Judgments

Judgment Title: Hamza & anor v Minister for Justice, Equality & Law Reform

Neutral Citation: [2013] IESC 9

Supreme Court Record Number: 442/10

High Court Record Number: 2009 794 JR

Date of Delivery: 02/20/2013

Court: Supreme Court

Composition of Court: Denham C.J., Murray J., Hardiman J., Fennelly J., Clarke J.

Judgment by: Fennelly J.

Status of Judgment: Approved

Judgments by	Link to Judgment	Result	Concurring
Fennelly J.	Link	Appeal dismissed - affirm High Court Order	Denham C.J., Murray J., Hardiman J., Clarke J.

Outcome: Dismiss

THE SUPREME COURT

Appeal No. 442/2010

Denham C.J.
Murray J.
Hardiman J.
Fennelly J.
Clarke J.

BETWEEN:/

MOHAMMED HUSSEIN AHMED HAMZA AND ASMA MAHGOUB ELKHALIFA
Applicants/Respondents

-AND-

THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM

Respondent/Appellant

Judgment of Mr Justice Fennelly delivered the 20th day of February 2013

1. This is one of two judgments concerning appeals from decisions of the High Court (Cooke J.) of 25th November 2010 ordering that a decision of the Minister refusing family reunification be quashed.

2. The first-named respondent (whom I will describe as "Mr. Hamza") had been declared to be a refugee but failed to persuade the Minister to permit the second-named respondent (whom I will describe as "Ms. Elkhalifa"), as his spouse, to enter and reside in the State.

3. A person who has been declared to be a refugee may apply to the Minister pursuant to s.18 of the Refugee Act 1996 for permission for a member of his or her family, including a spouse, to enter and reside in the State. If the Minister is satisfied that the person, who is the subject of the application, is the spouse of the refugee, the Minister is obliged to grant the permission. The present case is concerned only with an application in respect of a spouse, though it should be noted that the Minister, while refusing the application in respect of Ms Elkalifa, granted it in respect of the two children of the respondents.

4. The section envisages three stages in the procedure. Firstly, subsection (1) confers on a refugee a right to "apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State……" On receipt of such an application, the Minister is obliged to "cause such an application to be referred to the [Refugee Applications] Commissioner…." (hereinafter "ORAC").

5. Subsection 2 provides that "it shall be the function of the Commissioner to investigate the application and 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."

6. The third stage provides for the making of a decision by the Minister. To that end s. 18(3)(a) provides:

> "Subject to subsection (5), if, after consideration of a report of the Commissioner submitted to the Minister under subsection (2), the Minister is satisfied that the person the subject of the application is a member of the family of the refugee, the Minister shall grant permission in writing to the person to enter and reside in the State and the person shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State."

7. Thus, the only function of the Minister is, having considered the report of the Commissioner, to determine whether the person in respect of whom the application is made is, as a matter of fact, a member of the family of the refugee. In the present case the Minister had to decide whether Ms Elkalifa was the spouse of Mr

Hamza. Once that fact has been positively determined, the result is automatic. The Minister has no discretion, except to grant the application, except where he decides to invoke subsection (5) which permits the Minister to refuse permission in the interest of national security or public policy.

8. Section 3 of the Act lists the rights enjoyed by a refugee under the laws of the State. Thus, s. 18(3) has the effect that the member of the family of the refugee who is permitted to enter and reside in the State has exactly the same legal rights as the refugee.

9. Mr Hamza is a citizen of Sudan. He came to the State in 1998. He applied for refugee status which was granted by the Minister on 25th May 2006. He has lived and worked in the State since then.

10. He says that he was married to Ms. Elkhalifa in Sudan in 1990. He submitted his application to the Minister, pursuant to s. 18 of the Act of 1996, on 23rd May 2007 in respect of Ms. Elkalifa, their two children and his mother-in-law.

11. The application was duly referred to ORAC. Mr. Hamza was required by ORAC to complete a detailed questionnaire and to provide supporting documentation.

