THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 102 J.R.]

BETWEEN

CHAUDHRY FAROOQ AND MAVRA SAJAL

APPLICANTS

AND

THE SUPERINTENDENT REGISTRAR OF THE CIVIL REGISTRATION SERVICE AND THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 11th day of May, 2018

Background

1. The first named applicant is a Pakistani national, born on 2 December 1990. The second named applicant is a United Kingdom national, born in Manchester on 22 May 1992. The applicants met in Manchester in October 2014, when the second named applicant was a student at the University of Manchester. The first named applicant was residing in the United Kingdom having entered on a student visa in or around December 2009. At the time of their meeting, the first named applicant had made an application for permission to remain in the United Kingdom to complete a Masters in Business Administration at Anglia Ruskin University, Cambridge.

2. A relationship developed between the applicants and they celebrated an Islamic marriage, attended by friends and family, on 8 February 2015 at Nawab Restaurant in Manchester. A certificate of Islamic marriage was issued by the Manchester Central Mosque. The marriage, however, was not entered into the civil registry in the United Kingdom nor did the applicants ever attempt to do so.

3. The applicants moved to Ireland in late June 2015 and lived together as a couple. The following month, July 2015, the applicants sought to be married in Ireland. Initially they applied by phone to Roscommon Civil Registration Office and were informed that a marriage notification form would be issued and a date was given to attend at the Registrar's Office to provide the necessary information. An appointment for this was fixed for 22 October 2015.

Proceedings Before the Registration Office

4. Prior to the meeting of 22 October 2015, the Civil Registrar wrote as follows to the applicants:-

> "I refer to your contact with this office regarding your proposed marriage and enclose herewith for your information:
>
> • "Checklist" of information/documentation required by the registrar at your appointment
>
> • "Capture of data" sheet to be completed in block capitals (only) and presented to the registrar on the day of your appointment to expedite the processing of your marriage registration form (your licence to marry)"

At the meeting on 22 October 2015, the applicants were asked to produce a number of documents including a "letter of freedom to marry" from the United Kingdom authorities in respect of the second named respondent, a Certificate/Letter of Freedom to Marry from Pakistan, a PPS number and information on the immigration status of the first named respondent.

5. The first named applicant provided "a freedom to marry" letter from Pakistan and his PPS number. However, the second named respondent was unable to obtain the Certificate/Letter of Freedom document from the United Kingdom that had been requested by the registrar. In an effort to resolve this, the registrar herself emailed the Manchester Register Office in February 2016 enquiring about the possibility of obtaining a Letter of Freedom to Marry (sometimes called a Certificate De Coutume) or otherwise known as a Letter of No Impediment to Marry. By reply, two days later, the Manchester Register Office indicated that a Certificate of No Impediment to Marry could be issued for the purposes of marriage in another country.

6. At this point it appeared that there would be no difficulty in securing the relevant letter or certificate. However, in the course of a subsequent interview, the applicants submitted a copy of an Islamic marriage certificate which disclosed that the applicants had undergone a religious ceremony of marriage under the auspices of the Manchester Central Mosque on 8 February 2015. The registrar was of the view that this certificate changed the basis on how matters would proceed.

7. By letter dated 16 September 2016, the registrar (on behalf of the respondents) wrote to the first named applicant stating:-

> "I refer it your proposed marriage and documentation received with regard to your religious marriage.
>
> The status of this religious marriage in Ireland remains unclear and in the circumstances this office is not in a position to determine if this religious marriage is recognisable under Irish Law. Accordingly, the proposed marriage may not take place.
>
> Alternatively, it is open to you to seek legal advice and your legal adviser will be aware of the provisions of s. 29 of the Family Law Act, 1995. If it is intended to make an application for a declaration under s. 29 this office should be notified in writing in advance…"

8. As suggested, the applicants sought legal advice and responded by letter dated 2 November 2016. The letter was headed:-

> "Pre-litigation Letter
>
> Refusal to marry"

The letter stated, *inter alia*:-

> "We confirm on our client's behalf that there is no legal grounds to refuse to marry them on the basis that they have

previously had an Islamic marriage. As you must be aware, a religious marriage is distinct from a civil legal marriage, and has no bearing on an applicant's legal entitlement to marry pursuant to Civil Registration Act, 2004 (as amended).

