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

The Recognition of a Religious Ahmadi Marriage in Belgium

Question(s) at stake:

Whether an Ahmadi marriage, which is not legally recognized in Pakistan, can be recognized in Belgium.

Outcome of the ruling:

An Ahmadi marriage cannot be recognized in Belgium because it is legally non-existent in Pakistan, the country where the marriage was celebrated (*lex loci celebrationis)*. Recourse to an infringement of the public order cannot remedy this, although the marriage's non-existence stemmed from Pakistani law discriminating against the Ahmadi minority.

Topic(s):

- Foreign Laws, Decisions, Acts and Institutions
- Personal Status, Family and Inheritance

Keywords:

- Recognition
- Religious marriage

Tag(s):

- Ahmadi

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Country:

Belgium

Official citation:

Family Court of Brussels 18 November 2019 (Familierechtbank Brussel 18 november 2019)

Link to the decision:

https://www.ipr.be/sites/default/files/rechtspraak/20201_20191118.pdf

ECLI:

No ECLI number / ECLI number unknown

Date:

18 November 2019

Jurisdiction / Court / Chamber:

Court of first instance Brussels (family court) (Rechtbank van eerste aanleg Brussel (familierechtbank))

Remedy / Procedural stage:

First Instance

Previous stages:

-

Subsequent stages:

- No information found

Branches / Areas of law:

Private international law; Family law

Facts:

The applicants, both Pakistani nationals, belong to the Ahmadi minority. They married in Pakistan in 2007 in accordance with Ahmadi laws. Their marriage was arranged by the husband's father. The husband himself lives in Belgium and obtained Belgian nationality in 1998.

When the wife requested a visa for family reunification at the Belgian Embassy in Islamabad in 2015, it was refused since Pakistani law does not attach any legal consequence to a religious Ahmadi marriage. Subsequently, the couple planned to remarry in Belgium. In January 2018, the Ahmadiyya marriage office issued an attestation which stated that no objection would be raised against this remarriage; the Ahmadi marriage would thus continue to exist, next to the Belgian one.

They thereupon declared their marriage at the Belgian civil registrar, but the conclusion of the marriage was postponed and a public prosecutor started an investigation of the couple's intentions for marriage. Meanwhile, the wife made a new visa request (December 2018) and (following the *nikah*) the marriage was celebrated with the family (February 2019).

The public prosecutor eventually advised against their marriage. This decision was based on the following elements: the applicants are cousins, the couple was married in Pakistan after a few brief contacts by phone, the couple met for the first time only a few days before the marriage in Pakistan, the Ahmadi marriage is not recognized in Belgium, the man only travelled once to Pakistan since the marriage in 2007, there is a major financial inequality between the applicants, and they have no shared social life. As a consequence, the Belgian civil registrar refused to celebrate the marriage.

In a new attempt to obtain a legal basis for family reunification, the couple brought their case to court, asking for the recognition of their religious Ahmadi marriage in Belgium.

Ruling:

The family court started its assessment on the merits, finding that the applicants had submitted a legalized marriage certificate with a sworn translation. The court

then listed the relevant provisions for the recognition of foreign marriages in Belgium, namely Article 27 of the Belgian Code of Private International Law (BCPIL) on the recognition and executory force of foreign authentic instruments, such as marriage; as well as Articles 18 and 21 of the BCPIL regarding the PIL-barriers in case of circumvention of the applicable law and incompatibility with the Belgian public order.

According to Article 27 of the BCPIL, the marriage should conform with the applicable law determined by Articles 46 and 47 of the BCPIL.

Article 46 BCPIL uses the criterion of nationality to determine the law applicable to the valid celebration of marriage. Since both spouses were Pakistani nationals, with the husband also holding Belgian citizenship, the court referred to both Pakistani and Belgian law to determine the marriage requirements for the wife and husband. Pakistani law for the wife and Belgian law for the husband.

The formal requirements of marriage are, on the other hand, determined by the law of the country where the marriage is celebrated (the so-called *lex loci celebrationis* criterion). According to Article 47 of the BCPIL, this *inter alia* includes the requirement for a religious marriage to have civil consequences. The court cited research on the Ahmadi minority conducted by the Belgian Office of the Commissioner-General for Refugees and Stateless Persons, which had been submitted by the applicants. It hereby ascertained the discrimination against the applicants since the Pakistani legislator had, through the constitution, excluded them from the Muslim community. They were, therefore, unable to marry, neither under the Muslim Family Law Ordinance nor under the Special Marriage Act of 1872. The court further stated that the Ahmadi do have their own laws referred to as the *Fiqah-e-Ahmadiyya*, although it is not recognized under Pakistani law.

