Neutral Citation Number: [2011] IEHC 415

The High Court

Appeal from the Circuit Court

FAMILY COURT

2010 19 CAF

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

D. M.

APPLICANT

AND

C. F.

RESPONDENT

AND

THE ATTORNEY GENERAL

NOTICE PARTY / APPELLANT

JUDGMENT of Ms. Justice Clark delivered on the 27th day of May, 2011.

1. This matter comes before the Court as an appeal from a decision of the Circuit Family Court made on 15th February, 2010, granting (i) a declaration pursuant to s. 29(1)(a) of the Family Law Act 1995 that the applicant's marriage to the respondent in the district area of G, Zimbabwe on 25th April, 1998, was at its inception a valid marriage; and (ii) a declaration pursuant to s. 29(1)(b) of the Family of Law Act 1995 that the said marriage is a subsisting marriage on the date of the decision. The appellant is the Attorney General who, by notice of appeal dated 23rd February, 2010, appealed the entire of the judgment of the learned Judge Nolan and argues that a traditional marriage which allows for the possibility of polygamy cannot be recognised as a valid marriage known to Irish law.

2. The background to this case is as follows. The applicant, DM, is a national of Zimbabwe. He arrived in Ireland on 28th September, 2006, as an asylum seeker. As is mandatory in applications for refugee status, he filled in a preliminary form and then a detailed questionnaire and was interviewed by an officer of the Office of the Refugee Applications Commissioner ("the Commissioner"). At all stages he claimed that he was married to the respondent, Ms. CF and had two daughters of this marriage. His marriage was stated to be a customary marriage in Zimbabwe.

3. His claim for asylum was initially refused but was successful on appeal before the Refugee Appeals Tribunal. On 18th June, 2007, he received a letter from the Minister for Justice, Equality and Law Reform stating that he had been declared a refugee. A standard form letter issued informing the applicant of such declaration and enclosing a notice of rights for refugees which included the following:-

> *"You may apply to the Minister for permission to be granted to a member of your family to enter and reside in the State, in accordance with s. 18 of the Refugee Act, 1996 (as amended). If you wish to do this you should contact the Department of Justice, Equality and Law Reform, Immigration Section, 13/14, Burgh Quay, Dublin, 2."*

In November 2007, five months after receiving notification that he had been granted refugee status, the applicant applied under s. 18 of the Refugee Act 1996 to have his wife and children join him in the State.

How is Family Reunification Effected?

4. Under s. 18 of the Refugee Act 1996 a person declared a refugee is entitled to apply to the Minister to permit his/her family members to enter and reside with him/her in Ireland. Once such an application is made, the Minister must cause the matter to be referred to the Commissioner whose function is to investigate the application for family reunification and then submit a written report to the Minister, setting out the relationship between the refugee and the person who is the subject of the application and his/her domestic circumstances. If, having considered the report of the Commissioner, the Minister is satisfied that the persons mentioned in the application are indeed members of the refugee's family, the Minister *must* grant the permission sought. A "member of the family" of the refugee means:

> (i) in case the refugee is married, his/her spouse (provided that the marriage is subsisting on the date of the refugee's application for family reunification under s. 18(1)),
>
> (ii) in case the refugee is, on the date of the application for family reunification, under the age of 18 years and is not married, his/her parents, or
>
> (iii) a child of the refugee who, on the date of the refugee's application for family reunification under s. 18(1), is under the age of 18 years and is not married.

5. A refugee who seeks family reunification is required to submit documentation establishing the identity of the family members and

proving their relationship to him/ her by furnishing original birth and marriage certificates and national identity cards or passports, where those documents are relevant and available. The refugee must also provide evidence of his/her own financial and domestic circumstances in Ireland.

6. Once the examination is complete, the Commissioner prepares a report for the family reunification section within the Department for Justice, which considers the report in due course. At that stage, it may request the refugee to supply additional documentation or to address outstanding issues. Once the decision is reached, the family reunification section notifies the refugee in writing.