We further submit that they (sic) is no reasonable basis for requesting our clients to pursue a declaration pursuant to s. 29 of the Family Law Act, 1995, to establish that their Islamic marriage is not recognisable under Irish Law."

The letter concluded (in bold text):-

> **"In the event that your offices refuse our request to overturn the decision of the 16th September, 2016, or do not responded to this letter within the next 14 day period, we put you on notice that we will advise our clients to issue judicial review proceedings to seek to challenge the validity of the decision naming you as a respondent. In the event that it is necessary to institute judicial review proceedings we will rely, *inter alia*, upon the contents of this letter to fix you with the costs thereof.**

We request your urgent response to this letter within the next 14 days."

9. This letter was replied to by letter dated 10 November 2016, which stated, *inter alia*:-

> "[Y]our clients contracted a Muslim marriage on the 8th February, 2015 in Manchester, UK. The status of this marriage is unclear. The civil status of your clients is therefore unclear. As a result, it would be unsafe for their intended marriage to proceed. The only way in which the civil status of your clients can be definitely determined is by obtaining a declaration as to marital status in accordance with s. 29 of the Family Law Act, 1995. The Attorney General must be put on notice if it is intended that any resulting declaration is to be binding on the State.
>
> It is not possible, in the circumstances, to give your clients a date for their civil marriage. Any application for a judicial review would be inappropriate, will be defended vigorously and this letter will be used to fix your clients with costs."

10. This letter was responded to by letter dated 13 January 2017, some two months later, by the applicant. The letter, *inter alia*, called upon the Registrar to complete a marriage registration form. The letter also indicated that, failing the receipt of a satisfactory response, judicial review proceedings would be instituted.

Events Since the Institution of Judicial Review Proceedings

11. In June 2017 the second named applicant was offered a full time job in the United Kingdom. The second named applicant accepted this position, reluctantly she says, as it would provide her with relevant post graduate experience.

12. As the first named applicant was unable to enter the United Kingdom, in circumstances where he did not have a visa and was ineligible to apply for one, he decided to leave Ireland and return to Pakistan. He is currently living with his parents in Pakistan and has formally withdrawn his application for international protection.

13. The second named applicant has visited the first named applicant in Pakistan on one occasion. Despite living in different countries, the applicants have maintained their relationship through phone and social media.

Application for Judicial Review

14. By order of the High Court (Noonan J.) on 6 February 2017, the applicants were granted leave to seek certain reliefs by way of judicial review, these reliefs included:-

> "i. [A]n order of *certiorari* quashing the decisions of the first and/or second named respondents dated 16th September, 2016 and 10th November, 2016, to refuse to permit the applicants' marriage to proceed until the applicants obtain a declaration of marital status under s. 29 of the Family Law Act, 1995.
>
> ii. [A] declaration that the first and/or second named respondents have failed to process the applicants' application to marry in accordance with the procedures laid down in the Civil Registration Act, 2004 (as amended).
>
> iii. [D]eclaration that the applicants are entitled to have their marriage proceed absent of finding that an impediment to their marriage exists.
>
> iv. [I]n respect of the reliefs sought relating to the decision dated 16th September, 2016, an order extending the time for the bringing of the judicial review proceedings."

15. In support of the application, affidavits were filed by both applicants. In opposition, affidavits were filed by Ms. Teresa Lally, Senior Registrar of the Civil Registration Service, and Ms. Jennifer McCann, solicitor with the Chief State Solicitor's Office.

Issues to be Determined

16. The following are issues that have to determined by this Court:-

> i. Time.
>
> ii. Mootness.
>
> iii. The decision of the respondents, as communicated in letters dated 16 September 2016 and 10 November 2016.

