Judgment

Title: H. -v- A.

Neutral Citation: [2010] IEHC 497

High Court Record Number: 2005 53 M

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Court: High Court

Judgment by: Dunne J.

Status: Approved

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HIGH COURT

2005 53 M

FAMILY LAW

IN THE MATTER OF THE FAMILY LAW ACT, 1995

BETWEEN

H.A.H.

APPLICANT

AND

S.A.A.

RESPONDENT

AND

THE ATTORNEY GENERAL

AND

BY ORDER OF THE COURT S.A.H.

NOTICE PARTIES

Judgment of Ms. Justice Dunne delivered the 4th day of November 2010

The applicant herein has sought a declaration pursuant to s.29 of the Family Law Act 1995 that the applicant's marriage to the respondent was at the date of its inception, a valid marriage. In the grounding affidavit, the applicant stated that he married the respondent on 3rd day of January 1975, at Beirut, Shari'ah Court, Lebanon. There are a number of children of the marriage. The purpose of the proceedings was stated to be connected to an application for reunification of the family. The respondent was described as being a resident of Beirut, Lebanon, at the time of the issue of these proceedings. I am not entirely clear as to how the proceedings came to be served on the respondent outside the jurisdiction or if the proceedings were served on her outside the jurisdiction but in any event, an appearance was entered on her behalf on the 25th October 2005. Indeed the respondent gave evidence before the court in the course of these proceedings.

Background

It would be helpful to explain how these proceedings came into being. The applicant herein had

previously brought proceedings against the Minister for Justice, Equality and Law Reform for the purpose of quashing the decision of the Minister made on 1st October 2003, refusing to grant permission to family members of the applicant to enter and reside in the State. Those proceedings were compromised and an order was made in those proceedings on 23rd November 2004, which noted the applicant's agreement to bring an application before the court pursuant to s. 29 of the Family Law Act, 1995 (hereinafter referred to as "the Act") for a declaration that the applicant's marriage to the respondent herein was on the date of its inception, a valid marriage. An order of *certiorari* was also made in those proceedings quashing the decision of the respondent of the 1st October, 2003, refusing to grant permission to the family members of the applicant herein to enter and reside in the State pursuant to s. 18(3) and (4) of the Refugee Act 1996 (as amended). Thus these proceedings were commenced as part of the compromise entered into between the applicant and the Minister for Justice, Equality and Law Reform.

Apart from the grounding affidavit to which reference has already been made, a number of other affidavits were sworn in the course of these proceedings and I propose to refer to those affidavits and then I will refer briefly to the evidence given in these proceedings. The applicant herein swore a further affidavit on 5th April, 2006. He stated in that affidavit that at the time of his marriage to the respondent on the 3rd January, 1975, neither he nor the respondent was lawfully married to any other person. He went on to say that he went through a "purported" ceremony of marriage with the second named notice party on the 26th September, 1988, in Merjayoum Province, the Lebanon. The applicant said that the said notice party resides within the jurisdiction of the court. That affidavit was sworn in the context of an application to join her as a notice party in these proceedings, an application which clearly was granted.

The second named notice party swore an affidavit on 20th June, 2008 in which she said that she was the wife of the applicant and she referred to the marriage certificate in relation to the marriage between the applicant and her which was exhibited by the applicant in his affidavit of the 3rd October 2006. She and the applicant had four children. They reside in this jurisdiction and have so resided since August 2001. She explained that she, the applicant and his first wife are Muslims. At the time of her marriage to the applicant he was already married to the respondent. She was aware at the time of her marriage that the applicant was already married. She deposed that her marriage was and is valid under the laws of Lebanon and a normal marriage according to the laws and rules of her religion and traditions. She explained that the applicant left Lebanon and sought asylum in this jurisdiction in 1998. Having being granted refugee status in August 2000, he commenced the process of arranging for her and their children and for the respondent and her children to travel to Ireland. She stated in her affidavit that during the course of making arrangements for her travel to Ireland with her children, solicitors then acting for the applicant communicated with the Department of Foreign Affairs and the Irish Consul in Lebanon and referred to the fact that the applicant had two wives namely, the respondent and the second named notice party, both of whom he wished to bring to Ireland for the purpose of family reunification. She and her children were granted visas and permitted to come to the jurisdiction in July 2001, specifically on the basis that she was the applicant's wife. She says that leave to come to Ireland was granted on the basis that she was one of the two wives of the applicant. She has lived here since 2001. She confirmed that the applicant was granted citizenship in August 2002 and that their children were granted citizenship in or about 2006. Her application at the time of swearing of the affidavit has neither been granted nor refused. She went on to say that her marriage was and is valid and regular, pursuant to the laws of the Lebanon where the applicant, the respondent and she were domiciled and resident at the time of her marriage to the applicant. She accepts that such a marriage which is polygamous could not be entered into this jurisdiction but she avers that she has been advised and believes that the question of whether a polygamous marriage entered into in Lebanon where the marriage was lawful and valid is capable of recognition in this jurisdiction, is one that has not been considered in this jurisdiction. So far as she is concerned, she is the lawful valid wife of the applicant. She knows no reason why her status as the wife of the applicant should not be recognised in this jurisdiction. On that basis she is of the view that there is no reason why the applicant should not be granted the reliefs he seeks herein.

Affidavits of laws were also provided to the Court by an Attorney at Law, S. Mattar. I will refer to those affidavits later on in the course of this judgment.

As already mentioned oral evidence was also given before the court. The applicant gave evidence that he was born in Lebanon in the 1952. He married the respondent on 3rd January 1975. At that stage he was living in Lebanon and intended to continue to reside there. He entered into a second marriage with the second named notice party in 1988. His second wife is also Lebanese. He decided to leave Lebanon around 1996 and he outlined the reasons for doing so. He explained that it was permissible in accordance with the law of Lebanon and in

accordance with his religion to have two or three or even four wives. On his arrival in Ireland he claimed asylum and has been granted refugee status. He does not consider that it would be possible for him to return to the Lebanon because he fears that his life would be at risk if he did so. The applicant was not cross-examined on his evidence.

Evidence was also given by the respondent. She was born in 1953 in the Lebanon and she confirmed that she is Muslim. She also confirmed that she married the applicant in Beirut, Lebanon. The marriage took place in January 1975. The marriage was valid under the laws of Lebanon, so far as she was aware and also was in accordance with her religion of Islam. She was cross-examined very briefly by counsel on behalf of the Attorney General and she confirmed that she knew when she got married in 1975 that her husband could marry up to three more women, if he wished, while she was still alive. That concluded her evidence.

The second named respondent was also available to give evidence but it was accepted by the parties that it was not necessary for her to give formal oral evidence in circumstances where she had sworn an affidavit. It was accepted by all parties that the matter would be dealt with on that basis. She was in court and there was no application by any of the other parties to have her put forward for the purpose of cross-examination. Accordingly no further evidence was called in relation to the matter.

I now want to refer briefly to the affidavits of Laws. The first of those was sworn on the 18th June, 2009, and was provided by Salah Mattar, an Attorney at Law of the Beirut Bar Association. Having outlined his qualifications, he referred to the marriage certificate of the applicant and the respondent which stated that the applicant and the respondent were married on the 3rd January, 1975, at Beirut Shari'ah Court, in Lebanon. He expressed the view that the marriage certificate of the parties was evidence of a valid subsisting marriage according to the law of the Lebanon. He added that the marriage between the applicant and the respondent is a valid marriage according to the law of the Lebanon and legally binding on both of them and that the parties thereto obtained all of the legal remedies and rights of husband and wife under the laws of the Lebanon on foot of that marriage. He then furnished a second affidavit which was sworn on the 31st March, 2010. He referred to the previous affidavit and went on to say as follows:-

> "Furthermore, I say and believe that, according to the Lebanese laws governing the personal status and the marriage of Muslim individuals in Lebanon, the marriage of the applicant and the respondent which took place on the 3rd day of January, 1975, is valid in Lebanon, as well as the presence of another marriage, particularly the marriage between the applicant and the notice party . . ., which took place on the 26th day of December, 1988 at Beirut Shari'ah Court, in Lebanon, is not a relevant issue in this context, since according to Lebanese law and Shari'ah, a Muslim man in Lebanon shall have the right to marry up to four women."

Shortly before the hearing in this case, a further affidavit was sworn by Mr. Mattar and in that affidavit he stated:-

> "I say and believe that according to Lebanese law governing the personal status of the marriage individuals in Lebanon that the marriage of the applicant and the respondent which took place on the 3rd January, 1975 at Beirut Shari'ah Court, Lebanon is valid in Lebanon with the presence of another marriage, particularly the marriage of the applicant and the second named notice party, . . ., which took place on the 26th of December, 1988, at Beirut Shari'ah Court. According to Lebanese laws and Shari'ah, a Muslim man can marry up to four women. The statement finds its source in the Koran which allows Muslim men to marry women of the people of the Book a term which includes Jews and Christians and, of course, Muslims. The law dated the 13th March, 1936, in Lebanon which acknowledged the different religious communities in Lebanon, in which each community practices according to its own books and beliefs and therefore the Muslim communities to the Shari'ah and Koran."

At one stage in the course of the proceedings Mr. McDonagh on behalf of the Attorney General made the point that it was a matter for the applicant and the respondent to satisfy the court that the Lebanese marriages comply with the requirements of Lebanese law in regard to their validity in Lebanese law. There was no challenge to the affidavits of law submitted in this case by counsel for the Attorney General and there was no suggestion by or on behalf of the Attorney General to the effect that the parties in this case, namely the applicant, respondent and the second named notice party had not complied with the necessary requirements of Lebanese law in relation to the marriage ceremonies they went through. The Attorney General has not submitted any affidavit of laws in relation to this issue and the evidence provided to the court on

this issue is uncontroverted. I am satisfied having regard to the evidence before the court that so far as Lebanese law is concerned the marriages of the applicant and the respondent and the applicant and the second notice party are valid in accordance with the requirements of Lebanese law.

Section 29 of the Family Law Act 1995

At this point it would useful to set out the provisions of the s. 29 of the Family Law Act 1995, in full. It provides as follows:-

> "29(1) The court may, on application to it in that behalf by either of the spouses concerned or by any other person who, in the opinion of the court, has a sufficient interest in the matter, by order make one or more of the following declarations in relation to a marriage, that is to say:
>
> (a) a declaration that the marriage was at its inception a valid marriage,
>
> (b) a declaration that the marriage subsisted on a date specified in the application,
>
> (c) a declaration that the marriage did not subsist on a date so specified, not being the date of the inception of the marriage,
>
> (d) a declaration that the validity of a divorce, annulment or legal separation obtained under the civil law of any other country or jurisdiction in respect of the marriage is entitled to recognition in the State,
>
> (e) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in the State.
>
> (2) The court may grant an order under subsection (1) if, but only if, either of the spouses concerned –
>
> (a) is domiciled in the State on the date of the application
>
> (b) has been ordinarily resident in the State throughout the period of one year ending on that date, or
>
> (c) died before that date and either -
>
> (i) was at the time of death domiciled in the State, or
>
> (ii) had been ordinarily resident in the State throughout the period of one year ending on that date.
>
> (3) The other spouse or the spouses concerned or the personal representative of the spouse or each spouse, within the meaning of the Act of 1965, shall be joined in proceedings under this section.
>
> (4) The court may, at any stage of proceedings under this section of its own motion or on application to it in that behalf by a party thereto, order that notice of the proceedings be given to the Attorney General or any other person and that such documents relating to the proceedings as may be necessary for the purposes of his or her functions shall be given to the Attorney General.
>
> (5) The court shall, on application to it in that behalf by the Attorney General, order that he or she be added as a party to any proceedings under this section and, in any such proceedings, he or she shall, if so requested by the court, whether or not he or she is so added to the proceedings, argue any question arising in the proceedings specified by the court.
>
> (6) Where notice of proceedings under this section is given to a person (other than the Attorney General), the court may, of its own motion or on application to it in that behalf by the person or a party to the proceedings, order that the person be added as a party to the proceedings.
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> (7) Where a party to proceedings under this section alleges that the marriage concerned is or was void, or that it is voidable, and should be annulled, the court may treat the application under subsection (1) as an application for a decree of

may treat the application under subsection (1) as an application for a decree of nullity of marriage and may forthwith proceed to determine the matter accordingly and may postpone the determination of the application under subsection (1).

