Neutral Citation Number: [2010] IEHC 427

THE HIGH COURT

JUDICIAL REVIEW

2009 794 JR

BETWEEN

MOHAMMED HUSSEIN AHMED HAMZA AND ASMA MAHGOUB ELKHALIFA

APPLICANTS

AND

MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 25th day of November, 2010

1. This is the first of two cases which were heard together because some of the issues of law which they raise were similar, although the factual circumstances out of which each proceeding arose were different. The cases were also, to some degree, representative of a number of other cases awaiting hearing arising out of analogous circumstances. All of the cases concern applications made to the respondent under s. 18 of the Refugee Act 1996 (as amended). The second case is that of *Abdi Jama Hassan & Anor v. M.J.E.L.R.* [2009 No. 1054 J.R.] in which judgment is also delivered today.

2. These cases are so-called "family reunification cases" in which an application under s. 18 has been made to the respondent by a person previously declared to be a refugee in this country, seeking permission for a member of his or her family to enter and reside in the State and has been refused.

3. Section 18 provides that such applications are to be first referred by the Minister to the Refugee Applications Commissioner (the "RAC") whose function it is "to submit a report in writing to the Minister and such report shall set out the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person". (Sub-section 2).

4. The term "member of the family" is defined in subs. (3) of s. 18 as including, *inter alia*, "in the case that the refugee is married, his or her spouse (provided that the marriage is subsisting on the date of the refugee's application, pursuant to sub-section (1))". It is to be noted that in ss (3) and (4), a distinction is made between a "member of the family" as defined in ss (3) to cover the immediate members of the refugee's family and "dependent member of the family" as defined in ss.(4)(b). Where the Minister is satisfied that the subject of an application comes within the former definition, ss.(3)(a) requires that the "Minister shall grant permission … to enter and reside…" In the case of a dependent member of the family, ss.(4)(a) provides that the "Minister may at his or her discretion grant permission…".

5. The primary issue raised in the present case, as in most of the other cases awaiting hearing in this category, turns upon this definition of "member of the family" as applied to a spouse and arises, in effect, out of the refusal or inability of the Minister to decide to recognise, as the spouse of the refugee, the person in respect of whom permission to enter and reside has been sought. In particular, the issue is said to arise out of the terms of the Minister's refusal decision and as to whether the Minister is entitled to require that the subsisting validity of the refugee's marriage be confirmed by obtaining a declaration as to marital status by application to the Circuit Court under s. 29 of the Family Law Act 1995.

6. In the present case, the first named applicant ("Dr. Hamza") is a medical practitioner and native of Sudan who was declared to be a refugee in the State in May 2006. He claims to have married the second named applicant in Sudan in 1990 and says that she had remained there with their two children when he was forced to flee to Ireland in 1998. On 24th May, 2007, Dr. Hamza applied, under s. 18, for permission to be granted for his wife, his two children and his wife's mother to join him here and to enter and reside in the State for that purpose.

7. On 12th July, 2007, the office of the R.A.C. reported on its statutory investigation of that application. Apart from confirming that the information given by Dr. Hamza in the birth, marriage and divorce certificates and other documentation submitted was consistent with that in the original asylum application, the report confines itself to the comment that the passports of the wife and mother-in-law conform to the design and form of known Sudanese passports and that, on examination, they disclosed no obvious signs of alteration or additions.

8. By letter of 6th April, 2009, the application was refused in respect of the second named applicant, Dr. Hamza's wife. The essential reason for the refusal was given in these terms:

> "Following consideration of your application under s. 18 (3) of the Refugee Act 1996, the above application is being refused. Ms. Asma Mahgoub Elkhalifa does not qualify as a 'member of the family' under s. 18 (3) (b) of the Refugee Act 1996 as the marriage was by proxy, it does not appear to be valid under Irish law."

The letter then added:

> "It is open to you to seek a declaration from the Irish courts under s. 29 of the Family Law Act 1995, that the marriage in question is a valid marriage. You can arrange this through your solicitors. This is, of course, a matter entirely for you and your legal advisers to consider and the Department of Justice, Equality and Law Reform has no role in the matter."

9. By separate decision of the same date, permission was granted in respect of the two children, but Dr. Hamza says the children cannot leave Sudan without their mother. There then took place an exchange of correspondence between Messrs. Daly Lynch Crowe & Morris ("DLCM"), the applicants' solicitors, and the Family Reunification Section of the Irish Naturalisation and Immigration Service

("FRS"). The relevant parts of this exchange can be summarised as follows.