12. In his answers, Mr. Hamza said that he had been married to Ms. Elkhalifa, whom he had known since childhood, in Sudan on 14th September 1990. He said that he had previously been divorced and gave details. He ticked the box describing the marriage as "legal" rather than other options, "religious" or "traditional." He answered "no" to a question as to whether the marriage had taken place by proxy. He said that the marriage was a normal relationship between husband and wife, that Ms. Elkhalifa was his only wife and that she was the mother of their two children. He said that he had last resided with Ms. Elkhalifa in 1998. He submitted what he described as an original marriage certificate.

13. Mr. Hamza submitted a translation dated 25th June 2007 from Global Translations Ltd. of a marriage certificate from the Al Kamleen Civil Status Court in Sudan of the marriage between himself and Ms. Elkhalifa. That certificate, as translated, states that insofar as Ms. Elkalifa was concerned the marriage was "by the proxy of Al Omar Ismail." A separate translation from the Islamic Foundation of Ireland uses different language. Opposite the name of Ms. Elkalifa, it states: "who was represented in the marriage contract by Omer Ismail."

14. ORAC duly reported to the Minister on 12th July 2007, summarising the information provided by Mr. Hamza. The report said that the information provided by Mr. Hamza "in relation to his wife is consistent with that given in his initial application for Asylum in 2005" and that "throughout the asylum process, the refugee consistently mentioned his wife and children and did not proffer any contradictory statements with regard to them." It said that the passport of Ms. Elkalifa was consistent in both design and form with the characteristics of Sudanese passports. The report added, however, that the Commissioner could not verify the authenticity of the documents submitted.

15. Mr. Hamza was informed on 20th July 2007 that ORAC had completed its investigation and had returned the application to the Minister. Mr. Hamza's solicitors wrote to the Minister on 24th March 2009 pointing out that the application had, at that point, been outstanding for a period of 22 months.

16. The Minister conveyed his decision in relation to Ms. Elkalifa by letter dated 6th

April 2009 from the Family Reunification Section ("FRS") of the Immigration Section of the Department of Justice Equality and Law Reform. The letter stated:

> "Ms. Asma Mahgoub Elkhalifa does not qualify as a 'member of the family' under Section 18(3)(b) of the Refugee Act, 1996, as the marriage was by proxy, it does not appear to be valid under Irish law."

17. The letter stated that there was no provision for appeal of a decision on a family reunification application, but added that the FRS would review the decision "on foot of a declaration from the Courts pursuant to s. 29 of the Family Law Act, 1995, to the effect that the marriage certificate in question is entitled to recognition in this jurisdiction."

18. Mr. Hamza's solicitors wrote on 15th April requesting a review of the decision. They drew attention to the ORAC report and argued that a declaration pursuant to s. 29 of the Family Law Act was unnecessary. They said that their instructions were that their client's marriage was "not conducted by proxy" but that both Mr. Hamza and Ms. Elkalifa had been present. They suggested that the problem might lie with the translations. I have to say, at once, that this does not seem to be a correct statement of the facts. All the certificates of the marriage are consistent, however translated, in stating that Ms. Elkalifa was represented by Omar (or Omer) Ismail. It was he, it appears, who was present at the marriage ceremony.

19. There ensued further correspondence between the solicitors and the FRS. The FRS wrote on 13th May noting that there were two translations of Mr. Hamza'a marriage certificate. It said that the translation from Global Translations had been obtained by the Department and that this was the one which suggested that the marriage had been conducted by proxy. In fact, however, the translation from the Islamic Foundation of Ireland stated that Ms. Elkhalifa "was represented in the marriage contract by Omar Ismail." The FRS letter also suggested that there were several inconsistencies between the two translations. The inconsistencies suggested were that: the witnesses listed were not the same; the dates given for the marriage were different, the person who conducted the marriage was not the same; the amount of the dowry was not the same.

20. The appellant's solicitors pointed out, in a reply dated 26th May 2009, that both translations gave the date of the marriage as 14th September 1990, that the names of the witnesses were identical except for the most minor differences in spelling, such as Abdel for Abdul and that the name of the "marriage officiator" was the same, save for a difference in spelling which appeared as either Abdullah or Abdallah. It was true that the dowry was stated to be 100 guineas in the Global translations case and 100 Sudanese pounds in the other. The solicitors stated that these were references to the same unit of currency. It might further be remarked that, if, indeed, the Global Translations version of 25th June 2007 had been considered by ORAC, whose function it was to report to the Minister on the facts, the report of that body did not refer to any inconsistencies.

