Neutral Citation Number: [2011] IEHC 512

THE HIGH COURT

2011 1145 JR

BETWEEN/

RIZWANA ASLAM

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, GARDA NATIONAL

IMMIGRATION BUREAU, IRELAND

AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 29th December, 2011

1. The applicant is a Pakistani national who is currently over eight months pregnant. Her fiancée, Fakherr Udin, is the father of that (as yet unborn) child. He is also a Pakistani national who has been given asylum status in this State in 2008. If the child is born in Ireland, it will be entitled in these circumstances to claim Irish citizenship.

2. The couple are presently scheduled to get married in this State on 5th January, 2012, appropriate notice having been given for this purpose in accordance with the Civil Registration Act 2004. The parties also went through a form of Islamic marriage by proxy in Rabwah in Pakistan in February, 2011 and one of the issues which arises in these proceedings is whether this marriage should be regarded as valid by Irish law.

3. The applicant is an Ahmadi. The Ahmadis are followers of Mirza Ghulam Ahmad who towards the end of the 19th century proclaimed himself to be the "Reformer of the Age" and the Promised Messiah awaited by Muslims. Although this Ahmadiyya movement attracted many adherents in both present day Pakistan and India, Mirza Ghulam is regarded as an apostate by many Sunnis and Shia alike. This entire question of the authenticity of the Ahmadis as genuine Muslims is a matter of considerable controversy, not least within Pakistan. What is not in doubt but that the Ahmadis have suffered terribly for their beliefs within Pakistan itself, where they have been subjected to extensive persecution.

4. It is, however, important to recall the actual facts of Ms. Aslam's case. In her asylum application of 27th July, 2011, she claimed that she faced opposition (presumably from other Sunnis and Shia) to her teaching of her religious beliefs at in her house in a township in Lahore to mothers and their children. She claimed that she was subjected to death threats and that she determined to flee after two Ahmadi mosques were attacked in May, 2010.

5. It is not, however, disputed but that that application contained many untrue statements. Ms. Aslam denied that she had ever lived at another address other than the one provided in Lahore. She further denied that she had ever travelled outside her country of origin prior to her arrival in Ireland or that she had a visa to visit any other country. In fact, the true position is that - as she acknowledges herself through her own solicitor's affidavit - the applicant first secured a visa for the United Kingdom in May, 2008 and stayed there for four months. She obtained a further visa from the United Kingdom in May, 2009. This visa was issued by the British Embassy in Abu Dhabi (in the United Arab Emirates), which visa was valid for two years. According to her own solicitor, Ms. Trayers, she subsequently arrived in the United Kingdom on 19th October, 2010, and came to Ireland in February 2011, having arrived first in Belfast by ferry. She applied for asylum in mid to late July, 2011.

6. A further curious feature of the application form was that Ms. Aslam described herself as single. This may be technically correct as a matter of Irish law, but it is nevertheless surprising that the applicant did not disclose the fact that she had gone through a ceremony of Islamic marriage by proxy in Lahore that previous February.

7. Ms. Aslam has sought to explain these untruths by saying that she was terrified of being returned to Pakistan and being separated from her husband. When she realised that it would (or, at least, might be) necessary for her to marry Mr. Udin in this State by reason of the frailties associated with the Islamic marriage by proxy so far as legal recognition is concerned, she became concerned that the disclosure of the truth might jeopardise their right to carry out the proposed civil ceremony. She did not wish to apply for asylum in the United Kingdom, presumably because she felt that such an application would be regarded as being inconsistent with her having visa status for that State.

8. At all events, once the Irish authorities established the true position with regard to her visa status in the United Kingdom, contact was then made with the UK authorities who agreed on 30th August, 2011, to take charge of her application for asylum in accordance with Article 9(4) of Council Regulation (EC) No. 343/2003 ("the Dublin Regulation"). Ms. Aslam was informed of her right to appeal this decision, but this right was not exercised.

9. It could scarcely come as a surprise, therefore, that the Minister would elect to make a transfer order pursuant to Article 7 of the Refugee Act 1996 (Section 22) Order 2003 (S.I. No. 423 of 2003). In effect, the Minister had determined in accordance with the Dublin Regulation that it was more appropriate that Ms. Aslam should be transferred to the United Kingdom, as it was the place where she should most appropriately apply for asylum status given that she had resided there for some time prior to coming to Ireland and making a subsequent asylum application here.