> 10. (1) 15th April 2009: DLCM wrote requesting an urgent review of the refusal. They submitted that the declaration under the 1995 Act was unnecessary when the marriage had taken place some fifteen years prior to Dr. Hamza's arrival in the State. It was also argued that the refusal was mistaken in considering that the marriage had been by proxy: both applicants had been present. In case the problem lay with the translation of the marriage certificate, they propose to commission and submit a new one.
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> (2) 13th May 2009: The FRS replied pointing out that the new translation had not been received and then made the following points:
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> > "There are currently two versions of marriage certificate/marriage contract certificate on file both of which have been translated. One translation is from the Islamic Foundation of Ireland which seems to have been supplied by your client and the other is from Global Translations which was obtained by this department. It is this translation which suggests that your client's marriage was conducted by proxy. Also, while the names of the persons married are both the same on both certificates there are several inconsistencies between the two translations. For instance, the witnesses listed are not the same on both certificates, the date of marriage is different, the person who conducted the marriage is not the same and the amount of the dowry is not the same. Perhaps you would like to have these issues clarified by your client before a review is carried out."
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> (3) 26th May 2009: DLCM disagree that there are inconsistencies in the translations. They maintain that the names of the person officiating and the names of the two witnesses are the same but that the impression of inconsistency arose from variations in spelling due to the fact that Arabic characters do not convert into specific letters of the English alphabet. They again deny that the marriage was a proxy marriage and state:
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> > "In all Muslim marriages in Sudan, the bride is not permitted to be present in the Mosque during the marital ceremony, but rather is represented by a male relative. Dr. Hamza instructs that this is also the case in respect of marriage ceremonies conducted in the Mosque in Clonskeagh, Dublin 4."

They point out that a proxy marriage occurs when one of the parties to the marriage is outside the State where it is taking place. In the applicant's case, the reference to the proxy is the male relative who represented the second named applicant at the ceremony while she remained in her house with the female members of the wedding party. They also submit that it is inconsistent for the Minister to refuse to recognise the validity of that marriage and at the same time recognise the lawful guardianship of the two children for the purpose of the permission when that lawful guardianship flows under Irish law from the lawful marriage of the man to the mother of his biological children.

> (4) 2nd June 2009: FRS respond maintaining that the inconsistencies are not trivial differences of spelling and require further explanation. The letter compares details of the marriage certificate as given in the two translations pointing out particularly that the date of marriage given is different (14th September, 1990 and 1st March, 1991) as is the amount of the dowry (100 Sudanese pounds (SDP) and 2 Sudanese pounds (SDP).
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> (5) 26th June, 2009: FRS respond enclosing a third translation which had been found upon the first named applicant's naturalisation file and which Dr. Hamza had submitted in support of his naturalisation application believing it to be a translation of his original marriage certificate with the second named applicant which he confirmed took place on 14th September, 1990. In fact it is a translation of his remarriage to his wife which took place on 1st March, 1996 after a Tlaq divorce which took place in 1995. This letter then endeavours to explain at length the circumstances in which this occurred. In effect, having encountered marital problems in 1995, Dr. Hamza divorced his wife verbally in late 1995 and because more than three months passed before a reconciliation occurred it was necessary under Sharia law that a marriage certificate be reissued. This is the certificate of 1st March, 1996. They explain that for the purpose of the naturalisation application Dr. Hamza had obtained a translation of his post-divorce certificate in 2004 but realised that it contained a number of errors and had not intended to use it. By mistake he had subsequently unwittingly included the wrong translation with his application but had never intended to mislead the Department. The re-issue of the post-divorce certificate had the effect in Sharia law of renewing the validity of his 1990 marriage and that was why he had always referred to his marriage to the second named applicant by that date.
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> (6) By letter of 3rd July, 2009, the FRS gave its decision on the requested review in the following terms:
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> > "I have decided to uphold the original decision not to grant family reunification in this case. It is not clear from the documentation submitted if this marriage is valid under Irish law. It is open to your client to seek a declaration from the Irish courts that this is in fact a valid marriage. Should such a declaration be produced by the applicant I will proceed to review the file again immediately."

