**Judgment**

**Title:** Hassan & anor -v- Minister for Justice Equality & Law Reform

**Neutral Citation:** [2010] IEHC 426

**High Court Record Number:** 2009 1054 JR

**Date of Delivery:** 11/25/2010

**Court:** High Court

**Judgment by:** Cooke J.

**Status:** Approved

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Neutral Citation Number: [2010] IEHC 426

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2009 1054 JR**

**BETWEEN**

**ABDI JAMA HASSAN AND SAFIYA SAEED**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

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

1. This is the second of the two "family reunification" cases which were heard together and in which judgments are delivered today. The other case is that of *Hamza and Another v. MJELR* [2009 No. 794 J.R.].

2. The circumstances in which the present case arises differ from those of the *Hamza* case, but several of the legal issues that are raised have been answered in the *Hamza* case and it is unnecessary, therefore, to repeat the reasons given in that judgment in relation to those issues. The circumstances of the present case, it might be said, however, illustrate one consideration mentioned by the Court at paragraph 29 of the earlier judgment as regards the approach to be adopted in construing and applying the concept of "spouse in a subsisting marriage" in s. 18(3) of the Refugee Act 1996 (as amended). This is a case in which the applicants are nationals of Somalia, both of whom have fled that country, the first named applicant having arrived in the State in 2003, and been declared to be a refugee the following year. The second named applicant who is the subject of the application for family reunification as the "spouse" of Mr. Hassan, has apparently been living in Ethiopia as a refugee for a number of years. The country of origin information submitted on behalf of the applicants to the Minister demonstrates in detail a fact which is apparent to the general public from frequent news broadcasts, namely, that for more than a decade Somalia has been a failed State in which central and local government and administration have collapsed and where there is no functioning judicial system.

3. Thus, when the first named applicant applied, in November 2005, to the Minister, under s. 18, for permission for the second named applicant, together with a niece and nephew of his, to enter and reside in the State, he was unable to furnish any certificate or other documentary evidence of the marriage which he claimed had been solemnised between himself and the second named applicant in Mogadishu on 5th December, 1998. The ceremony was a religious

one performed by a sheik who had issued them with a certificate which they no longer possessed because it was left behind when they left Somalia. The marriage could not be registered because of the absence of any civil registration system due to the conflict in the country. That this explanation was credible and well founded in the circumstances prevailing in Somalia since 1991, was subsequently confirmed by the country of origin information submitted by the applicants' solicitors by letter of 6th October, 2009, towards the end of an extensive exchange of correspondence with the Family Reunification section ("FRS",) of the INIS in relation to the original refusal of the application and its subsequent reconfirmation. This documentation confirms that, prior to the collapse of the Somalia state in 1991, there had existed a centrally administered system for the appointment and registration of persons authorised to perform marriages under the aegis of the Ministry of Justice and Religious Affairs. This system was discontinued in 1991, but local Sharia courts "have, to a certain extent, retained some form of oversight and control over those authorised to perform marriages. Marriage certificates have also been issued by Sharia courts in Mogadishu and other towns after 1991". It also points out, however, "no national or local registers containing information on marriages certified by these courts exist, and the Sharia courts have only invariably kept possession of copies of the issued certificates, hence, it is very difficult or impossible to verify such certificates. Civil marriages have never been performed in Somalia".

4. When originally made, the application was referred by the F.R.S. to the Office of the Refugee Applications Commissioner for a report on the relationship between the applicants and the nephew and niece under s. 18(2) of the Act. (As the present proceeding concerns only the position of the second named applicant, further reference to the exchanges in relation to the nephew and niece will be omitted).

5. The report furnished by the ORAC dated 22nd August, 2006, confined its comments in relation to the second named applicant to these:

> "Mr. Hassan states that he married his wife on 5/12/98 and were married in a religious ceremony in Somalia. The refugee has not provided documentation to attest to his relationship with his wife, nor to her identity or nationality. He has submitted passport-type pictures of the person he states is his wife. In a written submission, he states he does not possess original documents due to ongoing difficulties in Somalia. The information in relation to his wife during this F.R. application is entirely consistent with that submitted during his asylum process."

6. It might appear somewhat surprising that the report limits itself in this way. The purpose of the Oireachtas, in requiring such applications to be referred first to the ORAC, is, presumably, because that office has the experience and expertise, together with resources such as the access to country of origin information, necessary to assess conditions in the regions from which refugees come, in order to assess the accuracy of facts relied upon and the credibility of explanations or claims that are made. It is, therefore, surprising and, in the view of the Court, regrettable, that the Office did not feel it necessary or appropriate to undertake any further enquiry or research into the circumstances of this application. It would, presumably, have been at least as easy for the Office to have verified the two points made in the above information quoted at paragraph 3, namely, that all marriages in Somalia are solemnised by a religious ceremony and that the applicants' claim that documentary proof of the particular marriage was unobtainable had a basis in the conditions prevailing in that country.