The Applicant's Application for Family Reunification
7. The Court was not furnished with the Commissioner's report. The correspondence furnished emanates from the family reunification section of the Department which requested the applicant to furnish further specific information on his marriage. In particular, in a letter dated 1st April, 2008, the authorised officer of the family reunification section who was dealing with his application wrote stating:-

> *"I note that you were married under the laws of customary marriages in a traditional ceremony that took place on 25th April, 1998 in your native country. As proof that the marriage complied with all the legal requirements for marriages in Zimbabwe please submit a letter from the headman of your native village confirming;*
>
> *(1) the event;*
>
> *(2) where and when the marriage took place;*
>
> *(3) who performed the ceremony; and*
>
> *(4) who the witnesses were.*
>
> *Please have the authenticity of this letter confirmed by having it authenticated at High local court in your country."*

This letter suggests an awareness of the requirements for a valid customary marriage in Zimbabwe as it seeks very specific information that the marriage complied with all the legal requirements for such marriages in Zimbabwe.

8. In accordance with this request, the applicant then sought and obtained a handwritten letter from the headman of his local community which confirmed that the customary marriage which took place on 25th April, 1998, at the homestead of TF, was in his area. The letter gave the date of birth of both parties and indicated that the bride price had been paid fully to the family of the bride. The letter also identified the "go-between" for the two families and listed the witnesses to the ceremony. The headman stated that each of the parties had agreed to take each other as spouses until death did them part and he further stated that this was a recognised marriage under the customary marriage laws of Zimbabwe and that the applicant and the respondent are by law recognised as husband and wife.

9. The authorised officer in the family reunification section of the Department acknowledged receipt of the letter and the envelope addressed to the applicant as proof of postage. A few days later the same authorised officer wrote stating that:-

> *"This letter does not appear to have been authenticated by a high local court office in Zimbabwe, there remains doubts as to the validity of your marriage. In this regard it is open to you to seek a declaration from the Irish courts under s. 29 of the Family Law Act, 1995 to the effect that the marriage in question is entitled to recognition in this jurisdiction. You can arrange this through a solicitor."*

No effort was made to identify what doubts remained as to the validity of the marriage or how such doubts could be clarified or mended by the applicant nor was it established how any deficits in the information provided by the headman (if any) could be resolved by the Irish courts. The extremely opaque contents of the letter did not invite the applicant to have the headman's letter authenticated by a "*high local court office in Zimbabwe."*

10. The applicant then obtained a second letter from the local headman that was certified by the provincial magistrate's office. No response was forthcoming until late 2008 when the applicant's solicitor threatened to apply to the Court for an order directing the Minister to make a decision on the application for family reunification of Mr. M's wife. This letter received a response dated the 24th February, 2009, stating the following:-

> *"I am directed by the Minister for Justice, Equality and Law Reform to refer to the above application for family reunification.*

Following consideration of the application under s. 18(3) of the Refugee Act 1996, the above application has been refused. CF does not quality as 'a member of the family' under s. 18(3)(b) of the Refugee Act 1996 as the marriage was a customary one it does not appear to be valid under Irish law."

11. The applicant was informed that there was no provision for the appeal of a decision in the case of a family reunification application under s. 18 of the Refugee Act 1996. The letter stated that it was open to him "*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*" and that the section would review the application should such a declaration be granted.

12. Again no explanation was given as to how the Minister's objection as to the customary nature of the marriage could be cured by an application to the Irish Circuit Court under s. 29 of the Family Law Act 1995. No explanation was furnished as to the change of direction in the inquiry mandated by s. 18 of the Refugee Act 1996 nor was there any clarification as to how the initial investigation into whether the parties were spouses under the customary law of Zimbabwe had progressed to a blanket refusal to recognise the wife's status because the marriage was a customary marriage. This issue was left hanging. The only solace offered, as to how family reunification might possibly be achieved, apparently lay in an application to the Circuit Court under s. 29 of the Family Law Act 1995, with no guarantee that the Minister would do any more than possibly review his earlier decision.

13. It should be said that the applicant's two daughters then aged eleven and seven, were granted permission to join their father in this country and have been here without their mother for more than three years. Their status as his children was accepted without question and there has never been any suggestion that the respondent is not their mother. The applicant's solicitors therefore felt

that their only option for family reunification was for their client to follow the invitation to pursue this particular course of action in the Circuit Court and they sought to establish the marriage in that way.