(8) A declaration under this section shall be binding on the parties to the proceedings concerned and on any person claiming through such a party and, if the Attorney General is a party to the proceedings, the declaration shall also be binding on the State.

(9) A declaration under this section shall not prejudice any person if it is subsequently proved to have been obtained by fraud or collusion."

Submissions

The fundamental submission made on behalf of the applicant and indeed supported by the respondent and the second named notice party is that the rules of private international law in relation to the recognition of marriage are well settled. The validity of a marriage is determined by the *lex loci celebrationis* and the *lex domicilii*. It was contended that a polygamous marriage valid under the *lex loci celebrationis* as regards form and under the law of each party's anti nuptial domicile as regards capacity would be recognised as a valid marriage unless there is strong reason to the contrary. It was submitted that questions of status are determined and governed by the *lex domicilii*. Accordingly it was submitted that as the evidence before the court indicated that the parties were domiciled in the Lebanon in 1975, that is to say, the applicant and the respondent and as Lebanese law permits polygamous marriage, therefore as the law of the domicile of the parties to that marriage permitted them to enter into a polygamous marriage, it was submitted that the conflict of law rules applicable in this jurisdiction require that the 1975 marriage is entitled to recognition under Irish law. It was further submitted that there was nothing in the Constitution which precluded the conflict of law rules from being applied in the circumstances of this case.

In support of the submissions, Mr. Durcan S.C. on behalf of the applicant referred firstly to Dicey and Morris on the *Conflicts of Law* (14th Ed.) and in particular to r. 69 and r. 73 which are as follows:-

> "Rule 69 For the purposes of the English rules of the Conflict of Laws a marriage is regarded as polygamous if either party to it is entitled to have another spouse.
>
> Rule 73 A marriage which is polygamous under r. 69 . . . will be recognised in England as a valid marriage, unless there is some strong reason to the contrary."

Reference was also made to a comment by Dicey and Morris to the effect that:-

> "It is submitted that there is now sufficient authority to warrant the generalisation in our rule."

In the course of his submissions, Mr. Durcan examined a number of English authorities. He also referred to the decision of the Supreme Court in the case of *Conlon v. Mohamed* [1989] I.L.R.M. 523, and he also referred to *Irish Conflicts of Law*, Binchy.

I now propose to look at the authorities opened by Mr. Durcan to the court and to his contentions based on those authorities. In due course I will also consider the response on behalf of the first named notice party by Mr. McDonagh, S.C. in relation to the applicant's submissions together with the submissions on behalf of the other parties.

In *Irish Conflicts of Laws* at p. 212, Prof. Binchy defined polygamous marriage as follows:-

> "A polygamous marriage is one 'under a system of law which permits one of the parties to the marriage to take another spouse at a later date even though the marriage still subsists'. Polygamy has a long cultural heritage. The law on the subject is complex and uncertain, with little Irish authority on some of the major questions.
>
> The term 'polygamous marriage' embraces two types of marriages, according to the terminology widely used in the reported cases:
>
> '(a) A potentially polygamous marriage, in which neither party has, at the relevant time, any other spouse, but in which one party is capable of taking another spouse; and

(b) An actually polygamous marriage, in which one party has, at the relevant time, another spouse or other spouses in addition to the other party.'"

He continued at p. 214 to state:-

> "The most important effect of polygamy, so far as the conflict of laws is concerned, is that neither party to a polygamous marriage is entitled to matrimonial relief in our courts. In the leading case of *Hyde v. Hyde*, in 1866, Lord Penzance declined to adjudicate on a petition for divorce in respect of a polygamous marriage contracted by Mormons in Utah. English matrimonial law, adopted to the view of marriage as monogamous, was 'wholly inapplicable to polygamy.' The notions of adultery and bigamy would be difficult to apply in relation to polygamous marriages.
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> Lord Penzance made it clear that his judgment did not address the questions of succession or the legitimacy of the children born of polygamous unions; all that was decided in the case was that the parties to a polygamous marriage were not 'entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.
>
> This approach was favoured in later decisions in England before the law was changed there in 1972. Whether an Irish court would take the same view today is not clear. Undoubtedly there are difficulties in modifying matrimonial remedies to cater for polygamous marriages, but these are scarcely so formidable as to justify the refusal to attempt this process in any case.
>
> The real issue is one of social policy. If we accept that our *ordre public* does not prevent us from affording recognition to a polygamous marriage valid under the *lex domicilii* of each of the parties, it then becomes a matter of deciding how entitlements in our law premised on monogamous marriages may most appropriately be applied, or not applied, as the case may be, in relation to polygamous marriages, with whatever modifications that may seem desirable."

There is no dispute by any of the parties herein as to the definition of polygamous marriage set out by Prof. Binchy. To that extent, it can be taken as a fact that the marriage of the applicant and the respondent in 1975 was a potentially polygamous marriage. The subsequent marriage of the applicant and the second named notice party was an actually polygamous marriage.

Professor Binchy observed at p. 213 as follows:-

> "The *lex loci celebrationis* prescribes the nature and incidence of the marriage: in view of these, the Irish court must determine whether the marriage is monogamous or polygamous. Thus, for example, if a man or woman domiciled in Ireland go through a ceremony of marriage in polygamous form in Pakistan, the marriage is polygamous; whereas if a man or women domiciled in Pakistan goes through a ceremony of a marriage in an Irish registry office, he or she contracts a monogamous marriage.
>
> The fact that a polygamous marriage is valid under the *lex loci celebrationis* does not mean that it must be treated as valid under Irish law; if either of the parties to the marriage lacks capacity under his or her *lex domicilii* to contract a polygamous marriage it seems that it will not be valid under our law. Thus it appears that a person domiciled in this country is incapable of contracting a valid polygamous marriage.
>
> It was formerly accepted that a marriage potentially polygamous when contracted remained a polygamous marriage even though the husband did not in fact take a second wife. More recently, decisions in some common law jurisdictions have recognised that such a marriage may subsequently be transformed into a monogamous marriage in certain circumstances, the most important arising where the parties originally domiciled in a country where polygamy is permitted later acquire a domicile of choice in a country where it is not. Pragmatically this approach has some attractions, but it can result in serious anomalies and injustice. Whether an Irish court would favour the same approach is not clear. In *Conlon v. Mohamed*, the question did not arise as the plaintiff was at all stages domiciled in Ireland."

In the course of the passage from *Irish Conflicts of Law*, Prof. Binchy went on to identify some of the problems that inevitably must arise in this jurisdiction in relation to the rights and remedies available to parties to polygamous marriages, if any, in Irish law. For example how

does one define "spouse" in the context of a polygamous marriage. Could one grant a decree for divorce on the grounds of "adultery" alleged by one wife against the husband in respect of sexual relations with the second wife? What is the position in relation to the entitlement to maintenance by a husband in respect of a number of wives? How does one qualify to elect for a share under the Succession Act 1965, in respect of the legal right share of a spouse. Thus, Prof. Binchy has identified a number of difficult issues which will inevitably arise in the case of parties to polygamous marriages who are now domiciled in this jurisdiction. A point made by the applicant and the respondent and second named notice party is that these proceedings are not for the purpose of seeking any matrimonial relief but are solely for the purpose of having the question of the recognition of the marriage decided. It remains to be seen if that point has a bearing on the outcome of these proceedings.

One thing that is clear at this stage is that the marriage at issue in these proceedings is one which at the time of its inception was potentially polygamous and is one which became polygamous as a result of the second marriage of the applicant to the second named notice party.

Mr. Durcan S.C. on behalf of the applicant proceeded to examine a number of the authorities in which the issue of polygamy has been considered in the English courts. The first of those decisions is the case of *Hyde v. Hyde* (1866) L.R. 1 Ed. 130. That was a case which concerned a Mormon marriage and Mr. Durcan referred to the head note in that case, which stated as follows:-

> "Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.
>
> A marriage contracted in a country where polygamy is lawful, between a man and a women who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the *lex loci*, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English matrimonial court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations."

Lord Penzance in the course of his judgment in that case stated at p. 133 as follows:-

> "Marriage has been well said to be something more than a contract, either religious or civil – to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induced definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

Lord Penzance continued at p. 135 as follows:-

> "Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation . . . . Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one third of his income. If these like provisions and remedies were applied to polygamous unions, the court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no

> offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers."

Lord Penzance went on to describe the fact that there was no law in England to deal with polygamy or adjusted to its requirements. In that case it had been urged on the court that the English matrimonial law should be applied to the first of a series of polygamous unions and that the subsequent unions should be treated as void. Lord Penzance noted the inconsistencies that would flow from that approach. He went on to conclude at p. 138:-

> "In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

On the basis of the decision in that case, Mr. Durcan urged upon this Court that that decision is simply an authority for the proposition that those who are parties to a polygamous marriage are not entitled to the remedies available under the matrimonial law of England. He contended that it is not an authority to the effect that polygamous marriages can never be recognised in the laws of England.

Reference was then made to the opinion in respect of the Sinha Peerage claim a note of which was appended to the decision in *Baindail v. Baindail* [1946] 1 All E.R. 348. The Sinha Peerage claim concerned a claim to be recognised by the petitioner of the claim as the Baron Sinha Raipur. The petitioner was the male heir of the late Baron Sinha. The late Baron was married in 1880 according to the formalities prescribed by Hindu law and usage. At the date of the marriage he was a member of the Hindu community. Hindu law permitted more than one wife and accordingly at the date of the marriage, the marriage was a potentially polygamous marriage. Subsequently the late Baron Sinha and his wife joined a religious sect of which one of the main tenets of the sect was monogamy. Accordingly whilst he remained a member of the sect he could not contract a second marriage while his first wife was alive which the courts in India would recognise as valid. Had he left the sect, he would have been at liberty to contract a second marriage during the life time of his first wife but he never did leave the sect. The issue in the particular case related to whether his son was his lawful heir. In the course of the opinion in that case, Lord Maugham, L.C., commented on a number of earlier decisions and stated:-

> "We have nothing to do in this case with the jurisdiction of the divorce court, which for reasons not difficult to understand has adopted the view that in that court the term 'marriage' means a voluntary union for life of one man and one women to the exclusion of all others. We are not therefore concerned with such cases as *Hyde v. Hyde* and *Brinkely v. Attorney General*. . . . There are other decisions which deal with the question whether the alleged marriages in these cases could be deemed to be marriages at all according to English ideas. On the other hand, it cannot, I think, be doubted now (notwithstanding some earlier dicta by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our court, that the issue are regarded as legitimate, and that such issue can succeed to property in this country with a possible exception which will be referred to later."

Relying on that passage Mr. Durcan urged that in some circumstances persons who have entered into a Hindu marriage will have that marriage recognised for certain purposes under the common law.

I should at this point say that I think the opinion in Sinha relied on by Mr. Durcan and the passages referred to in that opinion are of little assistance in the this particular case. Indeed, Mr. McDonagh was critical of the reliance on the opinion given that that was in fact all that it was. It is not a decided case. Regardless of that view it seems to me that that particular opinion is of limited value because in the course of the opinion, Lord Maugham went on to say at p. 349:-

> "It seems desirable also to clearly state that nothing in our decision of this petition is intended to apply to a case where the petitioner is claiming as a son of a parent who has in fact married two wives, e.g., a Hindu or a Mohammedan who has had a plurality of wives. It is apparent that great difficulties may arise in questions relating to the descent of a dignity where the marriage from which heirship is alleged to result is one of a polygamous character, using the word polygamous as meaning a marriage which did not forbid a plurality of wives, and where there has been in fact a plurality of wives. If sons were born of more than one of them, it might be difficult to reconcile one of these sons with English ideas of 'heirship' which must be involved in the words contained in a patent granted by the King in a well known form and dealing with a British dignity which, it will be remembered, entitled the holder to sit and vote in the House of Lords. . . . As I have said, the present question relates to the descent of a dignity conferred by the Crown on a subject resident and domiciled in India, who, according to his religion at the date of the patent, was prohibited from forming a polygamous union. The case is without precedent in peerage law and in the absence of authority must be decided in the light of its special facts."