11. By order of 27th July, 2009, leave was granted by Peart J. to bring the present application for judicial review of that refusal decision. Leave was granted to seek an order of *certiorari* to quash the decision of 3rd July, 2009, together with an order of *mandamus* compelling the respondent to reconsider the application.

12. Leave was granted in respect of a total of twelve grounds set out in the Statement of Grounds, but those effectively argued to the court at the hearing can be summarised as follows:

> (1) The respondent erred in law and in fact in considering that the marriage was not valid under Irish law because it was a proxy marriage and/or that a declaration under s. 18 indicates that a marriage is a valid marriage;
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> (2) The marriage was validly contracted in a religious ceremony under Sudanese law and certified by a marriage officer and thus recognised by the Sudanese state and as such is recognised as valid for the purpose of section 18;
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> (3) Under section 29 of the 1995 Act the Circuit Court declares a marriage of applicants in another state entitled to recognition in this jurisdiction: this is not the same as a declaration that the marriage complies with Irish law;

(4) No valid reason has been given as to why the applicants' marriage would be invalid under Irish law or meet the criteria of section 18;

(5) The respondent erred in law in requiring the applicants to obtain a declaration under s. 29 of the 1995 Act in circumstances where the said marriage is *prima facie* a valid civil/religious marriage in Sudan which meets all of the requirements for recognition under Irish law.

13. The grounds thus advanced, as later argued at the hearing, can usefully be reduced for the purpose of analysis to a series of questions which can be addressed in the following order:

(a) Is the Minister entitled in law to refuse an application under s. 18 of the Act unless a declaration under s. 29 of the Family Law Act 1995 is obtained and is that what has been done in this case?

(b) Is the Minister correct in deciding that Dr. Hamza's marriage to the second named applicant was "a marriage by proxy" and, as such, not valid in Irish law?

(c) Is the Minister correct in effectively requiring that to be recognised as a "spouse" for the purpose of s. 18, the refugee must establish proof that the foreign marriage is a "valid marriage" under Irish law?

(d) If so, do the proofs submitted in this case satisfy the requirements of s. 18 or was the Minister entitled to question whether there was a subsisting marriage in this case having regard to the discrepancies identified in correspondence in respect of the submitted certificates and/or their translations?

14. The first of these questions can be disposed of briefly. The Minister did not in fact refuse the application on the basis that a declaration under s. 29 of the Act of 1995 was first required. It is clear from the explicit terms of the letter of 6th April, 2009 (see para. 8 above) that the reference to such a declaration was put forward as an option to be considered and, as such, was "a matter entirely for you and your legal advisers". It was not stipulated as a precondition for a decision on the application. The ground summarised at para. 12(5) above is thus based upon a misreading of that letter and is unfounded.

15. Although that ground is thus disposed of in this case, the Court would indicate, for the avoidance of doubt in other cases that, in its judgment, it would not in any event be competent or appropriate for the Minister to require the obtaining of such a declaration as a condition for the making of a decision on a family reunification application under s. 18. In that section, the Oireachtas has designated the Minister as the sole authority to decide whether permission should be granted or refused under subsection (3). It is to the Minister that the application for permission is made under subsection (1) and it is the Minister alone who must be satisfied that "the person the subject of the application is a member of the family of the refugee" under subsection (3) (a). It is envisaged by the provision that he will do so on the basis of the report furnished by the Office of the RAC under subs. (2) which has "set out the relationship between the refugee concerned and the person the subject matter of the application". The Minister cannot delegate to any third party, therefore, (including a Circuit Judge) the decision he is required to make under subs. (3)(a), namely, that the person comes within the definition of a family member or, in a case such as the present, that the person concerned and the refugee are parties to a subsisting marriage.