21. The solicitors also said that marriage was "not a proxy marriage as we would understand it in Ireland" and contending that proxy marriages are marriages which take place while one of the parties is outside the State. They explained the practice that, in Muslim marriages, the bride is not permitted to be present in the mosque during the marital ceremony, but rather is represented by a male relative." They submitted, by way of explanation, an article by Ahmed Fazel Ebrahim entitled "Islamic Marriages," which stated:

> "Generally, since the Islamic marriage is preferably solemnised in the

> Masjid, while the female spouse preferably remains at another place or residence, a person is nominated to act as her representative while two persons act as witnesses to that representation. Thus, in the case of a marriage in the Masjid or any other venue where the "female spouse to be" is absent, the representative of the bride who would transmit her consent to the marriage as well is to witnesses to the representation, and two other witnesses to the solemnised edition of the marriage are a minimum requirement."

22. The FRS replied on 2nd June 2009 stating that "the issues regarding the inconsistencies with the marriage certificates are not as trivial as differences in spelling and would need further explanation." That letter then drew attention to the existence of a separate certificate showing the marriage between Mr. Hamza and Ms. Elkhalifa had taken place on 1st March 1991. That certificate had been found by the Department on the file relating to Mr. Hamza's own application for naturalisation.

23. This led to a lengthy explanation from the solicitors in a letter dated 26th June 2009. It was explained that the certificate referred to by the FRS related to the re-marriage of the parties following a "taleq divorce." Having encountered marital problems, the letter said, the appellant had divorced Ms. Elkalifa verbally in 1995. Under Shariah law, a man may divorce his wife verbally without the need for a court application. However, if more than three months passes before reconciliation, Shariah law requires that the marriage certificate be re-issued. This was the explanation for the additional certificate. The certificate contained several errors and Mr. Hamza had never intended to use it. The date of the re-marriage should have been given as 1st March 1996.

24. The FRS did not respond to the extensive explanation of the system of "taleq" divorce and made no suggestion that the explanations were not being accepted. Instead, it wrote on 3rd July 2009 conveying the second decision. It said that the FRS had "decided to uphold the original decision not to grant Family Reunification in this case," adding that: "it is not clear from the documentation submitted if this marriage is valid under Irish law."

25. The letter went on to say that it was open to Mr. Hamza "to seek a declaration from the Irish courts that this is in fact a valid marriage." If such a declaration was produced the file would be reviewed immediately.

26. By a separate decision of the same date, permission was granted, pursuant to s. 18 for the two children of Mr. Hamza and Ms. Elkalifa to enter the State.

27. On 27th July 2009, the respondents obtained leave to apply for judicial review of the decision of 3rd July 2009.

28. The Minister, in his response to the application for judicial review, asserted that there were two separate and distinct reasons for refusing the application for family reunification. The first was that he had concluded that marriage by proxy might not be recognised under Irish law. The second was that the documentation which Mr. Hamza had submitted, in particular "the various translations of the marriage certificate, was contradictory." Mr. Gerry Browne in the affidavit sworn in support of the statement of objections exhibited the recommendation of the FRS as the basis of the decision. That recommendation contained the following justification:

> "Having taken all matter (sic) into consideration I recommend that the original decision not to grant Family Reunification in respect of Asma Mahgoub Elkhalifa be refused. There are different marriage

> certificates on file giving two different dates of marriage and this issue has been put to the applicant. His first explanation was that these issues were the result in differences of spelling. However, when I provided details of the actual differences in dates, witnesses etc. the applicant stated that he had in fact been married on both these dates but considered his date of marriage as being on the first date in September, 1990. The applicant states that he married his second wife in September 1990 but divorced for a period of time in 1995. Due to the fact that they remained divorced for more than 3 months while differences were being resolved they had to re-marry in 1996. He counts the first date of marriage as being the correct date of marriage. However, the second marriage certificate on file is dated March 1991 and not 1996 as the applicant now contends.