Time

17. The respondents submit that the impugned decision is that contained in the letter of 16 September 2016. The application for leave to apply for judicial review was moved on 6 February 2017. Order 84, rule 21(1) provides:-

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose."

It was submitted that the letter of 10 November 2016 did not communicate a new decision, but was merely the reiteration of a previous decision. In support of this, reliance was placed on the decision of the High Court in *Finnerty v. Western Health Board* [1998]

IEHC 143, where it was held that:-

> "…A decision which is a reiteration of a previous decision is not a new decision. Time therefore begins to run when the final decision is first made…"

18. The applicants submit that it was only on the receipt of the letter of 10 November 2016 that it became a "condition" that the applicants obtain a declaration under s. 29 of the Family Law Act 1995 in order to be granted a marriage registration form from the respondents. In any event, the applicants have sought an extension of time for the purposes of bringing these proceedings.

19. In my view, the decision that started time to run was that which was set out in the letter of 16 September 2016. This letter clearly stated that "accordingly the proposed marriage may not take place." The response of the applicants' solicitor, referred to a para. 8 above, clearly regarded this letter as communicating a decision which they did not accept and, indeed, expressed the view that unless such decision was reversed judicial review proceedings would be initiated. Therefore, the application for judicial review is out of time.

20. In its application for an extension of the time, the applicants referred to *De Roiste v. Minister for Defence* [2001] 1 I.R. 190, where Denham J. (as she was then) stated:-

> "The conditions are not rigid as judicial review is a discretionary remedy. There remains in the court an inherent discretion to be exercised according to the requirements of justice in the circumstances of each case…In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive. It is clear from precedent that the discretion of the court has ever been to protect justice."

21. The applicant did engage in correspondence prior to the initiation of the proceedings in an attempt to resolve the matter. However, I do note that the respondents' letter of 16 September 2016 was only responded to by letter dated 2 November 2016 and that the respondents' further letter of 10 November 2016 was only replied to by letter dated 13 January 2017. I should also note that the terms of the applicants' responses were peremptory in nature and, as such, were unlikely to produce a positive response from the respondents. Despite the clear delay, it is important to bear in mind that the subject matter of these proceedings involves the exercise of the applicants' right to marry, which is an inherently personal matter to the applicants and, as a matter of justice and fairness, ought to be resolved by this Court. In addition, the time between which these proceedings should have been commenced and were in fact commenced is only a matter of weeks. Therefore, I am satisfied that time ought to be extended for the purposes of these proceedings.

Mootness

22. As referred to earlier, the first named applicant has returned to Pakistan and would require a visa to return to the State to proceed with the proposed marriage. The Court was informed that a non-national, such as the first named applicant, could be granted a "marriage visa" to enter the State for a period not exceeding 90 days. Were such a visa to be granted, and this is not a matter in which the respondents have any authority, the first named applicant would have the opportunity to be present for the necessary interviews and attend at the respondents' office not less than five days prior to the marriage. The second named applicant, being a citizen of the United Kingdom, is free to return to the State at will.

23. In order for this Court to determine that these proceedings are "moot", it would have to be satisfied that an application for a "marriage visa" by the first named applicant would be refused. The respondents have indicated matters which could result in the application for such a "marriage visa" being refused. This Court, however, is not in a position to conclude that such would happen. The persons who make determinations regarding visa applications are not before the court and it is not open to this Court to speculate as to what decision would be reached on such an application. Therefore, I do not consider these proceedings to be "moot".

