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CUREDI076NL004

Question(s) at stake:

Whether a customary marriage between a man and a woman concluded in Eritrea whilst the woman was 13 years old can be recognized in the Netherlands.

Outcome of the ruling:

Seeing as Eritrean law requires parties to a customary marriage to be at least 15 years old, no valid marriage had been concluded. As such, the marriage cannot be recognized in the Netherlands.

Topic(s):

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

Keywords:

Tag(s):

Author(s):

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Country:

Netherlands

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District Court Zeeland-West-Brabant, Judgement of 13 April 2021, case nr. C/02/371219 FA RK 20-1965, ECLI:NL:RBZWB:2021:2525 (Uitspraak Rechtbank Zeeland-West-Brabant, 13 april 2021)

Link to the decision:

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBZWB:2021:2525

ECLI:

ECLI:NL:RBZWB:2021:2525

Date:

13 April 2021

Jurisdiction / Court / Chamber:

District Court of Zeeland-West-Brabant

Remedy / Procedural stage:

First instance

Previous stages:

None

Subsequent stages:

None

Branches / Areas of law:

Private International Law, Family Law, Marriage law

Facts:

The present case concerns a customary marriage between a man and woman concluded in Eritrea whilst the woman was 13 years old. A child was born during this marriage.

After having reached the age of 18, the woman declared in a document that she was married, which was subsequently registered in the Dutch Municipal Personal Records Database (BRP) on 11 November 2015.

The woman requests the court to declare that the marriage between the man and the woman cannot be recognized as valid in the Netherlands and as such should not have been registered in the BRP.

Ruling:

To determine whether a valid marriage has been concluded between the man and the woman according to Eritrean law, the court first refers to Art. 577 of the Transnational Civil Code of Eritrea 1991 (TCCE) – which was applicable when the marriage was concluded – providing that three types of marriage are deemed to be valid in Eritrea: a civil marriage, a religious marriage, and a customary marriage. Additionally, Art. 46 (2) TCCE provides that both parties must be older than 18 years old for a valid marriage to be concluded. An exception, however, exists where the marriage was concluded on the basis of customary law.

According to the civil servant of the municipality, Eritrean customary law prescribes that girls may be married if they have reached the age of 8 to 15 years, and boys 12 to 15. For this, it refers to the OECD Social Institutions and Gender Index 2012 and the old provisions of the TCCE. However, the civil servant did not provide the court with any additional documents.

On the other hand, the woman argues that although marriages may be concluded with a woman younger than 15 according to customary Eritrean law, these are only recognized as valid by the public authorities once she has reached the minimum age of 15. She bases this information on the OECD and TCCE as well. Furthermore, she argues that at the time the minimum age for parties to marry was 15 years in the Netherlands (old Art. 10:29 Dutch Civil Code), and that a marriage concluded at the age of 13 would be contrary to Dutch public policy.

The court holds that, in line with the woman's argumentation, parties must have reached the age of 15 for a marriage to be validly concluded according to Eritrean law. Seeing as the woman was 13 years old when the marriage was concluded, the marriage is not valid according to the law of the state where it was concluded. Consequently, the marriage cannot be recognized in the Netherlands.

The fact that the woman was older than 18 when she signed the information form for her registration in the Municipal Personal Records Database can furthermore not be considered as a request for recognition of the marriage.

The non-recognition of the marriage in turn has consequences for the legal parentage of the child. Seeing as the child was not born out of a marriage between the man and woman, it only has one legal parent: the woman. Although the man is also mentioned on the birth certificate, the court rules that this should be adjusted.

Main quotations on cultural or religious diversity:

- “Pursuant to Article 577 TCCE […] three forms of legally valid marriages, namely civil marriage, religious marriage, and traditional marriage. Article 46(2) TCCE provides that both partners must have attained the age of eighteen years before the marriage begins, but an exception to this is made in Article 46(3) TCCE with respect to marriages concluded on the basis of customary law. On that basis, it must be established that child marriages may be legally valid in [marriage country].” (para. 3.5)