16. This is not to say that there may not well be occasions when a declaration under s. 29 might facilitate the resolution of doubts arising in an application under section 18. However, for the reasons explained later in this judgment, it must be questionable whether a declaration under s. 29 will normally be apt for that purpose. Having regard to its provisions in subs. (2) basing jurisdiction on domicile or ordinary residence, it is clear that the declaratory remedy is directed at questions of the recognition of the subsisting validity of marriage in Irish law for the purposes of divorce, remarriage, legitimacy, succession and related questions in cases of parties with an established connection with the country. The entitlement of a refugee to seek family reunification with a spouse under s.18 is not circumscribed by conditions of domicile or minimum ordinary residence. Almost by definition, the issues that arise in relation to the recognition of family relationships in the case of refugees will be materially different, both as regards formalities of proof and conflict of laws. The provision is also adapted to adversarial disputes as to the existence or validity of a marriage between the parties to it or others deriving rights or obligations from it, in order resolve issues with public consequences, such as an entitlement of one party to remarry, the possibility of bigamy, rights of inheritance and so on. Hence, the facility for joining the Attorney General to the application and the binding effect of the declaration on third parties and the State. The grant of permission to the spouse of a refugee to enter and reside does not, in the view of the Court, have any declaratory consequence so far as concerns the legal validity of the marriage in question and, for example, any later question as to whether an Irish court has matrimonial jurisdiction over it would remain to be decided. Furthermore, the Circuit Court has no inquisitorial competence or investigative function in adjudicating upon the application but is effectively dependent on the evidence adduced by the parties before it. By contrast, section 18(2) of the Act equips the Minister, with the assistance of the report from the RAC, presumably with the intention that the Commissioner should report on the relationship using the expertise and resources of the Office, to obtain and furnish such information as to local laws, customs and social conditions as may be required to assess the validity of the claim made and the authenticity of documents produced to substantiate it; or to confirm that conditions are such in the country in question that the explanation given for the absence of formal proofs is credible or not. The relevance of these considerations is illustrated by the circumstances of the second case (*Hassan*) where the Somalian applicants have been unable to obtain any original documentary proof of their marriage due to the collapse of civil administration in that country.

17. The pertinence of the considerations is also evident in the very nature of the primary reason given for the Minister's refusal in the present case, namely, that the marriage in Sudan of the first and second named applicants is said to be not valid under Irish law because it was "a marriage by proxy". The practice of "marriage by proxy" was much favoured by the monarchs and nobility of Europe in the age before the invention of the railway as a means of facilitating dynastic matrimonial arrangements without the inconvenience and hazards of long distance travel on the part of one or other of the betrothed. Strictly speaking, a proxy marriage in that sense, invariably involved a ceremony in which at least one of the parties was absent (invariably remaining in a separate Kingdom or State) and was represented by a third party nominee. The marriage was celebrated between the partner who was present and an authorised nominee of the absent partner acting expressly by and on behalf of the latter.

18. Proxy marriages are provided for by law in a number of countries, either generally or as a facility in specific circumstances such as the inability of one partner to be present because of absence on foreign military service. Proxy marriages are possible, for example, by State law in four of the States of the United States of America and, when solemnised in accordance with the requirements of the local laws of such States, will be recognised as valid elsewhere, including States were local laws prohibit a marriage by proxy subject to public policy considerations. The U.S. rule is expressed in this way:

"*A marriage which satisfies the requirements of the State where the marriage was contracted will everywhere be*

recognised as valid unless it violates the strong public policy of another State which had the most significant relationship to the spouses and the marriage at the time of the marriage." (Restatement (Second) of Conflicts of Laws § 283(1))

19. In the judgment of the Court, the primary reason given by the Minister for the refusal of the application in the letter of 6th April, 2009 (see para. 8 above) is mistaken in law. This is so for a number of reasons. First, the marriage in question may not have been a proxy marriage. Secondly, a proxy marriage, as such, is not necessarily excluded from recognition as valid in Irish law. Thirdly, recognition as valid in Irish law is not, in the view of the Court, the exclusive test for the recognition of a spouse as entitled to the benefit of s. 18(3) of the Act of 1996, as a member of the family of a refugee.

20. In the first place, it is questionable whether the ceremony claimed to have been solemnised by the applicants in Sudan on 14th September, 1990, was, in fact, a proxy marriage in this sense. Both applicants were domiciled and resident in Sudan at the time and there is no evidence that either had ever been previously domiciled or resident elswwehere. Both were actually present at the place where the ceremony was performed. The only feature giving rise to doubt was that the second named applicant had remained away from the masjid (or mosque) in which the ceremony was performed and her consent was given by a male relative on her behalf. As already mentioned above, there are discrepancies in some of the details of the translations of the marriage certificate for that ceremony, but in that provided by the Islamic Foundation of Ireland, the material part of the text is as follows:-

