IRLANDA

EQUIPARACIÓN DEL MATRIMONIO RELIGIOSO A LA UNIÓN DE HECHO A EFECTOS DEL EJERCICIO DE DERECHO A LA REAGRUPACIÓN FAMILIAR: CasoAbdi Jama Hassan and MinisterforJustice, Equality&LawReform[1]

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La reagrupación familiar ha representado en los últimos 20 años una de las principales fuentes de inmigración hacia la Unión Europea. Las medidas de reagrupación, no sólo suponen un medio para reunir a las familias, sino también contribuyen de forma esencial a la integración de los ciudadanos de terceros países de la Unión. Sin embargo, la política de reagrupación familiar en la órbita de los países de nuestro entorno, particularmente en aquellos que cuentan con una mayor tradición en la recepción de inmigrantes, ha comenzado a experimentar apreciables restricciones y se ha limitado notablemente el derecho de los extranjeros residentes en su territorio a reunirse con sus familias. Vista como una posible respuesta a la necesidad de limitar la mano de obra excedentaria, la implementación de este tipo de políticas, cada vez más restrictivas, refleja un esfuerzo explícito, por parte de los gobiernos de estos países por disminuir el potencial efecto multiplicador de la reagrupación, un proceso que puede constituir una fuente inagotable de retroalimentación de los flujos.

Para dar respuesta a esta situación, se aprueba la Directiva 2003/86/CE, en la que se establecen las reglas según las cuales los inmigrantes legales pueden solicitar la entrada de determinados miembros de su familia a efectos de logar la reagrupación familiar. No

[1] Sentencia del Tribunal Supremo Irlandés de 20 de febrero de 2013, Número de Citación (2013), IEHC 8. Número de Registro de la Corte 441/2010 JR.

obstante, sólo seis países de la Unión Europea han adoptado esta norma[2], mientras que Dinamarca, Irlanda y Reino Unido están excluidos de su aplicación. Por eso Irlanda se rige en esta materia por lo establecido en la Ley de refugiados de 1996[3] cuyas lagunas e imprecisiones han dado lugar plantear algunas demandas ante los tribunales de justicia, como ocurre en el caso de la sentencia comentada en esta sede, en la que se cuestiona la validez de un matrimonio celebrado en forma religiosa en el país de origen del demandante como vínculo jurídico habilitante para el ejercicio del derecho a la reagrupación familiar en Irlanda.

El demandante de este derecho es un Nacional de Somalia que llegó a Irlanda y solicitó la condición de refugiado en 2003. En 2005, alegando lo establecido en el artículo 18 de la Ley de refugiados de 1996, solicita que su esposa pueda entrar y residir en Irlanda. Para la tramitación de su solicitud de reagrupación ante el Comisionado para los refugiados, alegó que había celebrado un matrimonio religioso estando presentes ambos contrayentes en el acto de la celebración,si bien, no ha podido aportar certificación alguna que evidencie la naturaleza civil o religiosa de este matrimonio, debido a las dificultades de aportar documentación acreditativa de este extremo a causa del conflicto en curso con Somalia. Por eso el Comisionado para los refugiados en nombre del Ministerio dictó una resolución desestimatoria de la demanda por entender que no se aporta prueba suficiente para autorizar la reagrupación.

No obstante, los abogados del demandante deciden impugnar la decisión aportando un certificado original del matrimonio expedido por la Embajada de Somalia en Addis Abeba, si bien, el Comisionado para los refugiados de nuevo desestima su pretensión alegando que "el matrimonio celebrado con el demandante era un matrimonio religioso no reconocido por la Ley Irlandesa". Y se le invita al solicitante a obtener de los tribunales irlandeses una declaración de validez de su

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[2] Bélgica, Estonia, Letonia, Lituania, Polonia, y Eslovenia son los únicos países que han comunicado a la Comisión Europea sus medidas de trasposición de la Directiva a su legislación nacional.

[3] Refugee Act, 1996.No. 17/1996.26th June, 1996.Básicamente es de aplicación lo establecido en el artículo 18 de esta norma, que regula el procedimiento a seguir para el reconocimiento del derecho a la reagrupación familiar n. 1, 2), derecho de las personas reagrupadas (n. 3a), miembros de la familia susceptibles de beneficiarse de este derecho (n. 3b), y miembros dependientes de la familia (n. 4b).

matrimonio conforme a lo establecido en el artículo 29 de la Ley de familia de 1985.No obstante, en defensa del demandante se alega que "el matrimonio fue celebrado en una ceremonia religiosa islámica y posteriormente fue registrado con arreglo a la ley somalí.Sin embargo, al tratarse de un matrimonio religioso celebrado en el extranjero, para que éste sea reconocido ante la jurisdicción irlandesa, es necesario que en la celebración del matrimonio se hayan observado las formalidades que establece la*lexloci.*

Todos estos extremos, sólo se pueden acreditar en virtud de la declaración judicial a la que se refiere la mencionada Ley de familia de 1985, cuyo artículo 29 reconoce la competencia de la Corte para la determinación de las formalidades exigidas por la ley del lugar o de la sociedad en la que se celebró el matrimonio, así como para declarar si el matrimonio se ajustaba o no a estas formalidades. También puede ser necesario que el Tribunal precise si las partes que han celebrado el matrimonio poseían capacidad para contraerlo, capacidad que viene determinada por la Ley del domicilio pre-nupcial de cada uno de los contrayentes.