Accordingly having regard to the nature of the opinion, the fact that it relates to peerage law and was concerned with the issue of whether or not the petitioner in that case was "lawfully begotten" according to the laws of India, it does not seem to me to be as strong an authority as suggested by Mr. Durcan.

Mr. Durcan then referred to the decision of the Court of Appeal in the case of *Baindail v. Baindail* [1946] 1 All E.R. 342. The facts of that case set out in the head note were as follows:-

> "The respondent, an English woman, went through a ceremony of marriage with the appellant on May 5th 1939, at a London register office, the appellant being described in the marriage certificate as a bachelor. On May 1st 1928, the appellant had lawfully married a Hindu woman according to Hindu rites at Muthra United Provinces, India, and his Hindu wife was alive at the time of the appellant's marriage with the respondent. It was established that the appellant's Hindu marriage would be recognised by the courts of British India. The question for the determination of the court was whether, having regard to the appellant's marriage in India, the subsequent English ceremony of marriage was valid."

It was held by the Court of Appeal "the Court was bound to recognise the Indian marriage as a valid marriage and an effective bar to any subsequent marriage in England". Mr. Durcan referred to the editorial note in that case which stated:-

> "The degree of recognition to be accorded by English courts to Hindu marriages was considered by Barnard J. in *Srini Vasan v. Srini Vasan*, in *Metha v. Metha* [1945] 2 All E.R. 690 and in the case now reported on appeal. The Court of Appeal affirmed the views expressed by Barnard J. holding that on principle the court are bound to recognise the Indian marriage as binding, for the purpose of proceeding for nullity of a subsequent English marriage. By marriage in India, a Hindu domiciled in India acquires the status of a married man, although the marriage is not one falling within the definition laid down by Lord Penzance in *Hyde v. Hyde*, but in that case Lord Penzance clearly limited his decision to the matter with which he was immediately concerned. Similarly, Lord Greene, M.R. now limits the present decision to the circumstances involved and refuses to express any opinion upon whether such a marriage can provide a foundation for proceedings for bigamy."

In the course of his decision in that case, Lord Greene M.R. having referred to the decision of Lord Penzance in *Hyde v. Hyde* went on to say as follows:-

> "But that, of course, does not enable any general answer to be given to the question: 'what is to be understood by 'marriage' for the purpose of the various branches of English law in which the question of marriage is relevant?' For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage, it is no doubt the case (at any rate, it has always been accepted as the case following Lord Penzance's decision) that the courts of this country exercising the jurisdiction in matrimonial affairs do not and can not give effect to, or dissolve, marriages which are not monogamous marriages."

He continued:-

> "Lord Penzance quite clearly saw how undesirable it would be to attempt to lay down any comprehensive rule as to the manner in which a polygamous marriage ought to be regarded by the courts of this country for purposes different from that with which he was immediately concerned. I do not feel myself bound by anything said in *Hyde v. Hyde*, or any of the other cases on which reliance was placed in this connection, to hold that for the purposes of the present petition, the court is bound, or ought, to disregard the existence of the Hindu marriage. The problem, as it seems to me, requires to be approached *de novo* and from quite a different angle; that was the view which the judge took and, if I may respectfully say so, I entirely agree with the decision to which he came. The question as it presents itself to my mind is simply this: on May 5th 1939, when the appellant took the respondent to the Registry Office, was he, or was he not, a married man so as to be incapable of entering into another legitimate union. . . . We are not considering in this case the question of construction of any words such as 'marriage', 'husband', 'wife', and so forth in the Divorce Acts. We are considering whether, according to what would have been the old ecclesiastical law, the existence of the Hindu marriage formed a bar. For the purpose of that consideration, what was his status on May 5th 1939? Undoubtedly it was that of a married man. Will that status be recognised in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognised. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile, and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage, to the rights of his Hindu widow, and for that purpose the courts of this country would be bound to recognise the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here: one can think of other cases."

In a further interesting passage, he went on to make the comment:-

> "It would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status. There are some things which the court of this country will not allow a person in this country to do whatever status with its consequential capacity or incapacity the law of his domicile may give him. The status of slavery would not be recognised here, nor would a variety of other things allowed in status. In the case of infants, where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined not by the law of the domicile but by the *lex loci*. These are merely illustrations: I do not stop to cite authority about them, I refer to them in order to show that there cannot be any hard and fast rule relating to the application of the domicile as determining status and capacity for the purpose of transactions in this country."

Lord Greene went on to indicate that the question posed in that case had to be decided with due regard to common sense and some attention to reasonable policy. He considered in addition the consequences which would flow from disregarding the Hindu marriage for the purposes of the facts of the case before the Court of Appeal.

Mr. Durcan urged upon the court having regard to that judgment, that it was clear from that decision that polygamous marriages could be recognised for certain purposes and have effects for certain purposes under the common law of England.

In the light of the reliance placed on that decision by Mr. Durcan it is interesting to note the comments made by Lord Greene in the course of the judgment in the passage referred to above where he noted that:-

> "We are not considering in this case the question of construction of any words such as 'marriage', 'husband', 'wife', and so forth in the Divorce Acts."

The relief sought in these proceedings is a declaration under the provisions of s. 29 of the Family Law Act 1995. That does raise an issue to my mind as to the interpretation of the word "marriage" in the context of the provisions of that Act. Mr. Durcan when that point was raised urged on the court that the structure of the section is such that it is clear that it applies to marriages made abroad. He argued that the word marriage must be construed in such a way as to make it sufficiently wide to cover marriages which are recognised under our conflict of law rules.

In his response to this issue, Mr. McDonagh referred to a further passage from the judgment at p. 346, in which Lord Greene M.R. referred to the practical question posed in that decision namely:-

> "Will the courts of this country, in deciding upon the question of the validity of this English marriage, give effect to what was undoubtedly the status possessed by the appellant?"

He went on to say:-

> "That question we have to decide with due regard to common sense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter. The judge set out in a striking manner some the consequences which would flow from disregarding the Hindu marriage for present purposes. I think it is certainly a matter which we must bear in mind that the prospect if an English court saying it will not regard the status of marriage conferred by Hindu ceremony would be a curious one when the privy council might come to a precisely opposite conclusion as to the validity of such marriage on an Indian appeal. I do not think we can disregard that circumstance. We have to apply the law in a state of affairs in which this question of the validity of Hindu marriages is necessarily of great practical importance, in the everyday running of our commonwealth and our empire."

In referring to that passage, Mr. McDonagh emphasised the fact that there was a question of public policy at issue in that decision and that was the necessity for the courts of England and Wales to have regard to decisions of the Privy Council which could come to an opposite conclusion as to the validity of a Hindu marriage on an appeal from the Courts of India. Accordingly Mr. McDonagh submitted that the decision in *Baindail v. Baindai*l related to a very discreet issue as to whether Mr. Baindail was free to marry at the time he entered into a marriage in England.

It is important to note that one of the matters highlighted by the decision in *Baindail v. Baindail* is the extent to which public policy relating to the role of the Privy Council and the existence of the commonwealth and empire had in some of the cases which have arisen in the courts of England and Wales.

Finally I think it would be helpful to refer briefly to some of the concluding remarks of Lord Greene in the case of the *Baindail v. Baindail*. He concluded his decision by saying:-

> "On principle it seems to me that the courts are for this purpose bound to recognise the Indian marriage as a valid marriage and an effective bar to any subsequent marriage in this country. . . . I may perhaps conclude by saying this that the opinion which I have formed relates solely to the facts of the present case, which is simply and solely the validity of the English marriage in the circumstances of this case. I must not be taken as suggesting that for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country."

He went on to expressly state that nothing in the decision must be taken as having any bearing on the question of the law of bigamy having regard to the statutory definition of the offence of bigamy. It was his view that a different question arose in that context in which other considerations might come into play.

Mr. Durcan then referred to the decision in *Mohamed v. Knott* [1968] 2 All E.R 568, which related to a polygamous marriage between a Nigerian 13 year old girl and a Nigerian man. Both of the parties to the marriage were Muslims. The proceedings related to an application to a juvenile court in relation to which a fit person order was made committing the girl to care. At p. 566, Lord Parker C.J. referred to the decision of Lord Greene, M.R. in the case of *Baindail* referred to above and went on to comment:-

> "I read that because it seems to me that everything that Lord Greene there said applies equally today in relation to a Muslim marriage in Nigeria such as took place in the present case.
>
> As I have said, I do not propose to go through all the authorities, it seems to me that the present positions correctly set out in Dicey's *Conflict of Laws* (7th Ed) where in r. 37 it is said:

> 'A marriage which is polygamous under r. 34 and not invalid under r. 35 or r. 36 will be recognised in England as a valid marriage unless there is strong reason to the contrary.'
>
> The editor then goes on to refer to certain cases where there is some strong reason to the contrary, they all be cases which involve the construction in a statute of some such words as 'marriage', 'wife', 'husband', and where one has to decide whether those statutes have in mind merely a monogamous marriage in which case for the purpose of that statute the polygamous marriage will not be recognised or whether they are statutes which clearly cover marriages whether monogamous or polygamous. In my judgment the justices came to a wrong conclusion in this case and that for the purpose of ascertaining status of this wife, the courts here will recognise the marriage as a valid marriage giving her that status."

When considering that decision Mr. Durcan submitted that it suggested the following, that one should proceed on the basis that if the parties' domicile allows a polygamous marriage then one should recognise that marriage unless there are strong reasons to the contrary and those strong reasons may turn or indeed will turn on issues of the interpretation of particular statutory provisions and whether the words of those statutory provisions would not be appropriate to apply or be applied to a polygamous marriage. Based on that Mr. Durcan submitted that the decision is one which does not say that polygamous marriage should never be recognised or that polygamous marriage has no legal effect. On the contrary it was a recognition of the fact that such marriages may be recognised, that they do have legal effects and that it is appropriate to consider the question of recognition of polygamous marriage in particular cases.

Mr. Durcan also looked at the decision in *Shahnaz v. Rizwan* [1964] 2 All E.R. 1993, a case which involved a polygamous marriage contracted in India. The marriage in that particular case was potentially polygamous and the issue that arose in that case related to a contract for dower. The decision in that case does not add in any way to the other authorities referred previously.

Another case referred by Mr. Durcan was the decision in the case of *Chaudhry v. Chaudhry* [1976] Fam. 148. The parties in that case were married in Pakistan according to Islamic law on 28th June, 1959. The issue that arose in the particular case is whether a wife, a party to a polygamous or potentially polygamous marriage was entitled to relief under the provisions of s. 17 of the Married Women's Property Act 1882. The husband pronounced a talaq, a divorce under his personal law on 2nd July, 1972. It was accepted that at that date the talaq pronounced in that way would have been recognised by the English courts as validly dissolving the marriage. The talaq became final on 2nd October, 1972. That is significant because it was prior to the coming into operation of the Domicile and Matrimonial Proceedings Act 1973. Dunn J. in that decision at p. 153 referred to the judgment of Lord Penzance in *Hyde v. Hyde* and commented as follows:-

> "It is that authoritative statement of the law which was finally changed by the Matrimonial Proceedings (Polygamous Marriages) Act 1972, as a result of the Report on Polygamous Marriages, 1971 (Law Com. No. 42). But before that change was made there were a number of cases, which have been cited to me, referring to different statutes in which the words 'husband and wife' fell to be construed in which the courts held that the parties were husband and wife for the purpose of the statute, notwithstanding that the marriage was a polygamous one."