> "Dated this day 14/09/1990, under my supervision I, Abdullah Mohamed Saeed, Registrar of Marriages of El Kamlin City, under the jurisdiction of the El Kamlin Shari'ah Court, marriage took place between:
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> Bridegroom: Mohamed Hussein Ahmed Hamza, from Zalingi
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> Bride: Asma Mahgoub Elkhalia who was represented in the marriage contract by Omer Ismail.
>
> Marriage witnesses: Abdel Rahmin Awad and Abdel Rahman Ahmed Ibrahim
>
> Dowry: SDG100.00
>
> The marriage contract was performed according to Islamic Rites in the presence of the above mentioned who are both familiar with the bridegroom and bride and that they are free from any legal restrictions that might prevent their marriage.
>
> Two copies of the marriage certificates were issued; one was handed to the bridegroom and the other to the bride."

21. In the alternative translation provided by Global Translations Limited, the marriage is described as having been conducted between Mohammad Hussein Amro Hamza from Al Kamleen Area and his virgin adult fiancé Asmaa Mhjoub Al Khalifah Abou Bakir by the proxy of Al Omar Sismail *etc*."

22. Notwithstanding these discrepancies, it is clear to the Court that the marriage in question took place according to the formalities of the Islamic rites of the Shari'ah and under Sudanese law. According to country of origin information submitted by DLCM on the 26th May, 2009, where the marriage ceremony is performed in the masjid, the female spouse is not permitted to enter, but is represented by a male representative (usually a relative) who transmits her consent which is witnessed by the named witnesses. That the absence of the bride on the actual ceremony is an invariable formality of an Islamic marriage in Sudan is claimed to be confirmed by a brief statement from Dr. Mudafar Al Tawash dated 19th May, 2009, administrator of the Islamic Foundation of Ireland: "This is to confirm that during marriage contract in Sudan, the bride is represented by male relations". (The same feature of an Islamic ceremony was noted by Barron J. in the South African marriage ceremony examined in the *Conlon* case mentioned below.)

23. In the second place, however, it is not necessary to make any definitive finding in this case on the question as to whether this particular marriage was by proxy as far as the second named applicant is concerned because, under Irish law, a proxy marriage lawfully concluded, according to the law of the locality in which it takes place, will be recognised as valid provided the parties had the capacity to contract it at the time and unless some factor of public policy applies to prevent or to relieve the State from recognising it. This is particularly so where both of the parties concerned were domiciled in the jurisdiction in which the marriage was solemnised so that no issue arises as to the absent party represented by the proxy having been domiciled in Ireland at the time. (This is presumably why the family reunification questionnaire which Dr. Hamza was required to complete contains the item: "Q.1. (m) Did your marriage take place by proxy (somebody else represented you in your absence at your marriage)?" (Dr. Hamza understandably answered that question on the negative)).

24. In the judgment of the Court, it is well settled, both as a matter of rules of conflicts of laws and of Irish law, that the manner in which consent to marry (as opposed to the fact of the consent) is given is a matter of form and the formal validity of a marriage is governed exclusively by the *lex loci celebrationis* – the law of the place in which the marriage is solemnised. In the leading case of *Sotto Mayor v. De Barros (No. 1)* 3PD1, 5 it was said:-

> *"The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted."*

25. In the case of *Berthiaune v. Dastous* [1930] A.C. 79, 83, there is the *dictum* frequently quoted in the textbooks:-

> "If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter where the proceedings or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses. If the so called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceedings is conducted in the place of the parties domicile would be considered a good marriage."

26. Although there does not appear to be any direct modern authority on the point in Irish law, there is implied authority to be found in the judgment of Barron J. in the case of *Conlon v Mohammed* [1987] ILRM 5623, and there does not appear to be any reason to conclude that Irish law differs from the common law application of the conflict rule as stated by the English courts in *Apt v. Apt* [1948] p. 83, 88, and followed by other courts in the cases cited on the point under the heading of Rule 67, of Dicey and Morris *"The Conflict of Laws"* (13th Ed. Chap. 17, at para. 17-011 and footnote 30). Furthermore, as stated in *Apt v. Apt,* a proxy marriage validly solemnised according to local foreign law will be treated as valid in England even if one of the parties is domiciled and resident in England and the power of attorney authorising the proxy has been executed in England. The transaction is not contrary to public policy and, in the words of the judgment: "the method of giving consent, as distinct from the fact of consent, is essentially a matter of the *lex loci celebrationis* and does not raise any question of capacity or . . . essential validity". As already mentioned both

applicants were domiciled and resident in Sudan at the date of the marriage and, according to the birth certificates, were both of full age at that date.