Ante la reiterada negativa del Comisionado para los refugiados de admitir la validez del matrimonio, los cónyuges deciden interponer recurso de casación ante el Tribunal Supremo Irlandés, basando sus alegaciones en dos extremos:

a). dadas las circunstancias del caso, entienden que les asiste el derecho a la presunción de inocencia sobre la validez de su matrimonio en Somalia
b). aún en el caso de que su matrimonio adoleciese de algún defecto procesal, no hay duda de que se trata de una pareja de hecho, de manera que el art. 18 de la Ley de refugiados de 1996 debe ser interpretada a la luz del artículo 8 del Convenio Europeo de Derechos Humanos (sobre el reconocimiento del derecho a la vida privada y familiar), de tal manera que una pareja de hecho debe ser entendida, a estos efectos, como un matrimonio, independientemente del cumplimiento de los requisitos de procedimiento.

En virtud de las alegaciones planteadas, el Tribunal de casación anula la decisión del Comisionado para los refugiados y estima la pretensión del demandante aportando las siguientes argumentaciones:

"(...) de la información procedente del país de origen y aportada por los solicitantes se deduce un hecho que es de dominio público, a saber, que durante más de una década, Somalia se ha convertido en un Estado en decadencia en el que la administración y el gobierno se han derrumbado y donde el sistema judicial es imposible que funcione".

"A la vista de esta situación, está justificado que no se pueda aportar ningúncertificado o prueba documental del matrimonio. Por eso, se admite por este tribunal el hecho de que (...) "se ha celebrado una ceremonia religiosa oficiada por un jeque que había expedido un certificado que acreditaba esta celebración, pero que los contrayentes dejaron en Somalia. Se trata de un matrimonio que no pudo ser registrado al carecer de un sistema de registro civil, debido a la situación que atraviesa el país, situación que es creíble y está bien fundada ante las circunstancias en que se encuentra Somalia desde 1991".

"De la documentación remitida del país de origen se deduce que desde la citada fecha no existía en Somalia un registro de personas autorizadas para la celebración del matrimonios bajo la égida del Ministerio de Justicia y Asuntos Religiosos, si bien, los tribunales locales de la *Sharia* tienen, hasta cierto punto, poder de supervisión y control sobre las personas autorizadas para celebrar matrimonios. No obstante, no existen registros nacionales o locales que contengan información sobre los matrimonios certificados por esos tribunales, ni existe copia de los certificados emitidos, de manera que es imposible verificar esta documentación.

"Incluso aunque los requisitos formales de la *lexloci* no se hayan cumplido, es imposible ahora constatar cuáles eran esas formalidades o si en realidad, se han observado, pero en cualquier caso, el matrimonio puede ser considerado válido para la legislación irlandesa como una unión de hecho. De manera que, cuando un refugiado está en condiciones de probar por otros medios, desde la fecha de la ceremonia del matrimonio celebrado, una relación matrimonial basada en la convivencia y en la exclusividad de la relación entre las dos partes durante un período de tiempo considerable, puede apreciarse que cumple con los requisitos exigidos por el art. 18.3 antes mencionado. Es suficiente, en definitiva, con que el tribunal tenga la creencia arraigada de que

existe una unión y que ésta sigue existiendo en el momento de la solicitud"

Para llegar a este convencimiento, el Tribunal aplica las siguientes disposiciones:

- Manual de Reasentamiento de ACNUR 2004,
- Directrices de ACNUR sobre la reunificación de familias refugiadas del año 1983,
- Conclusiones del Comité Ejecutivo del ACNUR en la reunificación familiar de octubre de 1981,
- Directiva 2003/86/CE del Consejo de Europa, sobre el derecho a la reagrupación familiar, norma que, a pesar de no ser de aplicación en Irlanda, ofrece una visión de cómo debe interpretarse la "realidad de la relación conyugal", y de la trascendencia que ésta tiene a los efectos de la reagrupación y no tanto la exigencia de verificación formal de la legalidad del contrato matrimonial.