He then referred to the decision in *Baindail v. Baindail* referred to above and continued:-

> "In my judgment, the parties having been married according to the law of their domicile, the English court would regard them as husband and wife for the purpose of deciding any application by either of them under s. 17 of the Married Women's Property Act 1882. Any other conclusion would, in my judgment, be most impractical and an affront to common sense, because one would have the highly inconvenient situation that parties to a polygamous marriage could apply for transfers and settlement of property under the Matrimonial Causes Act 1973, but could not apply for their rights to be determined or for sale under s. 17 of the Married Women's Property Act 1882."

I have to say that given the significant changes brought about in the legislation of the United Kingdom by the Matrimonial Proceedings (Polygamous Marriages) Act 1972, it is my view that that decision is of less weight than some of the other authorities opened by Mr. Durcan.

Before I leave the cases opened by Mr. Durcan from the neighbouring jurisdiction, I want to refer to one final decision namely *Lee v. Lau* [1964] 2 All E.R. 248. In that case the husband and wife had been born in Hong Kong and lived there during their childhood. In 1942 when the husband was fourteen and the wife was fifteen years of age, they met for the first time and went through a ceremony which might constitute a valid marriage under Chinese law and custom. They lived together and a child was born in 1952. Subsequently the husband came to England and the wife remained in Hong Kong. The husband returned to Hong Kong and in 1959 the parties executed a document by which they agreed to dissolve their relationship of husband and wife. Since 1959 the husband had been domiciled in England. The Chinese customary marriage precluded the husband from marrying a second time in the same way, but it did not preclude him from having secondary wives who have rights against the husband and whose children are legitimate. There was a conflict of expert evidence as to whether the Hong Kong courts would in fact recognise the marriage as valid, the marriage in the present case given that both husband and wife were under sixteen years of age in 1942 at the time of the marriage. The husband brought before the English courts a petition for a declaration that the marriage between himself and the wife was invalid, alternatively that the contract of divorce had validly dissolved any marriage between them. It was held in that case that once the nature and incidence of a union abroad between husband and wife had been determined according to the local law, the question whether or not the union is a monogamous marriage is to be determined according to English law. A number of passages from that judgment were cited by Mr. Durcan and indeed a number were also cited by Mr. McDonagh in the course of his submissions. Mr. Durcan noted that the court in that case, Cairns J., stated:-

> "This court will not adjudicate upon a potentially polygamous union. (See *Hyde v. Hyde* . . .) Nevertheless a polygamous marriage is recognised by our courts for some purposes, for example, legitimacy of the issue (see *Sinha Peerage*) case and property rights (see *Colman v. Shang alias Quartey*) In particular such a marriage is recognised as a bar to subsequent marriage in this country (see *Baindail (otherwise. Lawson) v. Baindail*). In that case the respondent, having been a party to a polygamous marriage while domiciled in India, subsequently went through a ceremony of marriage with the petitioner in this country and the petitioner was held by the Court of Appeal to be entitled to a decree of nullity."

Mr. Durcan emphasised that part of the judgment which indicated that a polygamous marriage was recognised in the English courts for some purposes. Accordingly he submitted that the proposition had been established that for certain purposes polygamous marriages are entitled to recognition under the common law. In the course of his submissions, Mr. McDonagh in referring to that particular case referred to a passage at p. 252 in the following terms:-

> "I need not, I think, consider the further question, on which no argument was addressed to me, whether this marriage, which was obviously arranged for the young parties to it by other people, was truly a voluntary union.
>
> At this stage, then, I have reached the conclusions that the marriage may have been valid, but that, if so, it was potentially polygamous. Having held that the marriage may have been valid, I cannot make a declaration that it was invalid, and, indeed, at the hearing counsel for the husband did not invite me to do so. He asked for a declaration in accordance with the second paragraph of the prayer of the petition in the following form:
>
> 'A declaration that the said contract of divorce validly dissolved any marriage between the [husband] and the [wife]'.
>
> I draw attention to the words 'any marriage'. Counsel for the husband would be content with a declaration in this form and counsel for the Queens Proctor urged me to use this language and not to refer to 'the marriage'. His reason for this was that a declaration that the contract of divorce dissolved 'the' marriage would imply a finding that the marriage was valid, a matter on which Hong Kong law remains doubtful. I think that there is great force in this contention."

Mr. McDonagh also relied on a later passage at p. 253 to the following effect:-

> "The rule in this court is that the court will not adjudicate on a marriage without proof that a valid marriage was celebrated. The necessity for such proof is illustrated by numerous cases cited in *Rayden on Divorce*, (9th Ed.), p. 593, footnote (d), (e). The court may, of course, adjudicate on a ceremony of marriage without

holding that it was a valid marriage, because the very object of the adjudication is sometimes to determine that there was no valid marriage. In the present case, I am asked to adjudicate on the validity of the divorce and that might seem to presuppose a valid marriage. The context in which the necessity of proving a valid marriage ordinarily arises is on a petition for divorce where the court cannot grant a decree dissolving the marriage unless satisfied that a valid marriage exists. In such a case the court is asked to grant a decree changing status. Here I am merely asked to grant a declaration determining status and all that the husband wishes to know is whether he is at the moment free to marry. I can see no reason of public policy why the court should not say that if this was a valid marriage in 1942, then it was dissolved in 1959. I do not think that I am prevented by any previous authority from granting such a declaration without determining whether the marriage was valid."

Again I think it would seen from that quotation the limited degree of recognition that can be said to have been granted by the court to a polygamous marriage. Indeed one of the key issues in that case was the jurisdiction to declare the marriage dissolved in England as opposed to requiring the husband to go abroad to obtain a decision on his status. As Cairns J. commented at p. 255 of his judgment:-

> "It is far more desirable both from the point of view of the husband and of the lady whom he now wishes to marry, and in the public interest, that his status should be determined before he enters into the new marriage; and he ought not to have to go to the Hong Kong courts to obtain such a determination. In recent years the English courts have leaned strongly in favour of enabling a person domiciled and resident in England to obtain a decision about his matrimonial status without having to go to a court abroad for the purpose. . . ."

Mr. Durcan concluded his submissions by referring to a number of Irish authorities. The first of those was the decision of the High Court in the case of *K.E.D. v. M.C*. (Unreported, High Court, 26th September, 1984). The issue in that case was an application for a decree of nullity on the grounds that the respondent was already married according to the laws of the State at the time of his second marriage to the petitioner. The respondent had been married in 1946 and there were two children of the marriage. In 1955 the respondent's wife left him and went to live in England. The respondent continued to reside in Ireland with his daughters. Divorce proceedings were instituted by his wife in England in 1959. The respondent's address in Ireland was given in the proceedings and although he filed an answer in 1960 to the proceedings he did not defend the proceedings, nor did he challenge the statement to the effect that he did not have UK domicile. Subsequently the respondent and the petitioner were married in a registry office in London. The parties after marriage lived in a flat in London. It appears that the parties returned to Ireland in 1965 and continued to reside there. The issue was whether his domicile had changed when he went to live in England in October 1961. In the course of her judgment Carroll J. stated at p. 4 of 6 as follows:-

> "The law is settled that the domicile of the respondent is the relevant factor in this divorce. The divorce granted by the English Courts is not valid in this jurisdiction as it was not based on domicile. It was stated by Walsh, J. in *Gaffney .v. Gaffney* [1975] I.R. 133 at 150:
>
> 'In the course of his judgment in *Mayo-Perrott v. Mayo-Perrott*, Kingsmill-Moore, J. stated the Irish law to have been that the recognition of foreign divorces in Irish courts depended upon establishing that the domicile of the parties was within the jurisdiction of the court pronouncing the decree. Recognition and application of this principle of private international law was part of the common law in Ireland and like Kingsmill-Moore, J. in the Mayo-Perrott case and Mr. Justice Kenny in this case, I am satisfied that it is still part of our law. It follows therefore that the courts here do not recognise decrees of dissolution of marriage pronounced by foreign courts unless the parties were domiciled within the jurisdiction of the foreign court in question. Insofar as the courts of this country are concerned, the marriage remains as valid and as subsisting in this country as it would have been but for the intervention of the purported decree of dissolution.'
>
> Since the divorce granted in April 1962, is not a divorce which will be recognised in this country the respondent was not free to re-marry. The respondent's capacity to marry is determined by the law of his ante-nuptial domicile. Since he was not free to re-marry in this country, he therefore was not free to re-marry in England (see *Reg. v. Brentwood Superintendent Registrar of Marriages* [1968] 2 Q.B. 956).

In his judgment Sachs, L.J. says at page 968:

> 'The fact that the parties to a proposed marriage cannot marry according to the law of the country in which they are domiciled is as a normal rule, a lawful impediment to their being married in this country. That follows from what in Dicey and Morris *Conflict of Laws* (8th Ed.) page 254 is stated as Rule 31:
>
> > 'Capacity to marry is governed by the law of each party's ante-nuptial domicile'.'"

Mr. Durcan submitted that this was a recent example of the rule that one's capacity to marry is governed by the law of one's ante nuptial domicile. He submitted that therefore it will occur from time to time that people will having regard to the law of their domicile have capacity to enter marriages which would not be possible to enter in this jurisdiction. According to the rule referred to, he argued that such marriages should be capable of recognition in this jurisdiction.

Mr. Durcan then referred to the Supreme Court decision in the case of *Conlon v. Mohamed* [1989] I.L.R.M. 523 and 1987 I.L.R.M. 172. The facts of that case as set out in the headnote are as follows:-

> "The respondent, and Irish citizen brought proceedings to recover possession of her house against the appellant, a South African citizen, with whom she had gone through a Muslim marriage ceremony in South Africa. The defendant resisted the ejectment proceedings on the grounds that the marriage entered into by the parties being valid, he was entitled to remain in residence in the marital home. Barron J. in the High Court found that the parties were not husband and wife according to the law of this jurisdiction. A case was stated to the Supreme Court pursuant to s. 38(3) of the Courts of Justice Act 1936, as to whether the learned trial judge was correct, in the light of his findings of fact, to conclude that no valid common law existed between the parties."

The Supreme Court answered the case stated in the affirmative and held that the true position was that the Islamic marriage which took place in South Africa was one which was potentially polygamous and not valid at common law. The Supreme Court went on to hold that the learned trial judge's finding on this issue is one which binds the Supreme Court as there are no grounds on which it can be challenged; no incorrect inference of law was raised by the learned trial judge from the facts established before him. Mr. Durcan sought to distinguish the issue that arose in that case and which was decided from the issue to be determined in this case. He submitted that the decision in that case was of no assistance because the marriage was not one where the people involved were entitled to enter into a polygamous marriage according to the law of that place, both parties in the case were not domiciled in South Africa and that everything in the decision in *Conlon v. Mohamed* turned on the question as to whether or not there was a valid common law marriage. Accordingly he submitted that *Conlon v. Mohamed* was not a precedent which could help to assist in determining the outcome of these proceedings.

He concluded his submissions by saying that in considering the facts of this case, the issue one has to consider is whether the marriage is entitled to recognition; the law governing that issue is the conflict of law rules. He submitted that the conflicts of law rules require the question to be asked whether or not the marriage is permitted by the law of the domicile of the parties and is such marriage permitted by the law of the place in which the marriage occurred. He stated that those two questions had to be answered in the affirmative and that therefore the marriage at issue in this case, namely the 1975 marriage, was entitled to recognition. He acknowledged that in certain circumstances such as those outlined in the case of *Hyde v. Hyde* there may be a statutory or legislative context in which it will not be possible for a polygamous spouse to derive a benefit under the particular statute having regard to its wording. However, in the context here, he stated that there is nothing in Irish law that stops the court from recognising a polygamous marriage in circumstances where parties are domiciled in the country that allows polygamous marriage and in accordance with the normal conflict of law rules in relation to the status of an individual such a marriage should be recognised. He referred briefly to the decision of the Supreme Court in the case of *Mayo-Perrott v. Mayo Perrott* [1958] I.R. 336 at p. 349, where having stated that there have been divorces carried through under the law by courts for foreign States which were not regarded as effectual to put an end to the marriage., Kingsmill Moore J. went on to say:-

> "But there maybe other instances: *R. v. Hammersmith Superintendent Registrar of Marriages* suggests that our law would not recognise as valid a dissolution effected

> in a foreign country by persons domiciled in such country, whereby the law of that country, divorce could be brought about without recourse to the courts; nor would it recognise as effective the dissolution of a marriage essentially monogamous by a form suitable only to the dissolution of a polygamous marriage. It is unnecessary to examine all possibilities. It is, however, legitimate to suggest 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 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*. I cannot find anything in Article 41.3 to suggest the courts (in the absence of further legislation) are entitled to do otherwise than regard as valid and effectual a divorce as a vinculo granted by the courts of a foreign country, where the parties at the time of the suit were domiciled in that country."