27. The marriage law issues of *Conlon v Mohammed* arose out of an ejectment proceeding in which the plaintiff was endeavouring to recover possession of a house she owned from the defendant. The defendant was claiming to be entitled to remain, upon the ground that it was a family home, because he was validly married to the plaintiff. The couple had married in South Africa in a religious ceremony performed according to Islamic rites in which the bride is not present but is represented by a male nominee. At the time, South African law prohibited an interracial marriage such as the one in question, so the issue was whether the ceremony could be recognised in Irish law as a common law marriage. It was held that it was not, but because it was potentially polygamous (neither party was at the time married to anyone else,) rather than because it was a proxy marriage.

28. Having examined a series of authorities Barron J. said:

> *"It seems to me to be clear from the principles established by these cases that the existence of a valid common law marriage must be determined by the nature of the ceremony and the intention of the parties in relation to that ceremony and not as to their belief as to its effect. Accordingly, the validity of their marriage is not affected by their belief that they could not be legally married in South Africa. … They intended to be bound by that ceremony and any mistake as to its effect would not alter its legal validity."*

He concluded the judgment, having described the religious ceremony and the bride's role in it*: "Since it is accepted that such a marriage is potentially polygamous, it follows that the essential ingredients of a common law marriage were not present. Accordingly the parties are not husband and wife according to the law of this jurisdiction."*

The essential validity of a marriage is determined by the prenuptial domicile of the parties and as the plaintiff bride in that case was domiciled in Ireland she lacked the capacity to contract a potentially polygamous marriage.

29. Although this finding as to the mistake of law in the primary reason given for the Minister's rejection of the application is sufficient to warrant the issue of an order *certiorari* to quash it, it is appropriate, in view of the representative nature of the case, to consider also the issue as to the correctness of the approach that has been taken to the application of the requirement in s. 18(3)(b) that the person the subject of the application is to be shown to be the spouse of the refugee in a marriage that is subsisting as of the date of the application. In effect, the approach evident both from the reason for the refusal and in the matters raised in the exchange of correspondence summarised earlier in this judgment, is that this condition is to be regarded as satisfied only where it is shown that the foreign marriage is recognised as valid in Irish law. This approach brings into play an area law of considerable complexity and uncertainty, due not only to the absence of a detailed judicial consideration of the conflict rules in this jurisdiction in modern times, but also to the historical, cultural, religious and legislative differences which influenced Irish law on these issues as compared with other common law jurisdictions during the 19th Century. (See, for example, the detailed examination of these issues in Binchy: *'Irish Conflicts of Law'* (1988) at chapters 10 and 11). In the judgment of the Court, it must be at least questionable whether the Oireachtas, in providing for family reunification of refugees in s. 18, intended that the recognition of their marital relationships should be dependent upon such arcane and uncertain rules. Clearly, it is inevitable that the circumstances which will give rise to applications under the section will frequently involve situations in which formal proof of a marriage ceremony will either be non-existent or impossible to obtain. Almost by definition, the refugee will be somebody who has been forced to flee from a country or region which is in the throes of war or civil strife and in which public or municipal administration may have broken down and records been destroyed.

30. It is to be noted, first, that s. 18(3)(b)(i) of the 1996 Act, does not require that the Minister be satisfied that the refugee and spouse be parties to a marriage which is recognisable as valid in Irish law, or that any particular documentary proof of the foreign ceremony be produced. It requires, merely, that the refugee and spouse are married and that the marriage is subsisting at the date of the application. It does not define the term "marriage".

31. Secondly, it appears reasonable to assume that s. 18 has been incorporated into the Act in the interests of facilitating the reception of refugees and ensuring their personal wellbeing while in the State. The legislation is not enacted in discharge of any binding obligation of international law because family reunification, as such, is not provided for in the Geneva Convention of 1951 or the 1967 Protocol and Ireland has not opted into the European Union legislation in this area, namely, Council Directive 2003/86/EC of 22nd September, 2003, on the right to family reunification (O.J.L. 251/12 of 3rd October, 2003) (see Recital 17).