Both marriage certificates on file name particular persons as proxy for the husband and wife and are distinct from the witnesses to the marriage. The applicant's solicitor has submitted that the marriage did not take place by proxy and that it is the custom in Sudan for the bride to remain at home and to be represented at the Mosque by a male relative.

In the event it is clear that I am not qualified to establish if this marriage is valid under Irish law and it is a matter for the courts to decide under the Family Law Act, 1996. I have no option therefore to uphold the decision not to grant Family Reunification in this case. However the case can be reviewed again immediately should the applicant produce a Section 29 declaration from the family courts stating that this marriage is valid under Irish law."

29. The application for judicial review was heard by Cooke J. The order made on foot of that judgment was to quash the decision conveyed by the letter of 3rd July 2009 for error of law in two respects:

> (a) in the reason given, namely that the marriage was a proxy marriage and as such was not valid in Irish law; and
>
> (b) in applying a wrong test for recognition of a subsisting marital relationship between the refugee and the "spouse" for the purpose of s. 18(3)(a) of the Refugee act 1996.

30. The learned judge dealt firstly with Mr. Hamza's complaint that the Minister was not entitled to refuse an application under s. 18 of the Act unless a declaration pursuant to s. 29 of the Family Law Act 1995 was first obtained. This arose from the statement in both of the Minister's letters conveying decisions suggesting that it was open to Mr. Hamza to apply for such a declaration and that, if one were obtained, the application would be reconsidered. The learned judge held that the Minister had not in fact refused the application on that ground but that he had merely put forward the obtaining of such a declaration as an option which might be pursued. The learned judge correctly added that "for the avoidance of doubt in other cases…… 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." I will return to the suggestion that a s. 29 declaration be obtained at a later point.

31. The learned judge then explained, in my view correctly, the role of the Minister in dealing with applications 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."

32. The learned judge pointed out that the primary reason given by the Minister for refusal of family reunification of Ms. Elkhalifa with Mr. Hamza was that it was a case of "a marriage by proxy." Marriage by proxy was, he said, a system "much favoured by the monarchs and nobility of Europe." It was also, as he pointed out "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."

33. As was clear from the correspondence between Mr. Hamza's solicitors and the FRS a marriage by proxy may have two senses. The learned judge thought that the marriage in this case might not have been by proxy in the sense that one party was in a different country at the time. He pointed out:

> "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 elsewhere. 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."

34. The learned judge did not think it necessary to decide whether the marriage had taken place by proxy so far as Ms. Elkhalifa was concerned because, as he held:

> "…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."

35. He proceeded to hold:

> "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."

36. The learned judge referred to Sotto Mayor v. De Barros (No. 1) 3PD1, 5 and cited an often quoted passage from Berthiaune v. Dastous [1930] A.C. 79, 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 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."

37. Furthermore, he added that, as stated in Apt v. Apt [1948] P 83, 88; [1974] All ER 677, "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." These are essentially governed by the lex loci celebrationis.

38. Based on his examination of the facts submitted to the High Court, Cooke J. found as follows at paragraph 22 of his judgment:

> "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".

He added:

> "… 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."

39. Accordingly, Cooke J. concluded that the Minister had made a mistake of law in the primary reason given for rejection of the application. That was sufficient to warrant the issue of an order certiorari to quash it.

40. Nonetheless, in view of the representative character of the case, the learned judge expressed views generally on the correctness of the approach which the Minister had taken to the application of the requirement that the person the subject of the application must be shown to be the spouse of the refugee in a marriage that is subsisting as of the date of the application. He observed that, in effect, the approach actually adopted was that this condition could be satisfied only by showing that the foreign marriage would be recognised as valid in Irish law if performed in Ireland.

41. The learned judge reviewed this issue extensively by reference to a number of international sources including policy statements issued by the United Nations Commission on Refugees and Council Directive 2003/86/EC of 22nd September, 2003, on the right to family reunification (O.J.L. 251/12 of 3rd October, 2003). He

wrote in favour of a purposive construction of s. 18(3)(b) of the Act. In his view, "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." On the contrary, he considered that "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."

