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

Child Marriages Are Not Automatically Refused Recognition in Belgium

Question(s) at stake:

Whether a child marriage concluded in Somalia can be recognized in Belgium

Outcome of the ruling:

The status of the refugee must prompt Belgian authorities to show administrative flexibility. Since any exchange with Somalia, a country at war, is impossible, the legalization of Somali documents is not possible.

The recognition of a Somali child marriage is not contrary to the Belgian public order. Given the current age of the young woman, the recognition does not violate fundamental principles.

Topic(s):

- Immigration and Asylum
- Personal Status, Family and Inheritance

Keywords:

- Child marriage
- Limitations and justifications
- Marriage and partnership
- Public order
- Situations created abroad

Tag(s):

- Recognition of foreign institutions

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Country:

Belgium

Official citation:

Family Court Liège, Judgment of 25 May 2018 (Tribunal de la famille Liège, 25 mai 2018)

Link to the decision:

https://www.ipr.be/sites/default/files/rechtspraak/20182_20180525.pdf

ECLI:

No ECLI number / ECLI number unknown

Date:

25 May 2018

Jurisdiction / Court / Chamber:

Court of the first instance, Family court

Remedy / Procedural stage:

First instance

Previous stages:

- Non-recognition by the Belgian Migration Office (l'Office des étrangers) Request lodged by the spouses before the family court

Subsequent stages:

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Branches / Areas of law:

Private international law; Family law

Facts:

The applicants are two Somali nationals requesting the recognition of their religious marriage, which was concluded in Somalia in 2010. At the moment of the marriage, the girl was 14 and the boy was 18 years old. The young man left Somalia in September 2013 and arrived in Belgium in September 2015 where he applied for asylum. In 2016, he obtained refugee status issued by the Belgian Commissioner General for Refugees and Stateless Persons (CGRS). In 2017, the Belgian Migration Office (*l'Office des étrangers*) refused to grant a family reunification visa to the spouse. The Migration Office had doubts about the authenticity of the marriage certificate and considered the marriage contrary to Belgian public policy.

The spouses requested the recognition of their marriage before the family court in accordance with Articles 23 and 27 of the Belgian Code of Private International Law (BCPIL). The Public Prosecutor advised against it.

On 25 May 2018, the Family Court of Liège decided to recognize the Somali marriage.

Ruling:

The ruling of the Court can be divided into three main parts. First, the Court addressed the formal conditions, i.e., the authenticity of the marriage certificate. Second, it assessed the content of the marriage certificate ("*conditions de fond*"). Third, it considered the (sole) intention of the parties concerned to obtain a residence permit on the basis of the marriage.

With regard to the authenticity of the document, the Court decided that the recognition of the refugee status should guide the Belgian state towards administrative flexibility: Somalia is a country at war, there is no rule of law, legalisation of the documents is not possible, and the Belgian Commissioner General for Refugees and Stateless Persons (CGRS) only issues a (replacement) marriage certificate to recognized refugees when both spouses reside in Belgium. The fact that the spouses had limited contact ever since the man fled Somalia can be explained by the war in Somalia and by the granting of refugee status to the

man. According to the Court, this limitation is not likely to question the “reality” of the marriage.

Secondly, the Court assessed the content of the marriage concluded in Somalia. It applied the so-called review as to the applicable law (Article 27 of the BCPIL): the foreign marriage must comply with the same conditions that would have to be fulfilled under Belgian conflict rules if the marriage were to take place in Belgium. Therefore, the court referred to Article 46 of the BCPIL that refers to the national law of the spouses. However, with regard to the minimum age of marriage, the court immediately assessed its compatibility with public policy. Article 21 of the BCPIL stipulates two criteria for determining the incompatibility with the forum public policy: the extent to which the situation is connected with the Belgian legal order and the gravity of the possible effects of Belgium’s recognition of the Somali marriage. With regard to the first criterion, the court decided that the connection with Belgium was limited since the marriage had been concluded more than five years ago, in Somalia, between two Somalians. As far as the gravity of the possible effects, the court refers to the current situation. At the moment of the application for a family reunification visa, the woman was 20 years old. At the moment of the court proceedings, she was already 22 years old. Moreover, her husband is only three years older than her. Taking into account the current age of the woman, the Court decided that the recognition of the Somali marriage did not violate the fundamental values of the Belgian legal order.