32. The UNHCR, however, has, in various instruments, over many years, encouraged the Contracting States to recognise and respect the "essential right" of refugee families to unity and has encouraged them to facilitate its achievement (see, for example, the 'UNHCR Resettlement Handbook (Geneva, November 2004)'; the *'UNHCR Guidelines on Reunification of Refugee Families 1983' and the 'Conclusions of the UNHCR Executive Committee on Family Reunification of 21st October, 1981)'.*

33. The rationale of family reunification as an objective in this area is well expressed in Recital (4) to the Council Directive:

> *"Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty."*

34. Notwithstanding the non-binding nature of these sources, it is desirable in the view of the Court, that the provisions of s. 18 should be construed and applied so far as statutory interpretation permits in a manner which is consistent with these policies and with the consensus apparent among the Member States of the Union in the objectives of the Council Directive.

35. In this regard, it is notable that both the UNHCR in its guidance and the Union in the Council Directive effectively recognise the difficulties posed for refugee families in proving the fact or reality of a marriage, and both encourage a broad and pragmatic approach to such questions. Thus, the 1981 Conclusions of the UNHCR Executive Committee, referred to above, contain, at paragraphs 5 and 6:

> "5. It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.
>
> 6. When deciding on family reunification, the absence of documentary proof of a formal validity of a marriage or of the affiliation of children should, not, *per se*, be considered as an impediment."

36. The Council Directive, in Article 4.1, requires the participating Member States to authorise the entry and residence of immediate

family members, including the "sponsor's spouse", without defining the term "spouse". Article 4.3 provides that the participating Member States may authorise entry and residence of the sponsor's "unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable, long-term relationship . . ." Article 5.2 provides that when an application concerning an unmarried partner is examined, "Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof". Article 16.1 of the Directive, in listing the grounds upon which the participating Member States may reject or withdraw the residence permit of a family member, includes:

> *"Where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship."*

37. It is clear, accordingly, that the approach of the Directive towards the relationship between refugee (sponsor) and spouse is based upon the assessment of the reality of the conjugal relationship rather than upon the availability of formal verification of the legality of the marriage contract.

38. This corresponds closely with the approach recommended by the UNHCR which recognises relationships wider than that of legally married spouses. It recommends that reunification assistance be afforded to "couples who are actually engaged to be married, who have entered into a customary marriage or who have lived together as husband and wife for a substantial period" (*'UNHCR Guidelines on Reunification of Refugee Families, 1983'*).

39. In the judgment of the Court, in the absence of any contrary requirement imposed by the literal interpretation of s. 18(3)(b) of the Act, a purposive construction of the provision consistently with such authoritative guidance leads to the conclusion that the recognition of the marital relationship of spouse and refugee ought not to be confined to cases in which proof is forthcoming of a marriage validly solemnised in foreign law and recognisable in Irish law. A refugee who is able to demonstrate the existence of a subsisting and real marital relationship with the person the subject of the application is entitled to have the martial relationship recognised for the purposes of reunification under section 18 unless some reason of public policy intervenes to prevent its recognition. This will be particularly so in cases such as the present one where it can be demonstrated that the relationship has subsisted over many years; that the marriage has been consummated and it is not disputed that there are children of the relationship of whom the refugee is a parent. In the judgment of the Court, it is incumbent on the Minister, in such cases, to give due weight to those factors above all, notwithstanding deficiencies that may be apparent in formal documentary proofs of the ceremony.

40. There remains, however, one further issue which is relevant in the context of the present case, both because the marriage of the applicants was solemnised according to Islamic rites in an Islamic country, and because of the doubts and difficulties that arose out of the discrepancies in translations of the certificates of marriage and divorce in Sudan. This is the issue already mentioned in the context of the Conlon case above namely the public policy consideration in connection with foreign marriages under Irish law, which are either polygamous or potentially polygamous. The conflict rule to the effect that a state is not obliged to recognise a polygamous marriage as valid is, for example, reflected in Article 4.4 of the Council Directive which requires:

> "In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse."

41. An appeal by way of case stated was taken on the issue as to the correctness of the finding of Barron J. that the South African marriage was not recognisable as a valid common law marriage in this jurisdiction.