42. Finally, he expressed views on the public policy considerations which might arise in connection with foreign marriages under Irish law, which are either polygamous or potentially polygamous. In this context, he referred to the judgment of Barron J. in Conlon v Mohammed [1987] ILRM 172. He concluded that "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."

The Appeal

43. It is important to identify the precise focus of the appeal, in view of the wide ground covered by the Minister's notice of appeal. The fourteen grounds advanced raise the following issues:

> 1. The learned judge erred in his interpretation of s. 18(3)(b) of the Refugee Act 1996 and finding that the marriage might not have been a proxy marriage, and that, in the absence of supporting affidavit of laws, or of compliance with the requirements of the Islamic rites of Shariah law, that it complied with the lex loci celebrationis;
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> 2. The learned trial judge erred in holding that the validity of the marriage could not be established by way of a declaration pursuant to s. 29 of the Family Law Act, 1995;
>
> 3. The learned judge also erred in his interpretation of s. 18(3)(b) of the Refugee Act in holding that a marriage for that purpose should extend to cases of common law marriage or where the refugee could demonstrate the existence of a subsisting and real marital relationship and, in particular, by taking account of a Council Directive to which the State was not a party;
>
> 4. The learned judge also erred in concluding that it was not necessary to resolve difficulties and doubts arising out of the discrepancies identified in the translations of the documentation submitted by Mr. Hamza.

44. These grounds were very substantially narrowed on the hearing of the appeal. Firstly, as already noted, the learned judge held that the Minister had not in fact relied on s. 29 of the Family law Act 1995 as a ground for refusal of Mr. Hamza's application for family reunification. The Minister's reference to that section in his decisions was not a ground on which the High Court quashed the decision. As he put it, an application for a declaration pursuant to the section was "not stipulated as a precondition for a decision on the application." While the learned judge was, no doubt, correct to so hold, it is difficult to escape the conclusion that the possibility of the validity of the marriage being established pursuant to that procedure was material to the decision. In circumstances where the Minister has withdrawn any

such suggestion, it is desirable to state clearly that a declaration pursuant to s. 29 is not an alternative means of satisfying the requirements of s. 18. As the learned judge correctly held, it was for the Minister and him alone to determine whether Ms. Elkhalifa was the spouse of Mr. Hamza.

45. Secondly, counsel for the Minister expressly disavowed any argument in support of the refusal of the application on the ground that the marriage was by proxy so far as Ms. Elkhalifa was concerned. He accepted that he could not defend the decision conveyed in the letter of 6th April 2009, taken on its own. Thus, the Minister withdrew any criticism of the reasoning of the learned trial judge on the subject of proxy marriages. It has to be acknowledged that Mr. Hamza's solicitors contributed to the confusion by asserting at one point that both parties had been present at the marriage ceremony and, at another, that the true meaning of a proxy marriage was that one party was in another country at the time of the marriage ceremony. This latter point was completely irrelevant. It was clear that the marriage was conducted by proxy in the sense that both parties to the marriage were not present together. Nonetheless, it was perfectly clear that both certificates of the marriage ceremony of 14th September 1990 stated that Ms. Elkhalifa had been represented by Al Omar Ismail. It is equally clear that the Minister, by his letter of 6th April 2009, decided that "as the marriage was by proxy, it does not appear to be valid under Irish law." That meant, and can only have meant, that the marriage could not be recognised in Irish law for the simple reason that Ms. Elkhalifa was not present in the masjid or mosque but was represented by a male relative. The decision necessarily implies that the marriage could not, for that reason, be recognised in Irish law, even if it otherwise complied with the requirements of the lex loci celebrationis. The Court of Appeal in England in Apt v Apt [1948] P. 83 followed the decision in Bethiaume v Dastous, cited above, and held that to recognise a marriage conducted by proxy in Argentina and valid according to the laws of that country of an Argentinian man with a woman domiciled and resident in England was not contrary to public policy.

46. At the hearing of the appeal, counsel for the Minister submitted that he, through the FRS, had made an entirely new decision on 3rd July 2009. This decision, counsel argued, was based on the confusion and discrepancies in the documentation submitted by Mr. Hamza. The first difficulty about this argument is presented by the language of the decision:

> "I have reviewed the application and taken into account the submissions made on behalf of the applicant. 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."