- “The woman did submit information from the OECD Social Institutions and Gender Index with the aforementioned letter from her lawyer. This contains the following: ‘While the minimum age of marriage according to the Marriage Law is 18 years of age for both women and men (Article 46), the TCCE recognizes marriages between the age of 15 and 18 in recognition of Eritrean customary marriage practices. In addition, in case of pregnancy or birth, dispensation from the rule concerning marriage may be granted (Article 521 TCCE).’ It must be concluded from this that, in principle, the marriageable age for girls in [marriage country, Eritrea] must be at least 15 years. As the woman was only 13 years old at the time of the marriage, and there is no evidence of pregnancy or birth, it must therefore be concluded that her marriage was not a marriage validly contracted under [Eritrean law]. In light of this, the marriage cannot be recognized in the Netherlands.” (paras. 3.6–3.7)

Main legal texts quoted in the decision:

Domestic law

- Article 10:29 (old) Dutch Civil Code
- Article 10:31 Dutch Civil Code

Eritrean Family Law

*Article 46 (2) and (3) Transitional Civil Code Eritrea 1991 Article 577 Transitional Civil Code Eritrea 1991

Cases cited in the decision:

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Commentary:

The Recognition in the Netherlands of Child Marriages Concluded Abroad

In the Netherlands, parties must have reached the age of 18 years for a marriage to be validly concluded according to Art. 1:31 of the Dutch Civil Code (DCC). Seeing as this minimum age may differ in other legal systems, Dutch courts are confronted with child marriages on a regular basis: marriages where either one of the parties had not yet reached the age of 18 when the marriage was concluded (Rutten 2015).

The present case not only concerns a child marriage – the existence of which is most commonly held to be contrary to the public policy of the Netherlands, as will be examined later – but the particular marriage is also a customary marriage. As such, even though it is one of many cases assessing Eritrean child marriages, it also sheds a particular light on the view of the Dutch courts on the various types of marriages that can be concluded in Eritrea and whether they can be recognized as valid.

The Dutch legal system only recognizes civil marriages as being valid marriages concluded on its territory; however, through the rules of private international law it can nevertheless recognize a foreign customary marriage, provided it is recognized as valid under the law of the state where the marriage was concluded (Art. 10:31 DCC). As such, if the place where the marriage was concluded does recognize a customary marriage and/or a form of child marriage, in principle this marriage could be recognized.

Three types of marriage are deemed to be valid in Eritrea: a civil marriage, a religious marriage, and a customary marriage (Art. 577 of the Transnational Civil Code of Eritrea 1991, TCCE). Although Art. 46(2) TCCE provides that both parties must be older than 18 years for a valid marriage to be concluded, an exception exists where the marriage was concluded on the basis of customary law. The applicable minimum age in such a case is 15 years.

The latest available data from 2010 show that in Eritrea 41% of girls had married under the age of 18, of which 13% had married before turning 15 (EPHS 2010). The same report illustrates that early marriage is much more common in rural than in urban areas, in addition to the fact that the median age of women at first marriage also relates to their level of education and wealth. This can be explained by the fact that child marriage is particularly seen as a deeply entrenched and widely approved traditional custom in Eritrea, justified by social, religious, and economic concepts (Report of the UN Economic and Social Council 2021).

In spite of the general rule of recognition of Art. 10:31 DCC, Art. 10:32 DCC provides that a marriage must be denied recognition where this would be contrary to the public order of the Dutch legal system. The provision itself provides a number of situations in which recognition should not be granted. Child marriages are included in the provision.

The view of the Dutch legal system on child marriages has changed throughout the last century. Up until 1970 the Dutch Civil Code provided that the minimum age to be married for girls was 16, whilst for boys the relevant age was 18 years. From 1970 onwards, both minimum ages were raised to the same level, which is still applicable nowadays: both parties, irrespective of their gender, must have reached the age of 18 for a valid marriage to be concluded (Art. 1:31 DCC). At the same time, until December 2015, two exceptions continued to exist on the basis of which a marriage in breach of these minimum ages could be recognized. When the woman was pregnant or had already given birth to a child and both parties had reached the age of 16 (old Art. 1:32 (2) DCC), or if the Minister of Justice allowed for an exemption – although permission was not granted often – the marriage could nevertheless be concluded. Furthermore, marriages between parties of non-Dutch nationality that had not yet reached the age of 18 could be allowed if their national legal system accepted such a marriage to be validly concluded (old Art. 10:28 DCC) (Rutten 2016: 27–30).