Based on this information, the court concluded that the religious marriage at hand was not recognized by the *lex loci celebrationis* and could therefore not be recognized by the Belgian legal order. The fact that the applicants had been registered as spouses by Pakistan’s National Database and Registration Authority (NADRA) did not change the court’s conclusion.

Whilst the applicants shared this conclusion of the court, they considered the legal discrimination against them to be an infringement of the public order, which should be remedied. The court, however, did not approve of this use of Article 21 of BCPIL. It ruled that this provision on public order was a defence mechanism of Belgium to prevent the recognition of a marriage validly celebrated abroad, if recognition would lead to undesirable consequences in the Belgian legal order, and to apply another relevant provision of that law or, if necessary, of Belgian law. According to the court, this was not the issue in this case since the marriage was legally non-existent in the foreign – i.e., Pakistani – legal order. It is not for the Belgian courts to remedy this situation on the basis of the international public policy exception and to recognize the marriage.

Main quotations on cultural or religious diversity:

With regard to the legal status of the Ahmadi minority in Pakistan

“The applicants argue that they both adhere to the ‘Ahmadi’ religion, as stated on their birth certificates, and in that capacity are discriminated against in Pakistan. Since the 1974 constitutional amendment, the concept of ‘Muslim’ has been defined in Pakistan and Ahmadis are excluded from this definition. The document on the Ahmadiyya community presented by [the study service of the Belgian Office of the Commissioner-General for Refugees and Stateless Persons], which the applicants submit, illustrates the discrimination against Ahmadis in Pakistan in various areas, such as at the administrative level. On the subject of marriage, this document mentions the following:

‘Ahmadis cannot marry on the basis of the Muslim Family Law Ordinance as a result of a constitutional amendment in 1974 declaring Ahmadis non-Muslims. Nor can they marry under the Special Marriage Act 1872. For this reason, the Ahmadis have issued their own regulations referred to as the Fiqah-e-Ahmadiyya. However, this has never been officially recognized in the Pakistani legal system.’” (pp. 71-72)

Original text in Dutch:

“Verzoekers voeren aan dat zij beide de ‘Ahmadi’ religie aanhangen, zoals vermeld op hun geboortecertificaten, en in die hoedanigheid gediscrimineerd worden in Pakistan. Sinds de grondwetswijziging van 1974 wordt het begrip 'moslim' in Pakistan gedefinieerd en worden Ahmadi uitgesloten van deze definitie. Het document van Cedoca, de studiedienst van het CGVS, over de Ahmadiyya-gemeenschap, dat verzoekers voorleggen, illustreert de discriminatie van Ahmadi’s in Pakistan op diverse vlakken, zoals op administratief vlak. Over het huwelijk vermeldt dit document het volgende:

‘Ahmadi's kunnen niet huwen op basis van de Muslim Family Law Ordinance als gevolg van een grondwetswijziging in 1974 waarbij Ahmadi's tot niet moslims werden verklaard. Zij kunnen ook niet trouwen op grond van de Special Marriage Act 1872. Om die reden hebben de Ahmadi's hun eigen regelgeving uitgevaardigd die wordt aangeduid als de Fiqah-e-Ahmadiyya. Deze is echter nooit officieel erkend in het Pakistaanse rechtssysteem.’”

With regard to public order:

“However, the court is of the opinion that Article 21 BCPIL, which constitutes a protection mechanism for the benefit of its own forum, cannot solve this specific problem. Indeed, the public policy exception allows the State in which the recognition of a foreign marriage certificate is sought, in exceptional cases, not to recognize that certificate, although it was validly concluded in the other State, if this would lead to undesirable consequences in the Belgian legal order, and to apply another relevant provision of that law or, if necessary, of Belgian law.

Such a situation does not arise here, but the opposite is true, in particular that the applicants’ marriage is not recognized under the internal law of Pakistan, where the marriage was contracted. It is not for the Belgian courts to remedy this situation on the basis of the international public policy exception, and consequently to recognize the marriage concluded abroad, even if the foreign law has a discriminatory effect on the applicants.

Indeed, the public policy exception is only relevant if the marriage took place on the basis of a provision of foreign law that is in itself contrary to public policy,

such as a polygamous marriage, and not if it did not take place in accordance with the provisions of foreign law. What does not exist under foreign law cannot be recognized as such." (p. 72)

Original text in Dutch:

"De rechtbank is echter van oordeel dat art. 21 WIPR, dat een beschermingsmechanisme ten voordele van het eigen forum uitmaakt, voor dit specifieke probleem geen soelaas kan bieden. De openbare orde-exceptie geeft de Staat waarin de erkenning van een buitenlandse huwelijksakte wordt nagestreefd immers de mogelijkheid om, in uitzonderlijke gevallen, die akte niet te erkennen, hoewel deze rechtsgeldig werd afgesloten in de andere Staat, indien dit tot ongewenste gevolgen zou leiden in de Belgische rechtsorde, en om een andere relevante bepaling van dat recht of, indien nodig, van Belgisch recht, toe te passen.