47. The first of these sentences refers back to the "original decision," which is certainly the decision of 6th April. The second repeats in slightly different language, as the reason for the decision, the query as to the validity of the marriage in Irish law. This can only fairly be read as a repetition of the reference to the fact of the marriage having been conducted by proxy as the reason for that decision. The letter repeats the invitation to seek a declaration from the Irish courts as a means of resolving this difficulty.

48. Counsel suggested, however, that the Minister was really referring to discrepancies in the documentation. The FRS had, it is true, referred, in a letter of 13th May 2009 to certain suggested discrepancies, namely: the witnesses listed were not the same; the date of the marriage was different, the person who

conducted the marriage was not the same; the amount of the dowry was not the same. However, those suggested discrepancies were so trivial as to make one wonder whether they had been seriously meant. Notably, the differences in spelling were between Abdul and Abdel; Abdullah and Abdallah; Omer and Omar. The dowry was stated variously to be 100 guineas or 100 Sudanese pounds.

49. Counsel for the Minister also referred to the different marriage certificate dated 1st March 1991, compared with the marriage of 14th September 1990 and to supposed confusion concerning the "taleq divorce." However, the Minister's letter of 3rd July 2009 refers to the "documentation submitted." This can only mean the documents submitted by the applicant, Mr. Hamza. This other certificate had been obtained by the Minister from a separate file relating to Mr. Hamza's naturalisation application. His solicitors provided a lengthy explanation of the matter of the "taleq" divorce in their letter of 26th June 2009. The Minister gave no indication of unhappiness with those replies. He did not even refer to them. He merely communicated his decision on 3rd July.

50. Mr. Gerry Browne swore an affidavit in support of the Minister's statement of opposition, in which he said that there were two reasons for the decision of 3rd July:

- Firstly, that the marriage by proxy might not be recognised in Irish law;
- Secondly, that the documentation submitted, in particular, the various translations of the marriage certificate were contradictory.

51. He refers to the internal memorandum from the FRS, quoted above, of the decision in support. The first paragraph of that memorandum purports to recite the history of differences in the marriage certificates. It seems to trivialise the explanation given regarding differences in spelling. It goes on to refer to "differences in dates, witnesses etc." I have referred to these matters above and have commented that these differences were themselves trivial. They involve only differences in English spelling of names translated for Arabic. The only point of substance concerned the detailed explanation provided relating to the divorce and remarriage. The memorandum does not fairly recount the explanation provided by Mr. Hamza's solicitors; the FRS had not questioned these explanations and the Minister's decision of 3rd July 2009 made no reference to the question.

52. In fact, a fair reading of the memorandum leads ineluctably to the conclusion that the decision of 3rd July amounted to a repetition of the decision of 6th April. The penultimate paragraph commences by referring to the marriage having been by proxy. The second paragraph proceeds to offer a declaration pursuant to s. 29 as the means of resolving this problem.

53. Consequently, the decision of 3rd July was based on the same reason as that of 6th April, namely that the marriage had been conducted by proxy. Cooke J. correctly decided that this was not a valid ground for refusing recognition of the marriage and that the Minister's decision was invalid for that reason alone. The Minister no longer seeks to defend that ground. For this reason alone, I would dismiss the appeal.

54. The learned judge held also that the Minister's decision was invalid because an incorrect test had been applied for recognition of a subsisting marital relationship between the refugee and the "spouse" for the purpose of s. 18(3)(a) of the Refugee Act 1996. However, the learned judge reached a very clear conclusion that the respondents to this appeal were married "according to the formalities of the Islamic rites of the Shari'ah and under Sudanese law." He rightly held that "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."

55. For that reason, it is not necessary for the purposes of the decision in this appeal to embark on the much broader question raised by the learned judge of the potential inclusion in s. 18 of relationships "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." I reserve for consideration in the case of Hassan and another v Minister for Justice Equality and Law Reform any consideration of a broader approach to the question of proof of marriage.

56. For the reasons I have given, I would dismiss the appeal.