect, Judge Cooke recommended a different approach should be adopted to the concept of a "subsisting marriage" under s 18

and expressly referred to the *Hamza* case in this regard. Judge Cooke opined that alternative means of proving a real marital relationship, for instance based on cohabitation and exclusivity in the relationship over a substantial period, should be able to satisfy the requirements of s 18 of the Refugee Act 1996. Of particular interest is the observation made by Judge Cooke 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 and, in this regard, placed reliance upon the case of *Conlon v Mohammad* [1987] ILRM 172. The recognition of common law marriages became a principle issue raised by the Minister for Justice, Equality and Law Reform ("the Minister") during the appeal of this judgment to the Supreme Court; *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8..

With respect to the third aspect, the requirement to provide documentary evidence to prove a spousal relationship for the purpose of family reunification applications pursuant to the Refugee Act 1996, this judgment provides a valuable insight into the complexity of this issue. The circumstances of the applicants in the *Hassan* case illustrate a hurdle which refugee applicants must face with the requirement to produce documentary evidence of their spousal relationship. As referenced in the opening paragraphs of the judgment, the applicants' solicitors had submitted country of origin information to the Minister which detailed that, for more than a decade, Somalia had been a failed state in which there was no functioning judiciary, coupled with a collapse of the government and administration. This explanation was found to be both "credible and well founded" and confirmed that, upon the former system being discontinued in 1991, local sharia courts maintained some oversight and control over those authorized to perform marriages and marriage certificates had been issued by sharia courts in Mogadishu and other towns. Furthermore, the country of origin information confirmed that civil marriages were not performed in Somalia nor was there any register of marriage certificates issued by sharia courts.

Mr. Hassan's application had been referred by the FRS to the Office of the Refugee Applications Commissioner ("ORAC") for a report on the relationship

between the applicants. Judge Cooke criticized the resulting ORAC report as it had failed to verify two essential points; (i) that all marriages in Somalia are solemnized by a religious ceremony, and (ii) that there was a basis in the conditions prevailing in Somalia that documentary proof of the marriage was unobtainable. Judge Cooke noted that the Irish legislature had assigned the responsibility for the compilation of reports in respect of such asylum related applications to ORAC given its expertise, experience, and resources such as access to country of origin information which would facilitate assessing the accuracy of information and the credibility of claims. Judge Cooke observed that: “It is, therefore, surprising and, in the view of the Court, regrettable, that the Office did not feel it necessary or appropriate to undertake any further enquiry or research into the circumstances of this application”. (para. 6) Later in the judgment, Judge Cooke noted that: “As the present case indicates, due to the collapse of civil administration in Somalia, a refugee will frequently be in a position where it is difficult to prove the particular rules of formality in the lex loci (because the legal system does not exist) or to produce any documentary evidence that the formalities were complied with as regards the presence of witnesses and so forth (because the administrative system has collapsed)”. (para. 15) Thus, the requirement for documentary evidence of spousal relationships is brought centre stage in this judgment. This is particularly relevant as this requirement, which is often treated as a basic requirement within the family reunification scheme, frequently poses a considerable burden for applicants who flee from failed states or otherwise administratively compromised countries. This judgment was appealed to the Supreme Court, *Hassan and Saeed v Minister for Justice, Equality and Law Reform* [2013] IESC 8, and was heard together with the appeal in *Hamza and Elkhalifa v Minister for Justice, Equality and Law Reform* [2013] IESC 9..

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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