Dergelijke situatie is hier niet aan de orde, maar wel de tegenovergestelde situatie, met name dat het huwelijk van verzoekers niet wordt erkend volgens de interne rechtsregels van Pakistan, waar het huwelijk werd aangegaan. Het komt de Belgische rechtbanken niet toe om daaraan te remediëren op grond van de exceptie van internationale openbare orde, en bijgevolg het in het buitenland afgesloten huwelijk alsnog te erkennen, zelfs niet indien de buitenlandse wetgeving een discriminerende werking heeft ten aanzien van verzoekers.

De exceptie van openbare orde is immers slechts relevant indien het huwelijk tot stand kwam op basis van een bepaling van buitenlands recht die op zich strijdig is met de openbare orde, zoals bijvoorbeeld een polygaam huwelijk, en niet wanneer het niet tot stand kwam volgens de bepalingen van het buitenlands recht. Wat volgens het buitenlands recht niet bestaat, kan als zodanig ook niet worden erkend."

Main legal texts quoted in the decision:

Articles 18, 21, 46, and 47 of BCPIL (Wetboek van Internationaal Privaatrecht)

Cases cited in the decision:

none

Commentary

The Recognition of a Religious Ahmadi Marriage in Belgium

This is the first published case on the recognition of an Ahmadi marriage in Belgium. According to Article 27 of BCPIL concerning the recognition and executory force of foreign authentic instruments, a foreign marriage can be recognized "*by any authority in Belgium without the need for any procedure if the validity is established in accordance with the law applicable by virtue of the present statute and more specifically with due regard to Articles 18 and 21.*" The requirement to establish validity in accordance with the applicable law, the so-called "*contrôle de la loi applicable*" or "conflict-of-law test", implies a thorough examination of the content of the foreign marriage certificate.

To determine the law applicable to marriage, a distinction must be made between the requirements for a valid celebration of marriage (such as the age or consent of the spouses) on the one hand and the formal requirements on the other. The former dimension is regulated by the law of the nationality of each spouse (Article 46), the latter by the law of the country where the marriage is concluded (Article 47). As Article 47, § 1, 3° BCPIL stipulates that the *lex loci celebrationis* determines if and according to which specific rules a marriage celebrated before a religious authority has legal effect, this became the central aspect of the conflict-of-law test in this judgment.

For the court to determine whether the marriage has a legal effect within the applicable *lex loci celebrationis*, it needed to gain knowledge on Pakistani law regarding the Ahmadi minority. It referenced a study by the Belgian Office of the Commissioner-General for Refugees and Stateless Persons. This study illustrates the discrimination against Ahmadis in Pakistan in various areas, such as at the administrative level. However, in this case, the court argued that the marriage could not be recognized as for a foreign institution to be recognized, it needs to legally exist in the first place. This conclusion demonstrates how the impact of discriminatory legislation in one country is not limited to its borders.

The same approach can be observed in two other first instance decisions: family court Antwerp 29 June 2017 (No. 16/2297/B, unpublished) and family court Antwerp 24 April 2020 (available online, 2021 *Tijdschrift@ipr.be* 2: 70-73).

The court in Belgium turned to a technical interpretation of the public policy exception in Article 21 of BCPIL by ruling that the non-existence in the Pakistani legal order of the religious Ahmadi marriage cannot be countered by establishing a violation of public order. The court stated that this specific provision can only be invoked by Belgian authorities to prevent the recognition of foreign institutions that violate the public order, such as polygamy or repudiation, and not against non-existent ones. Such reasoning, however, avoids an assessment of possible discrimination. Nonetheless, the principle of non-discrimination is fundamental to the Belgian legal order and thus to its international public order. Moreover, it is striking that the marriage, even if it cannot be recognized, was used against the applicants in their attempt to re-marry in Belgium. Consequently, the applicants are barred from marriage in Belgium and are not considered leggaly married in Pakistan as the Pakistani authorities do not recognise Ahmadi marriages. This judgment must be read in accordance with the decision of the court of appeal of Antwerp of 9 March 2021 (available online, 2021 *Tijdschrift@ipr.be* 2: 17-22 and CUREDI075BE001) as the seized appeal judge ruled – contrary to the judge in the discussed case – that the presented Ahmadi marriage celebrated in Pakistan had to be recognized in Belgium as the Pakistani Government recognizes – albeit implicitly – Ahmadi marriages.

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

No literature available.

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