Kingsmill-Moore J. went on to state at p. 350:-

> "But to hold that our law accepts the cardinal principle that questions as to married or unmarried status depends on the law of the domicile of the parties at the time when such status is created or dissolved is not to say that our law will give active assistance to facilitate in any way the effecting of a dissolution of marriage in another country where the parties are domiciled. It cannot be doubted that the public policy of this country as reflected in the constitution does not favour divorce as a vinculo, and though the law may recognise the change of status affected by it as an accomplished fact, it would fail to carry out public policy if, by a decree of its own courts, it gave assistance to the process of divorce by entertaining a suit for the costs of such proceedings. The debt which it is sought to enforce is one created by proceedings of a nature which could not be instituted in this country, proceedings the institution of which our public policy disapproves."

Based on that particular passage, it was submitted by Mr. Durcan that the issue in relation to divorce was governed by the common domicile of the parties and that that was simply a sub-set of the wider rule of conflict of laws which is that the status of parties, including their capacity to marry is governed by the law of domicile. Accordingly he submitted that there was no express provision in the Constitution to preclude the possibility of the recognition of a polygamous marriage. Accordingly it was his contention that in certain circumstances polygamous marriages are entitled to recognition under the common law.

Finally, Mr. Durcan made brief reference to Council Directives 2003/86/EC on the Right to Family Reunification. To the extent that it is necessary, I will refer briefly to this Directive subsequently in the course of the judgment.

Mr Devlin who appeared on behalf of the respondent indicated that he agreed with the submissions made on behalf of the applicant by Mr. Durcan. He referred in the first instance to the provisions of section 29 itself. He pointed out that an application under s. 29 of the Family Law Act 1995, was a stand alone provision which did not carry with it any consequential relief. He pointed out that the provisions of s. 29 do not provide a context within which such relief may be given. He compared and contrasted the component parts of section 29(1). These proceedings concern s. 29(1)(a), namely a declaration that the marriage was at its inception a valid marriage. He observed that in relation to the decree of divorce, annulment or legal separation, s. 29(1)(d) and (e) provide a court with the option to either grant or withhold recognition of the decree of divorce, annulment or legal separation, but in respect of s. 29(1)(a) all that the court can do is to grant a declaration that the marriage was at its inception a valid marriage. There is no provision comparable to s. 29(1)(e) which provides for the grant of a declaration that a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in the State. Mr. Devlin contended that this difference was of significance in that he contended a court on an application under s. 29(1)(a) was not entitled to give a declaration that the marriage at its inception was not a valid marriage. I note the comments of Mr. Devlin in this regard, but I am not convinced that the issue highlighted by him in regard to the provisions of s. 29(1) is of any real significance in the context of these proceedings. Obviously the court in these proceedings has not been asked to grant a declaration that the marriage was at the date of its inception not a valid marriage. I do accept that there may be a difference between a situation in which a court refuses to grant a declaration that a marriage was at its inception a valid marriage and an order to the effect that at its inception a marriage was not a valid marriage, but the fact that such difference in outcome is not provided for in the legislation does not to my mind make any difference to the overall consideration of the issue that requires to be determined in these proceedings.

Mr. Devlin submitted that as was clear from the authorities referred to by Mr. Durcan in some cases, a polygamous marriage may be valid. He contended that the capacity of the parties in the present case and the validity of the ceremony of marriage they went through was such that the question posed in these proceedings admitted of only one answer, namely, that the marriage in January 1975 was valid. He pointed out the problems that would be posed for the respondent, for example, if the applicant was to contract a marriage in this jurisdiction. He argued that it would be inappropriate for the previous relationship which a person in the position of the applicant had entered into was to be set at nought for the purposes of Irish law. He accepted the position that once a party in the position of the applicant and the respondent in these proceedings are in this jurisdiction, that they must regulate their affairs in accordance with Irish law but submitted that it was another thing altogether to say that the regulation of the conduct of their previous status required to be tested in accordance with the traditional concept of marriage in this jurisdiction. He noted that the Attorney General's submissions were to the effect that to afford a degree of recognition to the marriage in this case between the applicant and the respondent would somehow constitute an attack on the constitutional family or the constitutional institution of marriage and he submitted that those fears are unfounded. In conclusion, he submitted that it was clear having regard to the principles of conflicts of law that there are situations in which a marriage such as the marriage between the applicant and the respondent would be valid under Irish law.

I should add that in his written submissions Mr. Devlin reiterated that the common view of the effect of the decision in *Hyde v. Hyde* was that polygamous marriages would not be recognised as valid. He submitted that in fact all that was decided in that case was that the parties to a polygamous marriage were not "entitled to the remedies, the adjudication, or the relief of the matrimonial law of England". He argued that the reason for that was that English law was predicated on the view that marriage was monogamous. Notions of adultery and bigamy would be difficult to apply to a polygamous marriage.

Mr. Devlin in his written submissions also made reference to the European Convention on Human Rights Act 2003, and he submitted that s. 29 of the Family Act 1995, and indeed the order made herein on the 23rd November 2004, must be read so as to give effect to the right to private and family life of the respondent pursuant to Article 8 of the European Convention on Human Rights. He also referred to the provisions of Article 12 of the European Convention on Human Rights. He referred to the decision in the case *R.B. v. The United Kingdom* [1992] 628/92 (9th December, 29th June 1992), in which the European Commission on Human Rights upheld the UK Immigration Act 1988 providing that a women would not be entitled to immigrate to the United Kingdom on the basis of the polygamous marriage, if another had already been admitted to the UK as the wife of the same husband; the Commission found there was an interference with the applicant's right to respect for her family life but held that it was justified for the protection of morals and rights and freedoms of others. He submitted that there was no evidence in this case to show that the actions of the State parties herein are claimed to derive from or justified by the protection of morals or the rights and freedoms of others. That concluded the submission of Mr. Devlin.

Ms. Clissman S.C. in her submissions also looked at the provisions of section 29. She emphasised the fact that it was a procedure providing merely for declaratory relief and did not provide any actual remedy or ancillary relief or benefit to the parties. She emphasized the role of the conflict of laws rule. In that context she accepted that in so far as the recognition of a marriage is concerned, the first requirement is that the form of marriage must comply with the *lex loci celebrationis* and the capacity to marry is determined in accordance with the personal law of the parties i.e. the law of their domicile and that provided such a marriage is not incompatible with the constitution, she argued that there was a presumption as to the validity of the marriage. She referred in that context to Dicey and Morris (13th Ed.) at para. 17-045, which states:-

> "The presumption of marriage takes two forms. (a) There is a rebuttable presumption of law that if a couple go through ceremony of marriage and thereafter live to together as man and wife, the marriage is valid in all respects; (b) there is a rebuttable presumption of law that a couple who co-habit with the reputation of being married are validly married."

She submitted that the parties in this case have established that in accordance with private international law the parties in this case are entitled to the recognition of the marriage of the applicant and the respondent in 1975. She contended that the rules of private international law as understood in this jurisdiction have not been altered by the implementation of the 1995 Act.

She emphasised again that the application for a declaration did not involved any application for ancillary relief.

She said that contrary to the contentions of the Attorney General contained in the written submissions, not to recognise the marriage in this case would be a failure to implement the constitutional provisions which provide for special protection for the institution of marriage. She noted that there is no definition of marriage within the Constitution and that if the marriage between the applicant and the respondent were not to be recognised, the parties to that marriage would be viewed in Irish law as being parties to an extra-marital union. She submitted that such a conclusion would be inconsistent with the special protection for the institution of marriage contained in the Constitution. She also pointed out that in those circumstances the parties would be free to marry and capable of marrying other persons if that were the conclusion of these proceedings.

In the course of the submissions I asked Ms. Clissman about the role of public policy in regard to the recognition of marriages according to the rules of private international law. She referred in that context to the decision in *Baindail v. Baindail*, where Lord Greene stated:-

> "It would be wrong to say that for all purposes the law of domicile is necessarily conclusive as to the capacity arising from status. There are some things which the court of this country will not allow a person in this country to do, whatever status, with its consequential capacity or incapacity the law of his domicile will give him. The status of slavery would not be recognised here, nor would a variety of other things involved in status. . . . Those are merely illustrations. I do not stop to cite authority about them, I refer to them in order to show that there cannot be any hard and fact rule relating to the application of the law of the domicile as determining status and capacity for the purpose of transaction in this country."

She went on to quote what was described by Lord Greene in that case as the practical question namely, "will the courts of this country, in deciding upon the question of the validity of this English marriage, give effect to what was undoubtedly the status possessed by the applicant? That question we have to decide with due regard to common sense and some attention to reasonable policy. . . ." a passage previously referred to above.

In dealing with this issue Ms. Clissman submitted that Ireland had changed in the last number of years and that there are nowadays people who have come to live in this country and who have come to invest in this country and she argued that it would affront the morality of most people if, for example, a married Hindu couple were to be regarded by the law of this country as strangers and living in an extra-marital relationship, because the courts of this country would not recognise a polygamous marriage. She contended that where the principles of private international law are so clear with regard to the recognition of the status of marriage without necessarily involving ancillary or other relief that it is no extension of our definition of the nature or characteristic of marriage in our jurisdiction to recognise the marriage of people who have contracted a polygamous marriage outside the jurisdiction in circumstances where they are regarded as validly married under the law and domiciles of their country of origin.

Mr. McDonagh in his submissions also examined the provisions of s. 29 of the Family Law Act 1995. He compared the wording used in the various subheadings of section 29(1). He expressed the view that the reason for the use of the phrase "at its inception" was because the marriage may have ceased to exist at the time the court comes to consider its validity. That in his submission explained the difference in wording between s. 29(1)(a) and s. 29(1)(d) and (e). He also referred briefly to the provisions of s. 29(8) and in particular to the effect of the expression "binding on the State". He contended that proceedings pursuant to s. 29 may give rise to issues which have effects beyond the relationship between the private parties to the proceedings and may impinge on the State interest concerning the status of marriage as an institution. Accordingly he submitted it was entirely logical that the Attorney General may have a role to play in such proceedings. The Attorney General is viewed as having a real input into the issues before the court as evidenced by the approach taken by the Oireachtas in enacting this legislation. He then submitted that having regard to the interpretation of s. 29(1)(a), the correct interpretation is that the court is involved in looking at the validity of the marriage in terms of whether that marriage is valid in Ireland. He added that it would be of no benefit to the applicant and the other parties in these proceedings to grant a declaration to the effect that the marriage was valid in the Lebanon. The declaration involves a decision to the effect that the marriage is a marriage valid according to Irish law.

In the course of his submissions, Mr. McDonagh commented on the fact that neither Mr. Durcan nor Mr. Devlin addressed the issue of public policy. He accepted that the question of public policy was to some extent considered by Ms. Clissman in her submissions and he argued that public policy had an important bearing on the issue in this case. In this context, he noted the extract from Dicey and Morris and the commentary under r. 73, which provides "A marriage which is polygamous under rule 69 and not invalid under rr. 71 or 72 will be recognised in England as a valid marriage unless there is strong reason to the contrary". He also referred to a passage from Prof. Binchy's book *on Conflicts of Law*, in which he observed at p. 215:-

> "The real issue is one of social policy. If we accept that our *ordre public* does not prevent us from affording recognition to a polygamous marriage valid under the *lex domicilii* of each of the parties, it then becomes a matter of deciding how entitlements in our law premised on monogamous marriages may most appropriately be applied, or not applied, as the case may be, in relation to polygamous marriage, with whatever modifications that may seem desirable."