14. As outlined above, a refugee is entitled as of right to be joined by members of his/her family. The identity of those family members entitled to join the refugee is circumscribed by statute. It can often be very difficult for a refugee to obtain documentary proof of his/her relationship with a spouse or dependent. While the lack of marriage and birth certificates in certain failed states does pose problems and can give rise to suspicion, those problems can, insofar as children are concerned, very often be determined by DNA testing of the alleged parents and their children, although such testing can prove costly for the refugee. Mr. M was never asked to provide DNA evidence to establish that his daughters are also the daughters of CF. He was refused family reunification with his wife because his marriage was a customary law marriage.

15. As there is no statutory right of appeal from a refusal of family reunification, it is vital that the investigative role of the Commissioner is conducted with care, compassion and vigour to ensure that a refugee who has fled his/her country, leaving his/her family behind, is reunited as soon as is practicable with the members of his/her family. The Court is profoundly disturbed by the apparent insensitivity in this particular instance to the pain of separation of the two young girls from their mother and that of the applicant from his wife of thirteen years. The Commissioner has the statutory obligation and the resources to investigate applications for family reunification and to obtain information on the law relating to marriage in the relevant country of origin. The relevant law determining the validity of the refugee's marriage is that of the country where the refugee was domiciled before his/her flight and these are the matters within the competence of the Commissioner to investigate and determine. Nowhere is it stated in the Refugee Act 1996 that the status of spouse is recognised only if the marriage is recognised as such in Irish law.

16. It is therefore not at all clear how the practice arose of determining whether a claimed family member is the refugee's spouse by referring the validity of his marriage to the Circuit Court, thus depriving the Commissioner of this necessary inquiry. The Irish Naturalisation and Immigration Service (INIS) website contains the following advice:-

> *"If your marriage falls under one of the following categories; proxy marriages, traditional marriages, customary marriages and/or religious marriages then it may not be recognised under Irish Law.*
>
> *If you have concerns in relation to the recognition of your marriage under Irish Law, it is open to you to seek a declaration from the Irish courts under Section 29 of the Family Law Act, 1995, that the marriage in question is a valid marriage. It may be beneficial for you to obtain the declaration at your earliest opportunity."*

The Application to the Circuit Court

17. The procedure before the Circuit Court involved the applicant setting out facts asserting the existence and validity of his marriage which took place in Zimbabwe in April, 1998, where he and the respondent were domiciled. The respondent, who continues to live in Zimbabwe, did not enter an appearance. As both the applicant and the respondent were hoping to achieve the same end, that of family reunification, the proceedings suggest an element of contrivance and even farce. So bizarre was the procedure utilised that an application was then brought to enter judgment in default of appearance against the respondent. However, the Attorney General, who was the notice party, opposed the granting of a declaration of validity of the asserted marriage on the basis that the marriage was potentially polygamous and therefore could not be a valid marriage under Irish law.

18. Against this background, the learned Circuit Court judge heard oral testimony from the applicant and received a number of documents into evidence. He heard that the marriage was conducted on 25th April, 1998, in accordance with the formalities for a valid customary marriage in Zimbabwe and that the parties complied with the national legal requirements for capacity to marry in that they were of the appropriate age, their families had consented to the union and the witnesses to the ceremony were listed. The local headman was informed that the marriage was to take place and in a handwritten document he outlined the facts of the ceremony and affirmed its validity. The letter from the headman was authenticated and stamped by a magistrate in Zimbabwe. A certificate of compliance with local law was furnished by a Zimbabwean barrister asserting expertise in family law. The Zimbabwean Ambassador to the U.K. also furnished two letters outlining the three types of marriage recognised by the laws of Zimbabwe and confirming that a customary law marriage is recognised and legally binding in Zimbabwe.

19. The Attorney General's counsel objected to the validity of the marriage on the basis that customary marriages are potentially polygamous and therefore cannot be recognised in this jurisdiction. The Circuit Court declared that the marriage was valid at its inception and was a subsisting marriage on the date of the s. 29 application. It is from this decision that the Attorney General has appealed.