The current predominant view is, however, that child marriages should in principle not be allowed nor recognized. As such, child marriages concluded in the Netherlands can never be allowed; in all cases the parties must have reached the age of 18 years for the marriage to be deemed valid (Art. 10:28 in conjunction with Art. 1:31 DCC). As for marriages concluded abroad, all marriages under the age of 18 are considered to contradict Dutch public policy. The only exception that remains is when the recognition of a child marriage is requested at a time when both parties have already reached the age of 18 (Art. 10:32 (c) DCC). A proposal to also always refuse recognition of child marriages after spouses have reached the age of 18 has been waived by the Dutch Minister (TK 2021-2022, 33 836, no. 67, Letter of the Minister for Legal Protection d.d. 22 March 2022). An example of the application of the exception can be found in the judgment of the Court of Appeal Arnhem-Leeuwarden (4 December 2019, ECLI:NL:GHARL:2019:10281), where, although the woman was 17 at the time of the marriage, she had reached the age of 18 at the time of the registration. The court held that the public policy exception did not form an obstacle for the marriage to be recognized as valid. The judgment of the District Court of Oost-Brabant (19 October 2020, ECLI:NL:RBOBR:2020:5136), however, illustrates that such a request for recognition must be explicit. Although the woman did declare that she was married under oath, this was only at the request of the civil servant. The court therefore held that no explicit request for recognition could be derived from her declaration. The same applies for the case at hand, where the court did not derive a request of recognition from the information form the party signed for her registration in the BRP. However, this issue is still controversial and not finally settled. Still, in a decision of the Court of Appeal Den Bosch (14 July 2022, ECLI:NL:GHSHE:2022:2400), the court considered the disclosure to the municipal official and the statement made under oath of an existing marriage to be sufficient to conclude that the woman had requested recognition of the marriage. The court recognized the marriage.

The previously mentioned changes in the Dutch Civil Code were part of the Forced Marriage Prevention Act. The rationale for not allowing and recognizing child marriages is namely that people at a young age are more vulnerable and more susceptible to influence. As such, they cannot always decide voluntary and independently on whether they wish to conclude a marriage. Child marriages are therefore often viewed as a fundamental violation of human rights, especially for girls. Imposing a minimum age of marriage would therefore protect children from abuse, harm, violence, and exploitation. More information on the role that abuse and force may play in a child marriage can be found in CUREDI026NL005.

Although non-recognition may encroach on the right to private life enshrined in i.a. Art. 8 of the ECHR, especially where children are born from the child marriage, the importance of the overarching aim of the Dutch Act was granted more weight by the Dutch legislator (Vlaardingerbroek 2019).

In the present case, the marriage was concluded whilst the woman was only 13 years old. The civil servant claimed that the minimum age to be married for girls was 8 to 15, whilst for boys it was 12 to 15. On the other hand, the woman argues that, whilst marriages may be concluded whilst parties are below the age of 15, public authorities only recognise a marriage as valid once this age has been reached. The court follows this latter line of argumentation, which subsequent jurisprudence adheres to as well (see for example District Court Overijssel, 7 May 2021, ECLI:NL:RBOVE:2021:1925). As such, seeing as the marriage was not deemed to be valid according to Eritrean law, recognition of the marriage is not possible according to Article 10:31 DCC. The question on whether the public policy exception would apply is therefore not relevant.

The District Court of Oost-Brabant pronounced a similar ruling in 2019 (24 December 2019, ECLI:NL:RBOBR:2019:7586) concerning a Roma marriage. Here, the court held that it was irrelevant to assess whether the marriage could be recognized

according to Art. 10:31 DCC, but immediately turned to the public policy exception of Art. 10:32 DCC. It ruled that, because the girl was still a minor when the marriage was concluded, regardless of the rules on marriage in the Czech Republic, recognition of the marriage would be denied.

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

General legal literature

- Askari, Ladan. 1998. “The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages”. *ILSA Journal of International & Comparative Law* 5 (1): 123–138.
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- Vonken, A.P.M.J et al. 2021. *Internationaal Personen- en familierecht en erfrecht* (Third ed, Asser-Serie, 10-II). Deventer: Wolters Kluwer.
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General literature on the topic from other disciplines

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