10. Ms. Aslam was required to present to the Garda National Immigration Bureau at the end of September, 2011. When she did not do so, she was classified as an evader. She was subsequently arrested in Galway in the late afternoon of 29th November, 2011, pursuant

to the provisions of s. 5 of the Immigration Act 1999 (as amended). The Gardai first sought to convey her to the Dochas Centre, but in view of her advanced pregnancy and abdominal pain, Ms. Aslam was then transferred to the Rotunda Hospital where she was an in-patient for two days.

11. In the meantime, her legal team contacted me at my own private residence and sought an interim injunction restraining her removal from the State. I was confronted with a situation of which I had but imperfect knowledge, but in an endeavour to preserve the status quo until the full facts could be made known, I granted a stay on the transfer order in the early hours of the morning of 30th November until 2pm later that day. That stay has been continued from time to time by consent. The present application is now for leave to apply for judicial review, together with an interlocutory injunction restraining the implementation of the transfer order.

Article 7 of the Dublin Regulation

12. The proceedings as originally drafted invoked the terms of the Dublin Regulation only in the most general and unspecific fashion, although some allowance must be made for the fact that the application must have been prepared under circumstances of extreme urgency. (In fact, the references were actually to the Regulation's predecessor, the Dublin Convention.) The applicants now seek to rely on the terms of Article 7 of the Dublin Regulation, which provides:

> "Where the asylum seeker has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire."

13. If the applicant is entitled to rely on Article 7, then it follows that her application for asylum would have to be processed in Ireland and her transfer to the United Kingdom for that purpose would be invalid. This begs the question as to whether (i) Ms. Aslam's case properly falls as to substance within the scope of Article 7 and (ii) whether it is too late for Ms. Aslam to rely on the terms of that provision in order to impeach the validity of the transfer order.

14. Article 5 of the Dublin Regulations sets out the criteria governing the identification of the EU state responsible for processing the asylum application:

> "1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.
>
> 2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State."

15. The first of these criteria, Article 6, deals with unaccompanied minors. It has no application to this case. If, however, Article 7 applied to the present case, then it would clearly require that Ireland (rather than the United Kingdom) should deal with this case. This then raises the question of whether Ms. Aslam can claim to be a "family member" for the purposes of Article 7.

16. This phrase is defined by Article 2(i) in relevant part as follows:

> "'family members' means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:
>
> (i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens….."

17. Leaving aside for the moment the question of whether the Islamic marriage by proxy would be recognised as valid by Irish law, it is clear that the parties are obviously "unmarried partners in a stable relationship". So far as the other criterion is concerned - whether unmarried couples are treated in a way comparable to married couples under the law relating to aliens - it seems clear that Irish law *in this particular area* does differentiate between couples depending on whether they are married.

18. This is illustrated by s. 18(3)(b) of the Refugee Act 1996, which obliges the Minister to admit the spouse and minor children of any persons declared to be a refugee to the State. Critically, however, the spouse has to be the spouse of the applicant at the date of the asylum application itself. While the Minister is also empowered to admit other family members - such as parents and siblings - who are actually dependent on the refugee, s. 18(3) does not mention unmarried partners with whom the refugee is in a stable relationship.

19. This, however, does not quite dispose of the issue, since there remains for consideration the question of whether the Islamic marriage by proxy should be recognised as valid in this State. Ms. Azlam has exhibited a marriage certificate dated 5th April, 2011, which appears to show that the parties were married on 20th February, 2001, and that it was registered on 24th February, 2011. Ideally, the certificate would have been notarised by a Pakistani lawyer and the appropriate affidavit of law sworn. The absence of such an affidavit presents considerable difficulties with the interpretation of these documents.

20. The certificate nevertheless presents some unusual features. The address of the applicant herself is given as that of her former address in Lahore, yet at the time it is known that she was resident in either the United Kingdom or Ireland. Ms. Azlam avers in her affidavit that the marriage became "official on 18th February, 2011", but the certificate itself says that the marriage took place on 20th February, 2011.