Thus, he submitted that a key element in considering the facts of this case and the issues involved is the issue of public policy.

Mr. McDonagh observed that many of the cases relied on by Mr. Durcan and his colleagues were predicated on public policy in the United Kingdom. He referred to a number of passages from a decision of the House of Lords, *Brooke v. Brooke* (1861) IX H.L.C. 703. That case concerned two British subjects who were domiciled in Britain, but who went to Denmark to contract a marriage there. That case concerned the marriage of a man with the sister of his deceased wife, which was forbidden by the law of Britain. As such it was held in that case that a marriage contracted by a British subject, temporarily resident abroad, but domiciled in Britain even if valid in the foreign country and celebrated according to the forms required of that country was void in Britain. In the course of his judgment in that case, the Lord Chancellor referred to the treatise on "The *Conflict of Laws*", by Mr. Justice Storey. He stated at p. 71.10 as follows:-

> "Mr. Justice Storey, in his valuable treatise on "*The Conflict of Laws*", while he admits it to be the 'rule that a marriage valid where celebrated is good everywhere' says (S113A) there are exceptions; those of marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country, he adds, 'in respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognise polygamy or incestuous marriages; but when we speak of incestuous marriage care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous'. The conclusion of this sentence was strongly relied upon by Sir Fitzroy Kelly, who alleged that many in England approve of marriage between a widower and the sister of his deceased wife; and that such marriages are permitted in Protestant states on the Continent of Europe and in most of the states in America.
>
> Sitting here as a judge to declare and enforce the law of England as fixed by King, Lords and Commons, the supreme power of this realm, I do not feel myself at liberty to form any private opinion of my own on the subject, or to enquire into what may be the opinion of the majority of my fellow citizens at home, or to try to find out the opinion of all Christendom. I can as a judge only look to what was the solemnly pronounced opinion of the legislature when the laws were passed which I am called upon to interpret. What means am I to resort to for the purpose of ascertaining the opinions of our nations? If my interpretation of these laws do vary with the variation of opinion in foreign countries? Change of opinion on any great question, home or abroad, may be a good reason for the legislature changing the law, that can be no reason for judges to vary their interpretation of the law."

That case, whilst it may not be of direct relevance given that it concerned a marriage which would not have been valid having regard to the *lex domicilii* of the parties concerned, does contain a useful point which is relevant in this case, namely that there are exceptions to the general rule that a marriage valid in accordance with the law of the *lex loci celebrationis* and one must add in accordance with the *lex domicilii* of the parties will be recognised as a valid marriage.

Mr. McDonagh then referred to the decision in *Conlon v. Mohamed* to which reference has already been made by counsel for the applicant, respondent and second named notice party. Mr. McDonagh accepted that the comments made in the course of the Supreme Court judgment in that case may be *obiter*, he submitted that the *dicta* confirm that a polygamous marriage is not recognised as valid in this State. In particular he relied on a passage from the judgment of Finlay C.J. at p. 525 in which it was stated:-

> "I am quite satisfied that the true position was that which apparently was accepted by the parties on the hearing in the High Court and that the Islamic marriage which took place in the Mosque was one which was potentially polygamous. The learned trial judge's findings on this issue is one which in my view binds this Court on the case stated as there are no grounds on which it can be challenged, and I reject the claim made on behalf of the defendant that it was an incorrect inference in law raised by the learned trial judge from the facts established before him. It has not been contested that a polygamous marriage cannot be recognised in our law as a valid marriage."

It has to be borne in mind that in that case the case stated recorded the fact that both parties accepted that a Muslim marriage was potentially polygamous. The trial judge (Barron J.) in the course of his judgment [1987] I.L.R.M. 172, had found at p. 180 of his judgment as follows:-

> "It was the intention of the parties to celebrate a religious Islamic marriage. Since the forms and customs attaching to such a marriage were unfamiliar to the plaintiff the entire ceremony was carefully explained to her as was her part in it including the giving of her consent three times and the exchange of vows and of rings following the Mosque ceremony. It seems therefore that the additional ceremony at the reception was intended to have and did have merely religious significance. The references to lawfully wedded husband and lawfully wedded wife in these vows must be taken to be husband and wife respectfully in accordance with Islamic law.
>
> Since it is accepted that such a marriage is potentially polygamous, it follows that the essential ingredient of a common law marriage were not present. Accordingly, the parties are not husband and wife according to the law of this jurisdiction."

Accordingly, Mr. McDonagh submitted that the approach of the Supreme Court was to the effect that it is simply not possible for a polygamous marriage to be recognised in our law as a valid marriage. He went on to submit that what was stated in that case about polygamous marriage is consistent with the notion of marriage as interpreted in this jurisdiction in accordance with our Constitution.

Mr. McDonagh then proceeded to make a number of submissions on the nature of marriage as known to Irish law. The starting point for that consideration is the Constitution. He pointed out that an application pursuant to s. 29 of the Family Law Act 1995, must be interpreted in accordance with the constitution. He referred to the provisions of Article 41 of the Constitution which deals with the family and in particular to article 41.3.1. which provides:-

> "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

Mr. McDonagh emphasised that the issue in this case could not be determined by regard to the common law principles of conflicts of law alone. Public policy also had to be considered. He commented on the submissions that had been made by counsel on behalf of the other parties to these proceedings and to the fact that they had not addressed one aspect of public policy, namely the extent to which public policy in this jurisdiction is informed by the Constitution. In that regard he referred to the manner in which the institution of marriage had been considered, described and discussed in a number of authorities in this jurisdiction having regard to the provisions of the Constitution. Most recently the authorities in this area were considered by this Court in the case of the *Zappone and Gilligan v. Revenue Commissioners, Ireland and the Attorney General* (Unreported, High Court, 14th December, 2006). In the course of that case a number of the Irish authorities on the subject of marriage were reviewed. In the course of that judgment I referred to the decision of Costello J. in *Murray v. Ireland* [1985] I.R. 532, *T.F. v. Ireland* [1995] I.R. 321, *D.T. v. C.T.* [2003] 1 I.L.R.M. 321 and *Foy v. An tArd Chlaratheoir* (Unreported, High Court, 9th July, 2002) (see pp. 43 to 46 of the judgment). Mr. McDonagh in the course of his submissions, then went on to quote a passage which dealt with a number of authorities from other jurisdictions where the issue of same sex marriage had arisen. The passage referred to by Mr. McDonagh starts at p. 125 and is as follows:-

"These authorities are interesting in many respects. They are dealing with similar definitions of marriage and the assertion of a right to marry requiring a redefinition of the traditional understanding of marriage as is the case in these proceedings. However as I have already noted many of the decisions are based on equal protection clauses. Many of the arguments in those cases put forward on behalf of the proponents of same sex marriage have been relied upon in the arguments in this case also. There is a limit to the assistance that can be drawn from them given the different constitutional framework applicable in this jurisdiction but the approach taken to the proposed re-definition of the freedom to marry is of interest.

Nonetheless, I have a difficulty in this case in accepting the arguments of the plaintiffs to the effect that the definition of marriage as understood in 1937 requires to be reconsidered in the light of now prevailing standards and conditions. The passage quoted above from the judgement of Murray J. at p. 681 of his judgment in *Sinnott* which approved of the suggested guidelines identified by the late Prof. Kelly seems to me to indicate the appropriate course for the Court to adopt in interpreting the Constitution in the context of this case.

Marriage was understood under the 1937 Constitution to be confined to persons of the opposite sex. That has been reiterated in a number of the decisions which have already been referred to above, notably the decision of Costello J. in Murray v. Ireland; The Supreme Court decision in *T.F. v. Ireland* and the judgment of Murray J. in *T. v. T*. The definition was reiterated in *Foy v. An tÁrd Claraitheóir* although there must be a caveat concerning the use of the words biological man and biological woman given the decision in the Goodwin case. That has always been the definition. Judgment in the *T. v. T*. case was given as recently as 2003. Thus it cannot be said that this is some kind of fossilised understanding of marriage. I fully appreciate that changes have been made; indeed, some far reaching changes have been made to the institution of marriage as it was understood in 1937. Changes in relation to capacity in respect of the marriage age have been made and the most fundamental change of all has been the change in relation to the indissolubility of marriage. . . .

The final point I wish to make in relation to the definition of marriage as understood within the constitution is that I think one has to bear in mind all of the provisions of Article 41 and Article 42 in considering the definition of marriage. Read together, I find it very difficult to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words used, relate to a same sex couple."

Mr. McDonagh in referring to that particular case commented that similar considerations arise in respect to a polygamous marriage.

He proceeded to refer to a number of decisions, some of which have been referred to already. In particular he referred to the decision in *T.F. v. Ireland* [1995] 1 I.R. 321, *D.T. v. C.T.* [2003] 1 I.L.R.M. 321. He referred to a passage from the judgment of Hamilton C.J. in the case of *T.F. v. Ireland*, where he stated at p. 373 as follows:-

"As to how marriage should be defined, the Court adopts the definition given by Costello J. in *Murray v. Ireland* [1985] I.R. 532 at p. 535:-

'. . . the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special lifelong relationship.'

And in *N. v. K*. [1985] I.R. 733, McCarthy J. said in his judgment at p. 754:-

'Marriage is a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole.'

One of the reciprocating rights and duties is obviously that of cohabitation. It is an important element in marriage that the spouses live together. The unique and special lifelong relationship referred to by Costello J. could not be developed otherwise."

Mr. McDonagh noted that similar views were expressed in the case of *D.T. v. C.T*. to which reference has already been made and Mr. McDonagh referred in particular to the judgment of

Murray J. (as he then was). I will refer to a part of the passage opened to the court by Mr. McDonagh commencing at p. 374 of the judgment of Murray J.:-

> "Nonetheless marriage itself remains a solemn contract as partnership entered between man and woman with a special status recognised by the Constitution. It is one which is entered into in principle for life. It is not entered into for a determinate period. The moment a man and woman marry, their bond acquires a legal status. The relationship once formed the law steps in and holds the parties to certain obligations and liabilities. Even where a marriage is dissolved by judicial decree, the laws of many if not most states required that the divorced spouses continue to respect and fulfil certain obligations deriving from their dissolved marriage for their mutual protection and welfare, usually of a financial nature. This reflects the fact that marriage is in principle intended to be a lifetime commitment and that each spouse has fashioned his or her life on that premise. If the law permitted a spouse to cut himself or herself adrift of a marriage on divorce, without any continuing obligation to the former spouse it would undermine the very nature of the marriage contract itself and fail to protect the value which society has placed on it as an institution. It would give rise, for example, to a complete disregard for the status of a spouse whose principle role in the marriage was working in the home in support of the other partner who was the principle earner or breadwinner. Hence the constitutional imperative of proper provisions for spouses.
>
> The lifelong commitment which marriage in principle entails means that there is a mutuality of an intimate relationship in which singular aspirations in the life of each partner are adapted to mutual life goals. They adapt their lives to live and work together for the mutual welfare of their family which usually, but by no means necessarily so, also involves the birth and rearing of children. Husband and wife having mutual duties and responsibilities for the welfare of each other and the marriage, will throughout the marriage, make private decisions as to the role each of them will play in the support of the marriage, the achievement of their goals and their lifestyles. These decisions are likely to have an effect on their way of life even after the eventuality of a divorce, such as the capacity of one of them at that stage to establish an independent and secure way of life."

Mr. McDonagh, relying on those authorities, submitted that on the occasions where the courts have since the enactment of the constitution being required to expand on, interpret and set out the meaning of marriage in the Constitution, it has been described as a monogamous union of one person with another. On that basis he argued that the policy of the courts and the policy of the Constitution is that the courts will recognise as valid a marriage which conforms to marriage as understood in this jurisdiction. He argued that it was not possible to recognise something as a valid marriage because it was conducted abroad which could not be recognised as a valid marriage in accordance which our social system, Constitution and culture, as defined and explained in the various cases referred to above.