The judgment of the Court by Finlay C.J. contains the following observation:

> *"I am quite satisfied that the true position was that which apparently was accepted by the parties on the hearing in the High Court and that the Islamic marriage which took place in the Mosque was one which was potentially polygamous . . . It has not being contested that a polygamous marriage cannot be recognised in our law as a valid marriage."*

42. As already pointed out above, the plaintiff/bride in that case was at all times domiciled in Ireland and therefore lacked the essential capacity to validly contract a potentially polygamous foreign marriage. In the view of this Court, the observation of Finlay C.J. quoted above to the effect that a polygamous marriage can never be recognised, ought not to be taken as a *dictum* that a potentially polygamous marriage can never be recognised as valid in Irish law as a general proposition. He is there pointing out a) that the issues came before the High Court on the basis accepted by the parties that the marriage in question had been potentially polygamous and b) that the findings of fact were binding on the Supreme Court. In the judgment of this Court, the better view of the general conflict of laws issue is that a foreign marriage validly solemnised in accordance with the *lex loci* may be recognisable as valid in Irish law, even if it was potentially polygamous according to that law, provided neither party was domiciled in Ireland at the time and neither has also been married to a second spouse, either then or since. As pointed out by Binchy (Chapter 10, p. 213 above), there is older common law authority for the proposition that a marriage potentially polygamous when contracted remains polygamous, even though the husband does not, in fact, take a second wife (*Hyde v. Hyde, L.R. 1P and D 130* [1866]). Later authority in some common law jurisdictions, however, suggests that a marriage which was polygamous when contracted may be transformed into a monogamous one, particularly in circumstances where the parties to a marriage which is in fact monogamous, acquire a new domicile of choice in a country where polygamous marriage is not possible (see, in this regard, Rule 71, as stated by Dicey and Morris (above) and the cases cited in support of it at footnote 87 on p. 697 of the above edition) : *"A marriage which was polygamous at its inception, but is de facto monogamous may be converted into a monogamous marriage (1) where, through a change of, or in, personal law or the happening of some event, neither party any longer has the capacity to marry another spou*se, or (2) (perhaps) where the parties go through a monogamous ceremony of marriage."

43. As already stated, it is not necessary to decide this issue in the present case because the potentially polygamous character of an Islamic marriage celebrated in Sudan was not relied upon or considered by the Minister in the context of this application. Nevertheless, it is appropriate to mention the issue and the difficulties surrounding it because of the public policy impediment which it potentially raises for the Minister in reconsidering the application following the issue of *certiorari* and the fact that Dr. Hamza, having now been resident in Ireland for many years, may assert that he has no wife other than the second named applicant and has now acquired a domicile of choice in this State.

44. In the light of the foregoing, it is not necessary for the Court to resolve the difficulties and doubts that have arisen out of the discrepancies identified in the translations of the documentation submitted in relation to the first named applicant's previous marriage and divorce and his allegedly temporary divorce and then remarriage to the second named applicant. It is unnecessary to point out that the onus of establishing an entitlement to the benefit of s. 18(3) of the Act, at all times lay with the applicants. The first named applicant is to some extent the author of the difficulties and delay that have beset this application by the failure to make full disclosure of his entire marital history at the outset, and the somewhat questionable attempts to explain how some of the inaccuracies in the certificates had arisen and the further mistakes made in attempting to rectify them.

45. Having regard to the approach that the Court has indicated should be taken to the construction and application of s. 18(3)(a) namely, that a "spouse" should be taken as including the conjugal partner with whom the refugee can demonstrate the existence of a real and exclusive marital relationship over a period of time and which still subsists, it is clear that one of the important factors in the present case is that the Minister has accepted that the first named applicant is the father of the two children included in the family reunification application. If, on reconsideration of the application in the light of this judgment, the Minister can be satisfied, on acceptable alternative evidence, that the second named applicant is the mother of those children, the Minister would be entitled, in the view of the Court, to grant the application in respect of the second named applicant, provided he is also satisfied that the marriage has been and remains *de facto* a monogamous marriage and that the first named applicant has now acquired a domicile of choice in the State.

46. The Court will, accordingly, grant an order of *certiorari* quashing the refusal of the application contained in the letter of 6th April, 2009, and confirmed in the letter of 3rd July, 2009, for error of law, a) in the reason given namely, that the marriage was a proxy marriage and as such not valid in Irish law; and b) in applying a wrong test for the recognition of a subsisting marital relationship between the refugee and the "spouse" for the purpose of s.18(3) (b) (i) of the Refugee Act 1996.