This Appeal

20. The applicant gave sworn testimony of the marriage ceremony before this Court that he went through a customary law marriage with his wife in the presence of the inhabitants of their village and the members of both families. The applicant explained that although both he and his wife are Christians, they chose to respect their families' beliefs by engaging in a traditional customary law marriage in their village in accordance with Shona traditions. Neither he nor his wife was previously married nor did he as a Christian intend to take another spouse. They could as other Christian couples do, have a second Christian ceremony but they found the cost of two marriage celebrations beyond their means. Mr. M explained local custom which forbids direct contact between a suitor and the family of the bride. A go-between is engaged to negotiate terms satisfactory to both families and to seek agreement on the bride price. If the terms of the marriage are agreed, the headman is notified of the date of the event and the particulars of the parties, the bride price and the terms. The marriage then becomes a public event at which all the villagers attend. He explained that while he was entitled to take a second wife under customary law he had never considered doing so then or now. He seemed genuinely perplexed that his marriage of fourteen years was refused recognition on the grounds that it was potentially polygamous while if he had married the same spouse in accordance with Christian rites and complying with the same rules as to capacity; his marriage would have been considered monogamous and therefore valid.

21. The Applicant further described how following his declaration as a refugee, he first obtained a job in catering with a semi-state institution and found a home before applying for family reunification. The documents exhibited in his grounding affidavit include correspondence with the family reunification unit. As mentioned previously, this correspondence demonstrates the difficulties he encountered in trying to meet the unusually terse and cryptically expressed requirements of the agent in this unit. He was not assisted by the Commissioner or by any of the Minister's agents in addressing any deficiencies in the documents originally sought nor indeed was he ever informed during the purported investigation of his marriage that the certificate from the headman, the authentication of his certificate or the opinion on Zimbabwean Law would serve no purpose to establish his customary law marriage. It begs the question why he was asked to furnish these documents when the marriage was viewed by the unit as potentially

polygamous and for that reason would not be recognised in Irish domestic law. The reason stated for refusal was "*as the marriage was a customary one it does not appear to be valid under Irish law*".

Decision

22. This decision does not engage in the question of the recognition of a potentially polygamous marriage contracted abroad by parties who are resident or domiciled in Ireland. That is not the issue to be determined. The decision of *Conlon v. Mohamed* [1987] I.L.R.M. 172 and [1989] I.L.R.M. 523 relied upon by the Attorney General as a recent authority on the treatment of potentially polygamous marriages in this jurisdiction, is not of relevance as it did not address or consider the issue of family reunification. The parties to this case are not seeking matrimonial relief, as occurred in *Conlon* where one of the parties disputed that they were married at all. That dispute required resolution and was the primary issue before the Court. The arguments were addressed to whether a particular ceremony conducted in a hotel in South Africa involving the exchange of rings and wedding vows in the presence of witnesses and which followed an Islamic marriage conducted earlier that day, was a valid common law marriage entitling one of the parties to invoke the protection of the Family Home Protection Act 1976. The parties were an Irish citizen and a South African citizen who were both residing in Ireland. The "marriage" was an inter-racial one, prohibited in South Africa at the time by the then Apartheid laws. It was contended that because the parties were unable to contract a valid marriage in South Africa that they could rely on the concept of a common law marriage which was provided by the second ceremony in the hotel.

23. The decision was, first, that the second ceremony was not a marriage ceremony and, secondly, that the Islamic ceremony created a valid marriage in accordance with Islamic rites even though neither party believed that they could be legally married in South Africa. Barron J. held that because of the potentially polygamous nature of an Islamic marriage, the essential ingredients of a common law marriage were not met and the parties were not husband and wife according to the laws of this jurisdiction. The decision was not that an Islamic marriage could not be a valid marriage in Ireland for all purposes. In the course of answering a case stated by Barron J. to the Supreme Court, Finlay C.J. made an *obiter* remark to the effect that "*it has not been contested that a polygamous marriage cannot be recognised in our law as a valid marriage*". This comment appears to have been somewhat misinterpreted and taken out of context as this was not the issue which was being determined by the Supreme Court. The Chief Justice specifically stated that no view was expressed on the precise standing and limits of a common law marriage in our law or of the proper principles to be applied in our law to the question of the validity of a marriage contracted outside Ireland by a person domiciled in Ireland, having regard to the *lex loci celebrationis.* he expressly stated that the Court was not called upon to consider those questions nor did they deal with questions of public policy which would arise concerning the prohibition under local law of inter-racial marriages as none of these issues had been raised by the High Court.