21. The marriage was, moreover, celebrated by proxy. The proxy (or "Nikah") form was completed on 28th January, 2011, so far as Ms. Azlam is concerned by two witnesses who themselves gave addresses in Lahore. The form recites that the bride (Ms. Azlam) "has expressed her consent to this NIKAH in our presence and has also signed the form in our presence." It is, of course, quite possible that Ms. Azlam completed the Nikah in the presence of the two witnesses in the UK and that the two witnesses then took the Nikah form back with them to Lahore where they reside, but none of this was explained.

22. Judged by the standards of Irish law, this procedure seems quite unorthodox and susceptible of abuse. Marriage by proxy is nevertheless a deep seated feature of the Islamic tradition and our conflict of law rules should be open-minded, tolerant, flexible and accommodating of different legal cultures and traditions. This, after all, as O'Donnell J. noted in his seminal judgment in *Nottinghamshire C.C. v. B.* [2011] IESC 48, is what Article 29.1 of the Constitution - with its commitment to "friendly cooperation amongst nations founded on international justice and morality" - simply requires. While that case concerned child abduction and the Hague Convention, the following comments of O'Donnell J. have a resonance and significance for the present case as well so far as marriage recognition rules in the context of asylum and immigration are concerned: -

"It is conceivable, at least in theory, that any particular state at any particular time might have so ideological or fundamentalist a view, or be so self-absorbed or self-confident, or indeed simply so powerful, as to insist that it would, through its legal system only deal with those countries who conformed to its precise standards. ….

It seems plain however, that the Irish Constitution does not demand the imposition of Irish constitutional standards upon other countries or require that those countries adopt our standards as a price for interaction with us. First and most obviously, the Constitution simply does not say so. Indeed, it might be expected that such a sensitive issue would be dealt with if that was the intention of the drafters and thus The People who adopted the Constitution. Furthermore, the historical context in which the Constitution was introduced was one in which international relationships were to the forefront of public concerns.

Article 29 of the new Constitution addressed the position Ireland was to take in its international relations. This in itself was a significant departure from the 1922 Constitution and a conscious attempt to assert nationhood. The significance of this Article, particularly in its historical context, was explored by Mr. Justice Barrington in his Thomas Davis lecture, *The North and the Constitution*. As he points out, it is of some significance that Mr.deValera was the President of the League of Nations in 1936 when the Constitution was being drafted. Indeed it appears that some of the values of the Covenant of the League of Nations were reflected in the Constitution and in particular in Article 29. The Article affirmed Ireland's devotion to the "The ideal of …. friendly cooperation amongst nations". In one sense accession to the Hague Convention [on Child Abduction] can be seen as a particular example of such cooperation. Such cooperation necessarily encompasses recognition of differences between states and the manner in which they approach the organisation of their societies. This together with the Constitution's recognition of the territorial boundaries of the State and the reach of its laws are important parts of the Constitution to which regard must be had when it is contended that the return of a child in another contracting state is not permitted by the Constitution. This is why in my judgment the Constitution requires the Courts to refuse return only when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the Court, that the Court would be justified, and indeed required, to refuse return."

23. This view was also prefigured by the judgment of Cooke J. in *Hamza v. Minister for Justice, Equality and Law Reform* [2010] IEHC 427 where, dealing with the question of the validity under Irish law of an Islamic marriage by proxy in Sudan, he observed that:-

"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."

24. While not at all of these principles apply with full force in the present case, our conflicts rules should be sufficiently accommodating of different religious and cultural traditions such that an Islamic marriage by proxy should be capable of recognition. This, as Cooke J. noted in *Hamza,* is particularly true in the context of family unification in the context of s. 18 of the 1996 Act:-

"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.

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".

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).

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)'*.

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."

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.

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:

> '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.'

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.

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.'*

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.

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*').

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."

25. This approach seems especially apt for application in the context of the treatment of what is regarded by Irish law as a "spouse" for the purposes of Article 7. While it is true that Article 7 defers to the local law of each Member State to resolve this question, it would not be appropriate that this question should be determined by the abstract application of quasi-mathematical conflict of laws rules.