Lastly, the Court very briefly stated that the arguments of the Migration Office and the Public Prosecutor with regard to the “migratory motives” of the parties (Art. 46*bis* Code Civil) are not pertinent. Indeed, it cannot be envisaged that the sole purpose of a marriage contracted in 2010 in Somalia between two Somalis was to obtain in 2017 benefits associated with having residence rights in Belgium for one of them.

Main quotations on cultural or religious diversity:

With regard to the formal validity of the marriage:

“The status of the spouse […] is a part of the applicant’s personal status: his refugee status obliges the Belgian state to show administrative flexibility, as any exchange with Somalia, which is not a state governed by the rule of law (a country at war), is impossible (the document certifying the marriage has not been legalized since any legalisation of a Somali document is impossible according to the Belgian Ministry of Foreign Affairs (https://diplomatie.belgium.be/fr)).

Furthermore, the CGRS only issues a marriage certificate if both spouses are present in Belgium (www.cgra.be).

The limited contact between spouses since […] fled from Somalia can be explained by the war in Somalia and by the granting of refugee status. The limited contact is not in itself sufficient to question the reality of the marriage. The contacts are established by the consistent declarations of the parties, in particular concerning the financial assistance given to […], declarations supported by the evidence of money transfers.

In these circumstances, the reality of the customary and religious marriage between […] and […] must be considered as established by the declarations issued *in tempore non suspecto* by […], supported by the declarations of […] and the Somali documents produced and not legalized.” (p. 96)

With regard to the minority of the girl at the moment of marriage:

“Concerning the intensity of the connection with Belgium, the submitted documents show that:

- the marriage was concluded in Somalia;

- both spouses were Somalis at the time of the marriage and are still Somalis today, […] having been recognized as a refugee in Belgium in 2016 after having applied for asylum in 2015.

The connection with Belgium is therefore limited, as it is five years after the marriage.

With regard to the seriousness of the effect that recognition in Belgium would have at present, it should be pointed out that [the wife] was 20 years old when

she applied for her visa and is currently 22 years old, while her husband is only three years and three months older than her.

Given the current age of the Somali plaintiff, the recognition in Belgium of her Somali marriage to the Somali [...] does not violate our fundamental principles." (p. 97)

Main legal texts quoted in the decision:

- Belgian Code of Private International Law, Articles 21, 23, 27, 46, and 47
- Belgian Code Civil, Article 146*bis*
- Geneva Refugee Convention, Article 12

Cases cited in the decision:

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Commentary

Child Marriages Are Not Automatically Refused Recognition in Belgium

The judgment of the Family Court of Liège on 25 May 2018 is the first well-motivated published Belgian case recognizing a foreign child marriage. In general, it is widely accepted that child marriages fall under the notion of forced marriages since children cannot make a fully informed and consensual decision, which may impact their legal status. As a result, recognition of these marriages should – in theory – be refused on public policy grounds. Case law analysis, however, illustrates that in practice, the situation is more complex.

When confronted with a request to recognize a child marriage concluded abroad, several questions arise. First, the seized Belgian administrative or judicial authority must examine whether underage children can validly contract a marriage. Only a marriage validly concluded abroad can be recognized in Belgium. As "age" is a substantive requirement, the national law of each of the spouses is decisive (see Article 46 of the BCPIL). Unfortunately, the family judge did not look into Somali law in the discussed case.

Assuming that the national law of the spouses allows child marriages, the Belgian authority has to determine whether the application of foreign law leads to a result manifestly incompatible with Belgian international public policy (Article 27 of BCPIL). As Article 148 of the Belgian Civil Code contains an exception on the age requirement of 18, not all child marriages can be perceived as violating Belgian public policy. In the discussed case, the Family Court did not mention the possibility for people under the age of 18 to get married in Belgium. Instead, it focused on the fact that recognition was sought at a time when both spouses had reached the age of majority. Taking into account the current age of the wife (22 years old), the small age difference between the spouses (three years and three months), and the fact that it was clear that both spouses had the intention to create a genuine married life (Art. 46*bis* Code Civil), the marriage concluded in Somalia was recognized in Belgium.