24. This Court therefore refrains from either considering or engaging with the undoubted prohibition in Irish law of a polygamous marriage or the more problematic issue of a potentially polygamous marriage. It simply does not need to consider what is settled law on polygamy or law which has no relevance to the only issue in this appeal which is the recognition of the applicant's marriage which was, according to the uncontroverted evidence adduced, a valid marriage in the country of his domicile.

25. A great deal of interesting U.K. law on the recognition of potentially polygamous marriages was opened to this Court and discussed at length, but no law on such marriages in the context of family reunification and refugees was opened to the Court. The cases opened including *Hyde v. Hyde* (1886) L.R. 1 P. & D. 130, *Cheni v. Cheni* [1965] P. 85; *Mehta v. Mehta* [1945] 2 All E.R. 690; *Baindail v. Baindail* [1946] 1 P. 122; *Ali v. Ali* [1968] P. 564;, *Mark v. Mark* [2006] 1 A.C. 98. When those cases are examined it is readily seen that they and more, all involve the attempt by one or both of the parties to seek rights and remedies or declarations of status under U.K. matrimonial or inheritance law. None of the cases in any instance involve issues relating to the reunification of the family of a refugee nor do they involve the recognition of a marriage per se but rather the right of the parties to seek relief under English law. While of interest and undoubted force, they are of little assistance in determining the issue before this Court. This appeal involves the recognition of the marriage conducted according to the law of the common domicile of the applicant and the respondent, neither of whom are seeking any matrimonial relief under Irish law. It may very well be that Irish domestic law, which is grounded in the monogamous union of a man and woman, would be entirely inadequate to deal with Irish family law relief for parties to a customary law Zimbabwean marriage, although it is easy to overstate those difficulties when the union is *de facto* monogamous.

26. It appears to this Court that were the recognition of the marriages of refugees to be confined to the definition of marriage defined by Lord Penzance in *Hyde v. Hyde* (cited above) as being "*recognised… throughout Christendom*" as "*the voluntary union for life of one man and one woman, to the exclusion of all others*", this would inevitably lead to the exclusion from recognition of all marriages carried out in accordance with Islamic and traditional African marriage rites because of their potentially polygamous nature. If those rules were followed, then no refugee married lawfully in his/her country of origin in accordance with customary or Islamic law could avail of his/her statutory right, subject to *ordre publique* considerations, to be joined by his/her spouse. This cannot be the correct approach.

27. It seems to this Court that the applicable principles for the recognition of a refugee's marriage for family reunification purposes are found in private international law and not in s. 29 of the Family Law Act 1995 or other Irish legislation or the Constitution. In accordance with the most basic principles of private international law, marriages are recognised where the parties to the marriage had the capacity to enter the marriage under their respective *lex domicilii* and the marriage complies with the formalities required under the *lex loci celebrationis.*

28. Private international law was recognised by Kingsmill Moore J. as part of our law when reviewing existing case law on the slightly different but analogous issue of the recognition of foreign divorces at a time when there was a constitutional prohibition on the grant of the dissolution of marriage in this jurisdiction. His minority decision in *Mayo-Perrott v. Mayo-Perrott* [1958] I.R. 336 has in later judgments been followed as representing the correct position applicable to the recognition of lawful divorce decrees of the courts of other jurisdictions. Kingsmill Moore J.'s determination resonates with common sense and sound jurisprudence. He found (at pp. 345 to 346) that:-

> *"An entirely different question is the recognition which will be afforded by our Courts to the decrees of dissolution of marriage granted by foreign Courts to persons domiciled within the jurisdiction of those Courts. The law both of England and Ireland recognised, at least up to the adoption of our present constitution, the validity of the change of status effected by such decrees. The law is stated by Lord Watson in Le Mesurier v. Le Mesurier [1895] A.C. 517 at p. 540. 'Their lordships have . . . come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage'.*
>
> *They concur, without reservation, in the views expressed by Lord Penzance in Wilson v. Wilson L.R. 2 P. & D. 435 at p. 442, which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce. 'It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their*

matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.'"