7. However that may be, by letter of 22nd July, 2008, the F.R.S. refused the application upon the ground:

> "You have provided insufficient documentary evidence in support of Ms. Safiya Aaeed (sic)."

8. There then commenced an extensive exchange of correspondence between the applicants' solicitors, Daly Lynch Crowe & Morris (DLCM), and the F.R.S. This included the submission on 20th May, 2009, of newly obtained documentation, including what were described as "original marriage certificate and original passports for all family members". The marriage certificate in question purports to have been issued, not by any authority in Mogadishu, but by the Embassy of the Somali Republic at Addis Abbaba in Ethiopia. No explanation is given as to the basis upon which the Embassy verified the information which it purports to certify. According to the affidavit evidence of Mr Hassan, the contents are based exclusively on information supplied to the Embassy by the second named applicant herself. The Court has only been supplied with a photocopy of the document and notes that while it purports to bear separate photographs of

each of the applicants, the photograph of the first named applicant appears to have been added later because it partly covers the stamp of the Embassy affixed to the Certificate.

9. By letter of 4th June, 2009, the F.R.S. again refused the application, saying:

> "With regard to Ms. Safiya Saeed, I understand that her marriage to the applicant was a religious one and therefore not recognised under Irish law. It was open to the applicant to seek a declaration from the Irish courts under s. 29 of the Family Law Act 1995, that the marriage in question is a valid marriage. This, of course, is a matter for the applicant to consider and the Department of Justice, Equality and Law Reform has no role in the matter."

10. DLCM again took issue with the rejection and particularly with the proposition that the marriage could not be recognised as valid because it was a religious one. The F.R.S. responded by letter of 31st July, 2009, explaining:

> "In his family reunification application, he (the first named applicant) stated that his marriage was religious. Therefore, it is unclear whether the marriage is valid in this jurisdiction. The marriage may be recognised as valid in Ireland if, under the law of the State in which it took place, the formal requirements for a valid marriage have been complied with."

The letter again stated that:

> "In order for this to be determined, it is open to your client to seek a declaration from the courts under s. 29 of the Family Law Act 1995, that the marriage in question is a valid marriage."

This was then challenged by DLCM in a letter of 10th August, 2009, stating that:

> "There is no basis for this finding. The marriage meets all the requirements for recognition in this State. However, it will take up to two years to get a declaration to this effect from the Circuit Court."

11. The position of the Minister was again reiterated by the F.R.S. in a letter of 2nd September, 2009, stating:

> "For the marriage to be recognised in this jurisdiction, it is necessary that the formalities required by the law of the place where the marriage was celebrated . . . were observed and complied with. In order for this to be determined, it is open to your client to apply for a declaration under s. 29 of the Family Law Act 1995, that the marriage in question is valid. In determining whether a foreign marriage is valid under s. 29, it is a matter for the court to determine the formalities required by the law of the place or society in which the marriage was celebrated, and also to determine whether the marriage complied with those formalities. It may also be necessary for the court to determine whether the parties to the marriage possessed the capacity to marry. The capacity to marry is determined by the law of each party's pre-nuptial domicile."

12. Finally, in a letter of 6th October, 2009, DLCM sought to persuade the Minister otherwise, and to challenge the requirement for the declaration under section 29. They said, *inter alia*:

> "Regarding ORAC's investigation into our client's marriage, in particular, we note that in its questionnaire, various questions relating to the nature of his marriage were put to our client. Mr. Hassan indicated therein that he married his wife in a religious ceremony in Somalia on 5th December, 1996 (sic). He confirmed that it was not a polygamous marriage, nor did it take place by proxy. In its report into its investigation dated 22nd October, 2006, the ORAC raised no issue with the legality of its marriage or its validity under Irish law."

13. It was in these circumstances, therefore, that, by order of 19th October, 2009, this Court granted leave to the applicants to seek judicial review of the decisions contained in those letters refusing the application. A number of the grounds raised on behalf of the applicants in the statement of grounds are, as already mentioned, dealt with in the judgment in the *Hamza* case, and the same answer will be given here without the need to repeat the detailed reasons.

14. First, in spite of the repeated references to the procedure under s. 29 of the Family Law Act 1995, in the correspondence on the part of the Minister, it is clear to the Court that the

1996, in the correspondence on the part of the Minister, it is clear to the Court that the Minister's refusal was not explicitly based upon the absence of such a declaration or on the refusal of the applicants to obtain one. It was made clear, on the contrary, that it was "open to your client to apply" for the declaration, and it was "of course, a matter for the applicant to consider" while the Department had "no role in the matter".