Mr. McDonagh proceeded to raise the issue as to what would occur if a declaration was granted to the applicant in this case. In the event that the applicant or the respondent sought a divorce in respect of the marriage what would occur, how would the court decide on issues such as ancillary relief in such a case particularly given that there is a second spouse? Having referred to a number of the difficulties that would arise in such a situation, it was submitted by Mr. McDonagh that marriages which can be declared to be valid marriages are those which conform to public policy in Ireland in the sense of being a monogamous marriage. He argued that polygamous marriage by definition cannot conform to the concept of marriage in this jurisdiction and therefore cannot be viewed as a valid marriage at its inception by means of a declaration under section 29(1)(a).

Finally Mr. McDonagh referred to the Supreme Court decision in the case of *Conlon v Mohamed* to which reference has already been made. He pointed out that Mr. Durcan, Mr. Devlin and Ms. Clissman were critical of that decision and had expressed the view that the comments made in that case were *obiter dicta* and not binding on this Court. However he submitted that one could draw from that decision a statement of policy as to what the courts will do. Accordingly, he argued that the courts will not recognise and do not consider polygamous marriage to be valid. He accepted that the decision might not be a precedent which was binding on this court, but contended that it was in effect a clarification or statement of policy, which has not changed in the period since that case was decided.

In replying submissions, Mr. Durcan took issue with the argument that the Constitution favoured a particular type of marriage and that only that type of marriage could be recognised by the court. He referred to the decision of the Supreme Court in the case of *Mayo-Perrott v. Mayo-Perrott* [1958] I.R. 336 at p. 350:-

> "The general policy of the article seems to me clear. The constitution does not favour dissolution of marriage. No laws can be enacted to provide for a grant of dissolution of marriage in this country. No person whose divorce status is not recognised by the law of this country for the time being can contract in this country a valid second marriage. But it does not purport to interfere with the present law that dissolutions of marriage by foreign courts, where the parties are domiciled within the jurisdiction of those courts, will be recognised as effective here. Nor does it in any way invalidate the remarriage of such persons. It avoids the anomalous, if not scandalous, state of affairs stigmatised in the passages which I have already cited whereby legitimacy and criminality could be decided by a flight over St. Georges Channel. But to hold that our law accepts the cardinal principle that questions as to married or unmarried status depends on the law of the domicile of the parties at the time when such status is created or dissolved is not to say that our law will give active assistance to facilitate in any way the affecting of a dissolution of marriage in another country where the parties are domiciled. It cannot be doubted that the public law of this country as reflected in the constitution does not favour divorce *a vinculo*, and though the law may recognise the change of status affected by it as an accomplished fact, it would fail to carry out public policy if, by a decree of its own courts, it gave assistance to the process of divorce by entertaining a suit for the costs of such proceedings."

The relevant constitutional provision that was being considered in that context was Article 41.3.3 of the Constitution which read as follows:-

> "No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

It was argued by Mr. Durcan that in the course of that passage referred to above Kingsmill-Moore J. was saying that the policy to be taken from the Constitution was that a particular type of marriage is favoured namely a type of marriage which is intended for life and where dissolution of the marriage was prohibited, but that did not stop the courts from recognising the dissolution of marriage elsewhere. His core submission was that although there was a prohibition on divorce contained within the Constitution, that prohibition was not interpreted by the courts as taking away the well established conflict of law rules about the status of individuals being determined by their domicile. On that basis he argued that there was nothing in the Constitution to prevent the recognition of marriages which were not expressly contemplated by the Constitution.

He also referred to the decision in the case of *Cheni v. Cheni* [1965] P. 85. That was a case in which the parties were married in Cairo in accordance with Jewish rites. The intention of both was to enter into a monogamous union. The marriage was valid by Jewish and Egyptian law and was potentially polygamous at its inception. It became irrevocably monogamous on the birth of a child of the marriage. Apart from the issue of polygamy that arose in that case that one of the features of the case was that the parties were uncle and niece, thus raising an issue as to incest. It was held that the marriage was at its inception potentially polygamous and the intention of the parties that the union should be monogamous was irrelevant; that the English court had jurisdiction to adjudicate on a marriage which, although potentially monogamous at its inception, had become monogamous at the date of the commencement of the proceedings. To that extent the court distinguished the decision in the case of *Hyde v. Hyde*. Sir Jocelyn Simon P. held at p. 97:-

> "So far as public policy is concerned, Mr. Stirling truly says that such marriages are void here by s. 1(1) of and Schedule 1 to the Marriage Act 1949. This is, however, expressly limited to marriages in England and affords me no guidance on how our law would regard foreign marriages good by their proper law. Mr. Stirling also relies on *Burgess v. Burgess*, where the office of the judge was successfully promoted to separate an uncle and niece, who were co-habiting without marriage as if husband and wife. Mr. Argyle replies, I think with force, that current public policy on

> incestuous relationships is to be ascertained less by looking at an ecclesiastical criminal jurisdiction which is now obsolete and by examining the modern statutes proscribing incest. Neither by the Incest Act 1908, whereby incest was for the first time cognisable by our lay criminal law, nor by its re-enactment in the Sexual Offences Act 1956, ss. 10 and 11, is it an offence for an uncle to have sexual intercourse with his niece. Even though the criminal law prohibits bigamy, public policy does not prevent or recognising and generally giving affect to polygamous marriages valid by their proper law; and it would be strange if public policy demanded our rejection of marriages constituted by a relationship of which our criminal takes no notice. In any event, the law proceeds charily where grounds of public policy are invoked. . . .
>
> I believe the true rule to be that the courts of this country will exceptionally refuse to recognise and give effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give it recognition and effect would be unconscionable in the circumstances in question. The rule is thus an example of a wider class which has received authoritative judicial acknowledgment in our private international law."

Mr. Durcan relying on that authority submitted that public policy should not be applied in a blanket fashion but rather had to be considered on the facts of each individual case. Finally, he submitted that the provisions in the Constitution were never intended to modify the long-standing rules of private international law.

A final point made by Ms. Clissman in her closing submissions was to the effect that in the case of *Conlon v. Mohamed*, the parties had conceded that a polygamous charge could not be recognised as a valid marriage. Therefore, it was her view that little weight could be attached to that decision as the issue of recognition of a polygamous marriage had not been argued, discussed or considered in that case. The issue was whether there was a valid common law marriage.

DECISION

This is a case in which the main relief sought by the applicant is a declaration pursuant to s. 29(1)(a) of the 1995 Act, that the marriage between the applicant and the respondent was on the 3rd January, 1975, a valid marriage. The provisions of s. 29 of the Act have already been set out in full, but I think it is important to set out again the provisions of s. 29(1)(a) which provides that:-

> "The court may, on application to it in that behalf by either of the spouses concerned or by any other person who, in the opinion of the court, has a sufficient interest in the matter, by order make one or more of the following declarations in relation to a marriage, that is to say:
>
> (a) a declaration that the marriage was at its inception a valid marriage."

There was some discussion in the course of the arguments as to the scope of s. 29 of the 1995 Act. It seems to me to be clear that s. 29 applies to marriages contracted in this jurisdiction and is also applicable to marriages contracted elsewhere. The question of the validity of a marriage contracted elsewhere, it seems to me, has to be considered having regard to the principles of conflicts of law rules. Therefore, although the application before the court is for a declaration pursuant to s. 29(1)(a) of the 1995 Act, the principles relating to the recognition of a foreign marriage have some relevance in the context of this case.

I want to reiterate at this point that I have had the benefit of a number of affidavits of law from an expert witness as to Lebanese law, Mr. Salah Mattar, Attorney at Law, of the Beirut Bar Association. His evidence is that the marriage of the applicant and the respondent is valid in Lebanon even with the existence of a subsequent marriage to the second named respondent, as a Muslim man can marry up to four wives. The evidence of Mr. Mattar was not challenged in any way and accordingly, as I have already indicated, I am satisfied having regard to the evidence that the parties to the 1975 marriage who were both domiciled in the Lebanon at the relevant time were capable of entering into a potentially polygamous marriage in accordance with the laws of Lebanon, a marriage which became polygamous with the subsequent marriage of the applicant and the second named notice party. I should add that there is nothing to suggest that the appropriate formalities required for a valid marriage were not complied with. Therefore, it seems to me to be clear that so far as the laws of the Lebanon are concerned, the marriage at issue herein is a valid marriage.

The question then arises as to whether the marriage in this case, valid in accordance with the laws of Lebanon, can be the subject of a declaration in the form sought pursuant to s. 29(1)(a) of the 1995 Act. As I mentioned already, conflicts of law rules may be of assistance in reaching a view on this question. I referred previously in the course of this judgment to a number of passages from Binchy, *Irish Conflicts of Law*. It is not necessary to refer again to those passages, but I think that one can draw from them some assistance in relation to a number of matters. Professor Binchy in his book gave a useful description of the meaning of a polygamous marriage derived from the case law. The term includes two types of marriage – namely, a potentially polygamous marriage and an actually polygamous marriage. In this case, the 1975 marriage was a potentially polygamous marriage at its inception and subsequently it became a polygamous marriage when the applicant married the second named notice party. The *lex loci celebrationis* prescribes the nature and incidents of the marriage. The *lex domicilii* determines the capacity to marry.

Dicey and Morris in *Conflicts of Law* (14th Ed.) set out a number of rules which are also of some interest in the context of this case. Two of those rules were relied on by the applicant as outlined above, namely r. 69 and r. 73. Rule 69 could be described as a distillation of the principles to be drawn from the case law as to the meaning of a polygamous marriage – that is, "a marriage is regarded as polygamous if either party to it is entitled to have another spouse".

There was no issue between the parties in relation to the definition of a polygamous marriage or as to the principles as to the role of the *lex loci celebrationis* in relation to the formalities for a valid marriage and the *lex domicilii* in relation to the capacity to marry.

I now wish to look at r. 73. It is in relation to this rule that the parties to these proceedings, the applicant, respondent and the second named notice party on the one hand and the Attorney General on the other hand find themselves at odds. It provides as follows:-

> "A marriage which is polygamous under r. 69 . . . will be recognised in England as a valid marriage, unless there is some strong reason to the contrary."

The basis for that rule is to be found in a list of authorities cited by the learned authors of Dicey and Morris, many of which were cited to this court and are referred to in the course of this judgment. The first in a long line of decisions from the courts of England and Wales in relation to polygamous marriages was the judgment in the case of *Hyde v. Hyde* to which reference is made above. The court in that case was dealing with a polygamous marriage and the finding of the court was confined to saying that the parties to such a marriage "were not entitled to the remedies, the adjudication or the relief of the matrimonial law of England". Certain issues, such as the question of legitimacy and succession rights, were expressly excluded from the decision. Mr. Durcan emphasised this fact to argue that although the decision was read for many years as completely excluding the possibility of recognition of such marriages, the decision was limited to excluding parties to such marriages to the reliefs and remedies of matrimonial law but was not a blanket refusal to recognise in any or all circumstances a polygamous marriage. The decision does contain a passage which has been cited frequently as to the nature of the institution of marriage, namely, the voluntary union for life of one man and one woman – a passage which has been approved in this jurisdiction.

One can see a changing view of polygamous marriage in the English case law since *Hyde v. Hyde* was decided. There has been a gradual relaxation of the view that polygamous marriage will not be recognised at all. The law in that jurisdiction has also been the subject of statutory change by reason of the Matrimonial Proceedings (Polygamous Marriages) Act 1972, which gave the parties to polygamous marriages, access to matrimonial relief. Thus the position in that jurisdiction is now quite different.

One of the aspects of r. 73 as set out in Dicey and Morris which is of in importance is the expression in the rule that polygamous marriage will be recognised unless there is some strong reason to the contrary. That expression brings into play the question of public policy, a topic upon which there was some discussion in the course of the submissions in this case. I think it is fair to say that the way in which English law has moved since the decision in *Hyde v. Hyde* has been influenced by public policy considerations some of which were well articulated in the case of *Bandail v. Bandail* in the passage from the judgment of Greene M.R. referred to earlier in the course of this judgment when he spoke of the need to bear in mind "that the prospect of an English court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when the Privy Council might come to a precisely opposite conclusion as to the validity of such a marriage on an Indian appeal". Greene M.R. went on to

comment that the question of validity of Hindu marriages was one of "very great importance in the everyday running of our commonwealth and empire".