A year later, the same court followed the same reasoning in a different case (Family Court Liège 17 May 2019, *Tijdschrift@ipr.be* 2019, No. 3: 165-171, available at <www.ipr.be>). The plaintiffs in that case, both born in Somalia, entered into a religious marriage in Somalia in October 2007. At that time, the first plaintiff (male) was 22 years old and the second plaintiff (female) was 17 years old. The first plaintiff fled Somalia and arrived in Belgium in October 2010. He was recognized as a refugee in April 2011. During his asylum procedure, he stated that he entered into a religious marriage with the second plaintiff, that they had had a child together in 2009, and that his wife was currently pregnant. He was able to submit a marriage certificate issued in October 2010.

In October 2012, the second plaintiff and the two children were granted a family reunification visa by the Belgian Immigration Office after a positive DNA test. In December 2016, the first applicant acquired Belgian nationality.

Between 2014 and 2018, the plaintiffs gave birth to four more children. However, the civil status registrar in Belgium refused to recognize the marriage contracted in Somalia and refused to establish the fatherhood of the first applicant. As a consequence, these children could not obtain Belgian nationality. In line with Articles 23 and 27 BCPIL, the plaintiffs requested the recognition of their marriage

before the Family Court.

Taking into account the age of the wife at the time of the marriage (17 years and nine months), when she applied for family reunification (at the age of 22 years old), her current age (29 years old), the minor age difference between the spouses (husband is five years older than his wife), and the fact that both spouses clearly have the intention to create a genuine married life (the couple has six children), the Family Court ruled that the marriage concluded in Somalia had to be recognized.

Research conducted by Den Haese (PhD submitted and defended in 2021 at Ghent University: *Crossing Borders: Proving Your Personal Status. Interactions Between Private International Law and Human Rights Law*) shows that only a small number of Belgian judgements are publicly available. Consequently, the two judgements issued by the Family Court in Liège are only the tip of the iceberg. The Family Court of Antwerp, for instance, has also dealt with requests to recognize a marriage concluded abroad when one of the spouses was still a minor. In 2017, for example, the Family Court in Antwerp recognized a marriage celebrated in Afghanistan between a 17-year-old girl and an adult male (age not known). The court argued that the marriage celebrated in Afghanistan did not constitute a child marriage in the strict sense of the word because the wife was 17 at the time of the marriage (Family Court of Antwerp (div. Antwerp) 9 June 2017, No. 16/3315/B, unpublished). In 2018, the same court was confronted with a marriage celebrated in Pakistan between a 16-year-old girl and an adult boy/man (age not known). In this case, the Family Court merely focused on the genuineness of the marriage (Art. 46*bis* Code Civil). The Court invoked Article 12 of the ECHR to justify not recognizing the marriage: “only real marriages should be protected, not marriages of convenience” (Family Court of Antwerp (div. Antwerp) 28 June 2018, No. 17/5316/A, unpublished).

While there is no general obligation to recognize child marriages (see, e.g., ECtHR 8 December 2015, No. 60119/12, *Z.H. and R.H. v. Switzerland*), the social reality of the case must be taken into consideration. As stated above, the prohibition to recognize child marriages stems from the idea that a child marriage cannot serve

the best interests of the child. While this is often the case, the context may change when the wife requests the recognition of her marriage certificate after she attained the age of majority. If it can be established that the spouses lead a genuine family life (or have the intention to do so) and that both spouses have the free will to continue their family life, recognition must duly be considered. An *in concreto* assessment of the competing interests at stake is necessary to safeguard the rights of the child and the right to respect for private and family life.

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

- Verhellen, Jinske and Patrick Wautelet. 2022. “The Treatment of Diversity in Family Law in Belgium: Between Acknowledgment and Indifference”. In Nadjma Yassari and Marie-Claire Foblets (eds), *Normativity and Diversity in Family Law: Lessons from Comparative Law*, 227–253. Cham: Springer International Publishing.
- Wautelet, Patrick. 2018. “Un mariage somalien et minorité des époux: une question de principe et de méthode”. *Revue du droit des étrangers* 198: 330–339.

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