26. There are undoubtedly issues here regarding compliance with the *lex loci celebrationis* and, indeed, the domicile of Mr. Uddin and, perhaps, even Ms. Aslam. Viewed, moreover, from the perspective of traditional conflicts rules, there is insufficient evidence of whether the requirements of local law were actually satisfied and whether, indeed, the marriage certificate tendered should be regarded as valid. Yet, I can nonetheless take judicial notice of the essentials of the Islamic marriage ceremony, the details of which were in any event set out by Cooke J. in *Hamza* by reference to both country of origin information and evidence from Islamic scholars. This suggests that the essentials of the marriage ceremony were complied with, both for the purposes of Islamic law, and, by extension, the law of Pakistan.

27. Judged by these standards and the flexible application of the conflicts rules in this context which I have advocated, I consider that Ms. Aslam should be regarded as being married to Mr. Uddin, at least for the purposes of the application of Article 7 of the Dublin Regulation.

The applicant's own conduct

28. If, however, the Minister had been aware of these facts, then it follows that, as a matter of law, she had the right to insist that her asylum application should have been dealt with in this jurisdiction in accordance with Article 7 by virtue of her marriage to a recognised asylum seeker. This right was not, however, an absolute right. As the language of Article 7 makes clear, it was conditional on her choosing to exercise that right at the appropriate time and place.

29. Yet, none of these facts relating to the marriage were ever disclosed to the Minister at the relevant time. As we have already noted, in her asylum application she insisted as late as July 2011 that she was single. The Minister cannot, therefore, be faulted for dealing with her on that basis. Even when the initial transfer order had been communicated to her and her right to appeal explained to her, she failed to avail of that right. Nor was the Minister ever informed prior to her arrest that she was pregnant by her fiancée.

30. In these circumstances, it seems to me that it is now too late for her to exercise her Article 7 rights. She elected to have her asylum application dealt with on the basis that she was single and unmarried. Now that this application has been dealt with in accordance with the facts as disclosed by her, she cannot be heard to complain that she should have been dealt with on the basis that she was married.

31. It is, of course, a long standing legal principle that a person may by their own conduct forfeit legal rights which they might otherwise have been able to assert. Thus, for example, in *The State (Byrne) v. Frawley* [1978] I.R. 326 the Supreme Court held that an applicant who knowingly allowed his unconstitutionally empanelled jury to proceed was later debarred by his won conduct from asserting that he had been convicted on an unconstitutional basis. The same principle applies here.

The applicant's medical condition
32. It remains to say something about the applicant's own medical condition. Of course, I am very mindful of the fact that the applicant is heavily pregnant and that it is appropriate that she be treated with particular care and in a dignified and a humanitarian fashion. It is important to stress here that it is proposed to remove her by ferry to the United Kingdom. It is by common consent too late in the pregnancy to transfer her by air. There is absolutely no question of the Minister transferring her to Pakistan.

33. The State is nonetheless constitutionally obliged to protect the "person" of Ms. Aslam (Article 40.3.2) and, of course, to take steps to safeguard her unborn child (Article 40.3.3). These constitutional obligations mean that the State cannot take any steps such as would unnecessarily jeopardise or compromise the life or health of either Ms. Aslam or her unborn child. In this respect, it is to be naturally assumed that the Minister will see to it that Ms. Aslam is medically examined by an appropriate independent specialist and that she will only be transferred in circumstances where it is considered medically appropriate to do so.

34. But matters do not stop there. These constitutional obligations must be interpreted in a fashion which ensures that, in the words of the Preamble, the "dignity…of the individual must be assured." One cannot therefore readily countenance the mandatory transfer of a heavily pregnant woman by sea, not least during winter conditions, with the prospect of gales and turbulent marine conditions. This would represent a potential test of endurance which no heavily pregnant woman should ever be obliged by State action to face, irrespective of whether she told untruths in the course of an asylum application. There would also be the prospect of the early commencement of labour (or even an early delivery) while at sea, perhaps brought on by turbulent conditions.

35. This conclusion is also consistent with the obligations imposed by Article 1 of the EU Charter of Fundamental Rights which applies in this situation: see generally Case 411/00 *NS v. Home Secretary* [2011] ECR I-000, paras. 64-69.

Conclusions
36. In these circumstances, I propose to grant the applicant an interlocutory injunction restraining her transfer by either sea or by air to the United Kingdom. I will not, however, restrain the Minister from transferring her by road to Northern Ireland under Article 7 of the Dublin Regulation on the understanding that she will not be removed from the island of Ireland pending the delivery of the child.