He continued (at p. 349):-

> *"…that it is highly unlikely that the Constitution intended, without clear words, to reverse what is a practically universal rule of private international law, and to produce a state of affairs which was stigmatised by Lord Penzance and Lord Watson in the words already quoted, words which were also adopted by Warren P. in Sinclair v. Sinclair [1896] 1 I.R. 603. I cannot find anything in Article 41,3, to suggest that the Courts (in the absence of further legislation) are entitled to do otherwise than regard as valid and effectual a divorce a vinculo granted by the Courts of a foreign country, where the parties at the time of the suit were domiciled in that country."*

29. Apart from the principles on the conflicts of laws, another perfectly valid reason why the courts of England and Wales and other common law jurisdictions have been reluctant to permit parties whose marriages are potentially or actually polygamous to seek matrimonial reliefs in English Courts was identified by Lord Justice Greene M.R. *in Baindail (otherwise Lawson) v. Baindail* [1946] 1 P. 122 at 125:-

> *"For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage it has always been accepted as the case, following Lord Penzance's decision, that the courts of this country exercising jurisdiction in matrimonial affairs do not and cannot give effect to, or dissolve, marriages which are not monogamous marriages. […] The reasons are that the powers conferred on the courts for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union."*

30. As Lord Justice Greene M.R. was at pains to point out, when relief was denied, as had occurred in a number of cases including in *Hyde* and the many decisions which followed afterwards, all that was intended to be decided was that the parties were not entitled to the remedies and reliefs of the matrimonial law of England and not that the marriages were not valid marriages.

31. Similar issues to those before this Court were considered by Cooke J. in the two recent cases of *Hassan & Anor. v. M.J.E.L.R.* [2010] IEHC 426 and *Hamza & Anor. v. M.J.E.L.R.* [2010] IEHC 427, both of which were delivered on 25th November, 2010. The Minister's practice of refusing to accept that a spouse is entitled to family reunification if the marriage is not a marriage recognised under Irish law was challenged in those cases, where in both instances the Minister had suggested the option, entirely at the applicant refugee's expense, of referring the question of the validity of the applicant's marriage to the Circuit Court under s. 29 of the Family Law Act 1995.

32. Cooke J. granted judicial review for other reasons and quashed in both instances the decision of the Minister refusing family reunification. The suggestion that the appropriate venue for determining the validity of the marriages was the Circuit Court by means of a s. 29 declaration was treated as inappropriate. Cooke J. at para. 15 in *Hamza* stated:-

> *"... 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."*

33. *Hamza* also raised issues as to the recognition of marriages conducted in accordance with the *lex loci celebrationis.* The recognition of marriage celebrated in the state of the parties' common domicile is viewed in a manner which respects the laws and customs of other jurisdictions, unless public policy holds against such recognition. At paragraph 18 of *Hamza*, Cooke J. cited with approval the U.S. rule:-

> *"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))"*

34. Dunne J. came to identical conclusions In *H.A.H. v. S.A.A.* [2010] IEHC 497, (Unreported, High Court, Dunne J., 4th November, 2010), delivered only weeks before *Hamza* and *Hassan*. Although the application before the Court in that case was also related to a declaration pursuant to s. 29 of the Family Law Act 1995, Dunne J. held the validity of the marriage which had been contracted in the Lebanon had to be considered having regard to the principles of conflicts of law rules.

35. This Court is firmly of the view that reference to the Circuit Court to determine the validity of a refugee's marriage according to Irish law and Irish constitutional principles is misconceived and gives rise to unnecessary delay in family reunification while the Circuit Court seeks to grapple with the complications associated with proxy marriages, traditional marriages, customary marriages and/or religious marriages and the differences between potentially polygamous marriages and actually polygamous marriages. Section 29 of the Family Law Act 1995, which applies Irish law, is appropriate to the determination of matrimonial status and access to relief under inheritance law, judicial separation, divorce or nullity. It is not, however, relevant to determining for the purposes of s. 18 of the Refugee Act 1996 the validity of a marriage celebrated according to the legal requirements and rites in a refugee's country of origin.