It is clear that such policy considerations influenced the decisions of the English courts on which such reliance has been placed by Mr. Durcan, Mr. Devlin and Ms. Clissman. Clearly, those policy considerations are of no relevance in this jurisdiction. Given the nature of the policy considerations that emerge from some of the English decisions, it seems to me that this Court has to be cautious in considering those authorities bearing in mind the public policy considerations at play in those decisions.

I now want to turn to a consideration of public policy considerations in this jurisdiction and how those considerations may be informed by the Constitution and by relevant statutory provisions. Ms. Clissman in her submissions said that if the facts established that the marriage at issue conforms to the laws of the country in which the marriage took place as to the formal requirements in that country and that each of the parties to the marriage had the capacity to marry in accordance with their respective domicile, then the marriage should be recognised in this jurisdiction unless it is contrary to public policy or incompatible with the Constitution to recognise the marriage. I think that is a correct statement of the approach to be taken by the court in considering the question of the recognition of a foreign marriage.

The question then arises as to whether the recognition of the marriage in this case is contrary to public policy or is incompatible with the Constitution. It may not always be easy to ascertain what is the public policy of the State in relation to certain issues or situations. However, I think that in the context of the institution of marriage, the public policy of the State is informed by the Constitution, by legislation and to an important extent by our culture and tradition. Together with the question of public policy, the question of compatibility with the Constitution also requires to be considered in the context of this case. It seems to me that there is a degree of overlap between the issue of public policy and compatibility with the Constitution. A point made by Mr. Durcan when dealing with the issue of public policy was that public policy may clearly be seen from a Constitutional provision, as in the former prohibition in respect of the dissolution of marriage but that public policy clearly articulated in the Constitution did not preclude the courts from recognising a divorce obtained elsewhere. His argument was based on a passage from *Mayo-Perrott v. Mayo-Perrott* referred to earlier in this judgment. He argued that public policy was clearly against divorce as could be seen from the Constitution's prohibition on divorce but nonetheless that did not stop the courts from recognising a valid divorce obtained outside the jurisdiction. By way of analogy therefore, he submitted that if the public policy of the State as indicated by the Constitution is that a polygamous marriage is not permissible in the State that does not mean that the courts will not recognise a valid polygamous marriage entered into elsewhere where such marriages are permitted. To my mind there is a flaw in his argument. It is true that the then existing absolute prohibition on the dissolution of marriage contained in the Constitution was a clear indication of the public policy of the State, namely to support the traditional lifelong marriage. However, the approach of Mr. Durcan ignores the provisions of Article 41.3.3 of the Constitution which provides that:-

> "No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

Kingsmill Moore in considering that Article commented at p. 349 of his judgment saying:-

> "No doubt the Oireachtas could pass a law that no dissolution of marriage, wherever affected, even where the parties were domiciled in the country of the court pronouncing the decree, was to be effective to null the pre-existing valid marriage. If it did so, then, by the law for the time being in force, the first marriage would still be valid and subsisting within our jurisdiction. But the Oireachtas has not done so and the law as existing when the Constitution was passed was that a divorce affected by a foreign court of persons domiciled within its jurisdiction was regarded as valid in our jurisdiction. Such law was preserved unless inconsistent with the new Constitution and, in the absence of any statement in the Constitution altering such law, inconsistency cannot be spelled out from the words now being interpreted for they are perfectly consistent with the preservation of the pre-existing law which was the 'law for the time being in force'."

In other words he gave effect to the existing common law principles in force at the time of the Constitution coming into effect. To that extent, the Constitution contained a saver for the existing principles of conflicts of law that a divorce would be recognised as valid if the parties to the divorce were domiciled at the relevant time in the country where the decree of divorce was obtained. Therefore, although it was clear that the public policy of the State was to prohibit the dissolution of marriage, nonetheless, the Constitution in Article 41.3.3 made provision for the recognition of foreign divorces. For that reason I find it difficult to accept the analogy drawn by Mr. Durcan from the decision in *Mayo-Perrott v. Mayo-Perrott* with the facts of this case.

I now want to look more closely at the institution of marriage as understood in this jurisdiction. Mr. McDonagh referred to number of authorities on this subject in the course of his submissions. He referred to, amongst others, *Zappone and Gilligan v. Revenue Commissioners*, a decision in which I previously looked at the authorities in which the meaning of marriage has been considered. Mr. McDonagh submitted that the principles applicable to the question of same sex marriage identified in that case were equally applicable to the question of polygamous marriage. As was pointed out in the course of the submissions in this case, that case is somewhat different to the present case in that the parties in those proceedings were at all relevant times domiciled in this jurisdiction and did not seek to have a marriage contracted elsewhere recognised in this jurisdiction. Some of the authorities reviewed in that case were referred to the course of the arguments in this case and I think it would be helpful to make brief reference again to one or two of those decisions. It is only necessary to consider the words of Costello J. in *Murray v. Ireland* referred to previously and the approval given to those words in *T.F. v. Ireland* also referred to above and the words of Murray J. in *D.T. v. C.T*. Costello J. in Murray v. Ireland at p. 535 said:-

> "…the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special lifelong relationship."

The Supreme Court in the case of *T.F. v. Ireland* adopted that definition marriage. It is also useful to remember the words of Murray J. in the case of *D.T. v. C.T*. [2003] 1 I.L.R.M. 321, at p. 374, where he stated:-

> "Nonetheless, marriage itself remains a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution. It is one which is entered into in principle for life. It is not entered into for a determinate period. The man and woman marry, their bond requires a legal status. The relationship once formed, the law steps in and holds the parties to certain obligations and liabilities. Even where a marriage is dissolved by judicial decree the laws of many if not most states require that the divorced spouses continue to respect and fulfil certain obligations deriving from their dissolved marriage for their mutual protection and welfare, usually of a financial nature. This reflects the fact that marriage is in principle intended to be a lifetime commitment and that each spouse has fashioned his or her life on that premise. If the law permitted a spouse to cut himself or herself adrift of a marriage on divorce without any continuing obligation to the former spouse it would undermine the very nature of the marriage contract itself and fail to protect the value which society has placed on it as an institution. It would give rise for example to a complete disregard for the status of a spouse whose principle role in the marriage was working in the home in support of the other partner who is the principle earner or breadwinner. Hence the constitutional imperative of proper provision for spouses.
>
> The lifelong commitment which marriage in principle entails means that there is a mutuality of an intimate relationship in which singular aspirations in the life of each partner are adapted to mutual life goals. They adapt their lives to live and work together for the mutual welfare of their family which usually, but by no means necessarily so, also involves the birth and rearing of children. Husband and wife having mutual duties and responsibilities for the welfare of each other and the marriage, will throughout the marriage, make private decisions as to the role each of them will play in the support of the marriage, the achievement of their goals and their lifestyles. These decisions are likely to have an effect on their way of life even after the eventuality of a divorce, such as the capacity of one of them at that stage to establish an independent and secure way of life."

It seems to me that those words encapsulate the traditional meaning of marriage in this jurisdiction informed and guided by the status given to marriage in the Constitution. How does that understanding of marriage bear on an application for a declaration under s. 29(1)(a) of the 1995 Act. The Act does not contain a definition of marriage. Nonetheless, in construing s. 29, it seems to me, that one must have regard to the meaning of marriage having regard to the provisions of the Constitution dealing with the family and education. The question then arises as to whether it is possible to say in the context of s. 29(1)(a) that marriage as referred to in that section may be construed so as to include a polygamous marriage. A statutory provision must be given a constitutional interpretation. It seems to me that to interpret the word "marriage" in s. 29(1)(a) as including polygamous marriage would be to give it an interpretation which is simply not compatible with the constitutional understanding of marriage. In effect, if I were to construe the word "marriage" in s. 29 as including polygamous marriages I would be re-writing the understanding of marriage in this jurisdiction. That is something I cannot do. I think it is impossible to equate polygamous marriage with marriage as understood in the Constitution and to that extent I am driven to the conclusion that it is not possible to grant the declaration pursuant to s. 29 (1) (a) sought in this case.

I want to refer briefly to a number of matters raised in the course of argument. The first relates to the decision in *Conlon v. Mohamed* which was referred to frequently in the course of this case. The issue at the heart of this case centres on the recognition of a polygamous marriage. It has been argued vigorously by all the parties herein. In the case of *Conlon v. Mohamed* where a similar issue arose, the issue was not argued at all as it was taken to be the case by all the parties that a polygamous marriage would not be recognised in this jurisdiction. The point at issue was whether the marriage at issue in that case was a valid common law marriage. It was however accepted that the marriage ceremony which the parties in that case went through was a religious Islamic marriage and as such it was accepted that such a marriage was potentially polygamous. Given that the issue of recognition and status of a polygamous marriage was not actually argued in that case, it seemed to me that it was not possible for me to base my decision in this case on the statements made in that case notwithstanding the authoritative source of the statement in that case.

I want to refer briefly to Council Directive on Family Reunification 2003/86/EC. The Directive was referred to in the course of arguments herein. That Directive does not provide any assistance to the applicant or respondent in this case. Article 4.4 of the Directive states:-

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

I think it is clear from that provision that there is no unified approach in the EU on the question of family reunification in the context of a polygamous marriage. Suffice to say that the provision of that Article, which is in the section of the Directive dealing with family members, places no obligation on member states to accept more than one spouse of a sponsor into the Member State by way of family reunification.

I want to refer also to the European Convention on Human Rights. I was referred to the decision in the case of *R.B. v. U.K*. 19628/92, a decision of the European Court of Human Rights. I note the findings in that case. The facts of that case were that the applicant's father, a Bangladeshi national, went to the United Kingdom in 1959 and became a British citizen in 1966. He married the applicant's mother, a Bangladeshi in 1967. He married another Bangladeshi woman three weeks later and she joined him in the United Kingdom in 1989. In 1989 the applicant and her sister were also admitted to the United Kingdom by virtue of being their father's children. The applicant's mother applied to enter the United Kingdom in 1990 but her application was refused as immigration legislation provided that wives and minor children who do not have British citizenship or the right of abode in the United Kingdom would be allowed entry if the husband/father could accommodate them but only one wife would be so permitted. A provision of the Immigration Act 1988 provided that a woman would not be granted a certificate of entitlement to the right of abode on the basis of a polygamous marriage if another woman had already been admitted to the United Kingdom as the wife of the same husband. The decision in that case was that there was an interference with the applicant's right to respect for family life, but it was considered on the facts of that case that the interference "did not outweigh the legitimate considerations of an immigration policy which rejects polygamy and is designed to maintain the United Kingdom's cultural identity in this respect". Thus the restriction or interference in that case was found to be in accordance with law and justified as being necessary. The decision in that case is not without interest, but it was not of assistance in the

interpretation of s. 29(1)(a) of the 1995 Act, and accordingly does not have any bearing on the conclusions reached in this case.

Many changes have occurred in Irish society since the bringing into force of the Constitution in 1937. It is interesting to note that there have been some changes to the institution of marriage. The most significant change relates to the removal of the constitutional prohibition on the dissolution of marriage. Nonetheless, it is clear that the basic understanding and concept of marriage in this jurisdiction has remained unchanged.

Other changes have taken place in Irish society and particularly since the enactment of the 1995 Act. Probably the most significant change has been brought about by the increase in immigration bringing with it the benefits that flow from a vibrant multi-cultural and pluralist society. People coming to this country have brought their own traditions and values with them, some of which will seem strange and sometimes alien to our traditions and culture. From time to time it is inevitable that there will be a clash of cultures. This case provides one such example. Polygamous marriage is at odds with the institution of marriage as understood in this country and protected by the Constitution as described in the cases to which I have referred above. I repeat that I have no doubt that the marriage of the applicant and the respondent is a valid marriage according to the law of Lebanon, but for the reasons I have outlined I cannot grant the reliefs sought by the applicant in these proceedings. Accordingly I must refuse the applicant's claim herein.

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