Decision Set Out in Letters of 16 September 2016 and 10 November 2016

24. Before looking at the decisions set out in the letters of 16 September 2016 and 10 November 2016, it is necessary to set out the relevant provisions of the Civil Registration Act 2004 ("the Act of 2004"):-

Section 2(2)(b) provides, for the purposes of this Act there is an impediment to a marriage if: –

> "*(b)* one of the parties to the marriage is, or both are, already married." Section 46 provides:-
>
> "(1) A marriage solemnised in the State, after the commencement of this section, between persons of any age shall not be valid in law unless the persons concerned—
>
> *(a)* …
>
> and
>
> *(b)* attend at the office of that registrar, or at any other convenient place specified by that registrar, at any time during normal business hours not less than 5 days (or such lesser number of days as may be determined by that registrar) before the date aforesaid and make and sign a declaration in his or her presence that there is no impediment to the said marriage."

Section 48 provides:-

> "(1) Where, in relation to an intended marriage—
>
> *(a)* a registrar to whom the notification concerned under, or a copy of the court order concerned referred to in, *section* 46 was given is satisfied that *section* 46 has been complied with, or
>
> *(b)* …

(c) …

he or she shall complete a marriage registration form in relation to the intended marriage."

Section 58 of the Act provides:-

"(1) A person may at any time before the solemnisation of a marriage lodge an objection in writing with any registrar and the objection shall state the reasons for the objection…"

"(4A) A registrar who-

(a) In the performance of his or her functions under this Part forms the opinion that an intended marriage would constitute a marriage of convenience or

(b) receives under subsection (1) an objection the stated reason for which is that the intended marriage would constitute a marriage of convenience, and forms the opinion that grounds for the objection possibly exist and need to be investigated,

shall refer the matter to the Superintendent Registrar of the registration area where the registrar who formed the opinion is assigned, for a decision…"

Section 60 of the Act provides:-

"(1) Where—

(a) a registrar fails or refuses to register in the appropriate register specified in *section* 13 a … marriage … or

(b) …

the registrar, an tArd-Chláraitheoir or authorised officer, as the case may be,… shall notify... the parties to the marriage… in writing of the reasons for the failure or refusal."

Section 60 further provides for a procedure whereby a person(s) dissatisfied with the decision can appeal such decision and, ultimately, appeal the matter to the High Court.

25. In my view, s. 46(1)(b) is central to these proceedings in that the applicants are required to sign a declaration that there is no impediment to the proposed marriage. Further, under s. 48 the first named respondent can only complete a marriage registration form if he or she is "satisfied that *section* 46 has been complied with". Implicit in this is that the first named respondent is satisfied that the declaration as to no impediment to the marriage is valid. It follows that if the first named respondent has information or knowledge that would call into question the validity of such declaration then he or she cannot be satisfied that the requirements of s. 46 have been complied with and so, under s.48, cannot complete a marriage registration form in relation to the intended marriage.

26. It was submitted by the applicants that the first named respondent's information gathering is limited to what is provided for in s. 46(7) of the Act of 2004. In my view, this is not so. The wording of the subsection states "may require" which would indicate that the information referred to in the subsection is not an exhaustive list and that there may well be other information which the first named respondent requires in order to be satisfied that s. 46 has been compiled with.

27. In this case, the registrar initially requested the applicants to produce a number of documents including a letter of "freedom to marry" from each of them. As the second named applicant was having difficulty in obtaining such a letter the registrar emailed the Manchester Registered Office on 5 February 2016. This was replied to indicating that a Certificate of No Impediment to Marry could be issued for the purposes of marriage in another country. It appeared that there would be no difficulty in securing the appropriate documentation in due course. The applicants attended for interviews on 24th August, 2016. However, the applicants then submitted, for the first time, a copy of the said Islamic marriage certificate.

28. The registrar took the view that the production of the Islamic marriage certificate was a new factor. As she stated in her affidavit:-

"13. The parties hereto [the applicants] had undergone a ceremony of marriage under the auspices of the Manchester Central Mosque on the 8th day of February, 2015. The parties had an Islamic marriage certificate in relation to same. I say that the existence of the marriage brought uncertainty to the civil status of the parties which could no longer be healed by the provision by the relevant party of a letter of freedom to marry or of a self-declaring affidavit as to the deponent's freedom to marry in circumstance where it appears under the laws of England and Wales marriages such as the one conducted on the 8th day of February, 2015 may be valid marriages even if they have not been registered."