36. Family reunification should mean just that: the refugee is entitled to be reunited with his closest family, being the children and the parent of those children, and should be facilitated in achieving that entitlement. The Commissioner's role is to investigate the familial or blood ties and report to the Minister. Establishing that a person is a refugee's spouse for the purposes of a family reunification application is not the equivalent of establishing lawful marital status for the purposes of the Family Law Act 1995, the long title to which describes it as:-

> *"An Act to make further provision in relation to the jurisdiction of the courts to make preliminary and ancillary orders in or after proceedings for judicial separation, to enable such orders to be made in certain cases where marriages are dissolved, or as respects which the spouses become judicially separated, under the law of another state, to make further provision in relation to maintenance under the Family Law (Maintenance of Spouses and Children) Act, 1976, and in relation to marriage and to provide for connected matters." [2nd October, 1995]*

37. Counsel for the applicant referred the Court to the major changes which have occurred in the laws of the United Kingdom and later in Canada and Australia in relation to the conversion of potentially polygamous, but *de facto* monogamous marriages into valid monogamous marriages. This conversion is achieved by reason of one of the parties to the union acquiring a domicile of choice in a country which prohibits polygamy with the result that that party no longer has capacity to take a second spouse. Again the relevant decisions all relate to the application for remedies, adjudication or reliefs under matrimonial law: see *Hussain v. Hussain* [1983] Fam. 26. The matter of the acquisition of a domicile of choice and therefore the recognition by the spouses of Irish norms of monogamous marriage has not been determined in this State, although the issue was raised in the recent case of *H.A.H. v. S.A.A* (cited above). However the question for determination before Dunne J. in that case was the recognition of an actually polygamous marriage; the husband, who was a refugee, sought to have his two wives with him in Ireland. Clearly public policy issues were determinative in that decision to refuse recognition. The validity of the marriage in Lebanon was not doubted, but in the particular circumstances of the case this could not overcome the public policy considerations informed by the provisions of our Constitution.

38. Public policy reasons leading to the refusal to recognise actually polygamous marriages in common law countries and the states comprising the E.U. are well established. The issue was tested before the European Commission of Human Rights in *R.B. v. The United Kingdom*, Application No. 19628/92, 29th June 1992. The Commission unanimously refused to admit a complaint of a woman of Bangladeshi origin whose mother had been refused entry by the U.K. immigration authorities on the basis that her father had already been joined by a wife. The applicant's mother was her father's first wife. Such interference with the applicant's family life protected by Article 8 was held to be lawful and in pursuance of the legitimate aim of preserving the Christian based monogamous culture dominant in the U.K., which prohibits bigamy. Polygamy is unlawful in the U.K. and Ireland and polygamous marriages are not recognised as valid marriages according to our laws. There is no dispute about that.

39. It seems to this Court that the difficulty which arose in this and other similar cases lies in the failure on the part of the Minister to recognise the distinction between the recognition of a marriage for family reunification reasons and the recognition of a marriage for the purpose of determining matrimonial reliefs and other related remedies. The approach which the Commissioner and the Minister should consider when dealing with refugee marriages is to determine at the outset whether the marriage is a marriage which accords with the law of the refugee's country of origin following the leading authority on the relevant conflicts of laws rule in *Berthiaume v. Dastous* [1930] A.C. 79 at p. 83,:-

> *"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 proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicil 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 proceeding if conducted in the place of the parties' domicil would be considered a good marriage."*

40. Applying that rule in accordance with the uncontroverted evidence presented on this appeal that the parties had married lawfully on 25th April, 1998, in the country of their common domicile, it follows that they are married for s. 18 family reunification purposes.

Conclusion

39. The use of the s. 29 procedure as a means of determining the validity of marriages in family reunification cases is inappropriate. It is for the Commissioner to determine the status of an asserted marriage by inter alia consulting reliable Country of Origin information on the facts alleged. The validity of marriages contracted abroad by persons domiciled abroad can only be determined in accordance with the principles of private international law. This particular case came before the Circuit Court, and then this Court on appeal, by way of an application for declarations pursuant to s. 29 of the Family Law Act 1995 and the learned Circuit Court judge granted the declarations sought. While this Court is firmly of the view that the invitation to the Applicant to bring such application before the Circuit Court was inappropriate, (and the Department of Justice rather than the applicant is to blame for this) it nevertheless upholds the finding of the Circuit Court judge. Having considered the lex loci rule and having heard the facts of this case, this Court finds that the applicant's marriage to the respondent in the district area of G, Zimbabwe on 25th April, 1998, was, and is, a valid marriage. The appeal is therefore refused.