15. Secondly, as again explained in the *Hamza* judgment, a declaration as to the validity of a marriage in Irish law is not the test that falls to be applied under s. 18(3) of the Act of 1996. The essential theme of the Minister's approach, as indicated in the correspondence, is that s. 18 requires that the marriage be recognised as valid under Irish law, and therefore valid in accordance with the rules of conflict of laws as applied in this jurisdiction. Its formal validity must therefore capable of being established according to the proofs required for compliance with such rules. As the present case indicates, due to the collapse of civil administration in Somalia, a refugee will frequently be in a position where it is difficult to prove the particular rules of formality in the lex loci (because the legal system does not exist) or to produce any documentary evidence that the formalities were complied with as regards the presence of witnesses and so forth (because the administrative system has collapsed).

16. Thirdly, even as a matter of Irish law, a marriage contracted in a foreign jurisdiction without compliance with local requirements as regards form, may be recognised as valid as a common law marriage. See, for example, *Conlon v. Mohammad* [1987] ILRM 172, where Baron J. considered the validity in Irish law as a common law marriage of a marriage which had taken place in a religious ceremony in a mosque in South Africa and which was valid as an Islamic marriage, but was between an Irish domiciled citizen (the plaintiff) and a South African domiciled husband. The marriage did not comply with South African law, both because interracial marriages were then prohibited by law and because South African law did not recognise potentially polygamous marriages. The issue before Baron J. was whether the valid religious ceremony was capable of recognition in Ireland as a valid common law marriage. Baron J., having considered authorities of the point, said:

> "It seems to me to be clear from the principle established by these cases that the existence of a valid common law marriage must be determined by the nature of the ceremony and the intention of the parties in relation to that ceremony and not as to their belief as to its effect . . . they (the parties) intended to be bound by that ceremony and any mistake as to its effect would not alter its legal validity."

17. Because the plaintiff in that case was domiciled in Ireland, she lacked the capacity to contract a valid polygamous marriage. It was for that reason that the religious ceremony in South Africa was incapable of being recognised as a valid common law marriage in Ireland. It would seem that, had it not been for the potentially polygamous nature of the Islamic marriage, a monogamous religious marriage would be recognised as valid in Irish law as a common law marriage, notwithstanding non-compliance with formal requirements of the civil law in the lex loci. It appears clear to the Court that had the marriage in question taken the form of a non-Islamic religious service according to a rite requiring monogamy, it would have been valid as a common law marriage in Ireland although prohibited as an inter-race union in South Africa at that time.

18. It follows that the bare statement contained in the letter of 4th June, 2009, to the effect that the marriage in Somalia was not recognised under Irish law because it was a religious one is mistaken. The modification of that view in the letter of 31st July, 2009, may be more understandable but is, nevertheless, incomplete. There, it is merely stated that it was "unclear whether the marriage is valid in this jurisdiction" with the explanation that it might be recognisable as valid if "under the law of the State in which it took place, the formal requirements for a valid marriage have been complied with". The statement is incomplete in that, even if the formal requirements of the lex loci have not been complied with, or it is now impossible to establish what those formalities were, or whether they were, in fact, complied with, the marriage may still be capable of recognition as valid in Irish law as a common law marriage.

19. To the extent that this reason for the refusal is mistaken in its approach to the criteria to be applied to s. 18(3) of the Act, this is sufficient ground, in the judgment of the Court, to quash the refusal and require the Minister to reconsider the application.

20. However, for the reasons explained in greater detail in the judgment in the *Hamza* case, the Court also considers that a different approach should be adopted to the concept of a "subsisting marriage" in the cases of applications by refugees under section 18. Where a refugee is in a position to prove by alternative means that, since the date of the claimed marriage ceremony, a

real marital relationship based on cohabitation and exclusivity in the relationship has subsisted between the two parties in question over a substantial period, the Minister may be entitled to consider that the requirement of s. 18(3) is satisfied. Whether the necessary corroboration might be forthcoming in the circumstances of the present case remains to be seen and it would be inappropriate for the Court to comment. For the avoidance of doubt, however, the Court would observe that the refusal to accept the documentary material purporting to originate from the Somali Embassy in Ethiopia on various dates in 2008 and 2009, would appear to be well founded, having regard to the country of origin information as to the absence of any sources of official information within Somalia at material times and the lack of explanation as to the basis upon which such documentation was issued by the Embassy in question. This does not however preclude the applicants seeking to establish the reality of a subsisting marital relationship by other means.

21. The Court will, accordingly, grant the application for an order of certiorari to quash the respondent's refusal of the application under s. 18 upon the grounds a) that it was based on a mistaken view that a foreign marriage contracted in a religious ceremony was, as such, incapable of recognition as valid in Irish law; and b) that it was based upon an incorrect interpretation of the test of a marital relationship applicable under s.18(3)(b) of the Act of 1996.

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