29. There were good grounds for this uncertainty. The court was referred to *M.A. v. J.A.* [2012] EWHC 2219 (Fam). In this case a couple had undergone a Muslim marriage ceremony in a mosque in Middleborough, United Kingdom. The chairman of the mosque was registered to conduct marriages under the relevant United Kingdom legislation. The ceremony, however, was conducted by an Imam who was not an authorised marriage celebrant at the relevant time. The parties argued that theirs was not a non-marriage. The court reviewed the relevant statutory requirements and concluded that the parties were in fact married. Thus, notwithstanding the fact that the marriage was not registered, the parties were held to be participants to a valid marriage under English law.

30. This uncertainty is further compounded by the fact that the first named applicant has now returned to Pakistan. The registrar has no information as to what is the status of the Islamic marriage in Pakistan.

31. Thus the registrar was unable to conclude that there was no impediment to the applicants marrying in the State. With the information that was provided to her she could not be satisfied as to the validity of the declaration required under s. 46(1)(b) without

knowing the legal status and effect the applicants' Islamic marriage of February 2015, evidenced by the certificate furnished. All of this is articulated in the letters to the applicants of 16 September 2016 and 10 November 2016. It follows, in my view, that there is a sound legal basis for the decisions contained in those letters.

32. The applicants have characterised references in the said letters to seeking a declaration under s. 29 of the Family Law Act 1995 as amounting to the imposition of a condition, not provided for in the Act of 2004, to the issuing of a marriage registration form. I do not accept this submission. The letters provide a way, namely a declaration under s. 29, to address the applicants' problem. It is not a condition. The Court was referred to the Supreme Court decision in *Hamza & Elkhalifa v. Minister for Justice, Equality and Law Reform* [2013] IESC 9. In that case the applicants alleged that the respondent was requiring a s. 29 declaration for the purposes of s. 18 of the Refugee Act 1996, which provided for permission to be granted to a spouse to enter and reside in the State if the Minister is satisfied that the person is the spouse of a refugee. Although this was not an issue in the Supreme Court appeal, in giving judgment Fennelly J. stated:-

> "44. While the learned judge was, no doubt, correct to so hold, it is difficult to escape the conclusion that the possibility of the validity of the marriage being established pursuant to that procedure was material to the decision. In circumstances where the Minister has withdrawn any such suggestion, it is desirable to state clearly that a declaration pursuant to s. 29 is not an alternative means of satisfying the requirements of s. 18. As the learned judge correctly held, it was for the Minister and him alone to determine whether Ms. Elkhalifa was the spouse of Mr. Hamza."

33. In the instant case, the first named respondent did not seek a s. 29 declaration for the purposes of satisfying the provisions of s. 46(1)(b) but rather indicated that such a declaration would be a means of overcoming the uncertainty that had arisen on the furnishing of the Islamic marriage certificate. Therefore, the applicants are not entitled to the reliefs sought in this regard.

34. Finally, the applicants submit that the respondents should have completed the marriage registration form and then relied on the provisions of ss. 58 or 60 of the Act of 2004. I do not accept this submission. Firstly, s. 58 deals with a situation where a person, other than the registrar, has an objection to the solemnisation of a marriage. Secondly, s. 58(4)(A) deals with marriages of convenience, which is not the case here.

35. Under s. 60 of the Act of 2004, a registrar may refuse to register a marriage and must notify the parties involved in writing of the reasons. It was submitted that this was a course of action which should have been taken by the registrar given the uncertainty arising from the Islamic marriage. Given the views I have expressed on the provisions of s. 48, if the registrar is not satisfied that s. 46(1)(b) has been complied with then he or she should not complete the marriage registration form and, therefore, the marriage would not take place at all.

36. By reason of the foregoing, I refuse the reliefs sought by the applicants herein.