El Tribunal Supremo irlandés reconoce efectos al matrimonio celebrado en forma religiosa en Somalia por equiparación de esta relación a la que se deriva de una "unión de hecho", como así se hace constar en reiterada Jurisprudencia pues "la existencia de una unión de hecho válida debe ser determinada por la naturaleza de la ceremonia y la voluntad de las partes de unirse, y no tanto por sus creencias o sus efectos (....) y dado que las partes tenían la intención de casarse, la validez de este matrimonio no puede verse afectada por el hecho de que no pueda ser reconocido en Irlanda (...)". Por otro lado, "el derecho consuetudinario en relación al matrimonio, antes de cualquier norma legal, era la Ley común en Inglaterra y también se aplica en Irlanda. Antes de la reforma, la Ley común era el Derecho Canónico de la Iglesia Católica Romana antes del Concilio de Trento. Es decir, "Derecho común y Derecho Canónico en Irlanda eran idénticos (...) y el derecho consuetudinario reconoce un matrimonio válido y eficaz como el que tiene lugar "pro sponsalia per verba de paraesenti", mediante el cual los cónyuges declaran que se tienen entre sí como marido y mujer a partir de ese mismo momento". Es en este sentido, precisamente, en el que el Tribunal equipara el matrimonio religioso a la unión de hecho, pues "a pesar de que el matrimonio se haga sin ninguna formalidad....., el mero consentimiento de las partes ha dado lugar a un matrimonio de derecho".

Sólo con el tiempo van apareciendo la exigencia de formalidades para evitar la proliferación de los matrimonios clandestinos, es decir, matrimonios celebrados sin la presencia de testigos o la del sacerdote cualificado. Para evitar las nefastas consecuencias contrarias al principio de seguridad jurídica, por primera vez en 1753, cuando se promulga la Ley de matrimonio de Lord Hardwickw, se exige que todos los matrimonios sean solemnizados en una capilla o un templo de la Iglesia de Inglaterra con la debida licencia y después de la proclamación de las amonestaciones. No obstante, esta ley no se aplica a Irlanda, por eso, el derecho consuetudinario siguió reconociendo los matrimonios contraídos "*por verba de praesenti*" y se debía pasar por alto ciertas irregularidades formales. Sin embargo, estas cuestiones, son ahora objeto de regulación por parte de la Ley de unión de hecho, lo que dificulta ignorar la ausencia de formalidades, como muestra el caso presente.

No obstante, la jurisprudencia Irlandesa ilustra numerosos casos en que el matrimonio es reconocido a pesar de las irregularidades de forma, particularmente si se trata de matrimonios contraídos en el extranjero baja la "commonlaw", de manera que los matrimonios extraordinarios de derecho consuetudinario no pueden celebrarse válidamente en el Reino Unido, pero sí que tienen validez si se celebran con arreglo a la ley local, como ocurre en los casos de ciudadanos irlandeses emplazados en destacamentos militares. En estas situaciones, si los contrayentes demuestran que se han sometido a la ley del país de celebración, no se regirán por el derecho común irlandés, que exige como requisito formal de validez que el matrimonio se celebre en presencia de un clérigo ordenado episcopalmente bien en la Iglesia de Inglaterra o en la Iglesia Romana. En estos casos, los únicos elementos esenciales son que ambos contrayentes tengan capacidad para contraer matrimonio y que se acepten mutuamente "per verba praesenti", ni siquiera es necesario que una de las partes sea británica.

Se ha venido admitiendo en sede jurisprudencial una serie de lugares en los que el matrimonio de hecho puede ser contraído válidamente sin necesidad de que concurran las formalidades antes mencionadas, a saber, las colonias británicas,los países en los que por acuerdo capitular la Reina madre ejerza jurisdicción extraterritorial

sobre los súbitos británicos, los buques de guerra en el extranjero fuera de las aguas territoriales extranjeras así como los buques mercantes británicos. Análogamente, el Tribunal Supremo añade la República de Sudáfrica, como posible lugar de la ceremonia de matrimonio carente de la forma habitual, siempre que haya evidencia de la intención de celebrarse el matrimonio, como ocurre en el caso sometido a enjuiciamiento por este Tribunal, en el que se ha observado la ley de la *Sharia* y las leyes de Somalia.

Es por ello que el Tribunal entiende que "en aplicación de los principios de derecho internacional privado es posible admitir otras pruebas alternativas al certificado de matrimonio en las situaciones de falta de pruebas ante la imposibilidad o grave dificultad para la obtención de las mismas. Una de estas posibilidades viene de la mano del juego de las presunciones, de manera que existe una presunción según la cual en el supuesto de que una pareja haya celebrado un matrimonio, si después cohabita como marido y mujer, el matrimonio se debe considerar válido a todos los efectos".

A la vista de todo lo expuesto, el Tribunal supremo considera que"una convivencia de larga duración, con independencia de la forma en que ésta se haya constituido, debe ser interpretada, a los efectos de la reagrupación familiar (art. 18 de la Ley de refugiados de 1986) en un sentido amplio, a la luz de los instrumentos internacionales, de manera que se pueda dar cabida a este tipo de relaciones matrimoniales con graves dificultades de acreditación". Para ello recurre a una serie de consideraciones que el Tribunal denomina "compensatorias" que han de ser tenidas en cuenta, entre otras, el contexto constitucional.

En consecuencia, el Tribunal aprueba la reagrupación familiar por considerar, en primer lugar, que la mera celebración de una unión de carácter religioso no puede ser motivo de denegación del ejercicio de este derecho y, en segundo término, por estimar que el Ministerio no tiene suficientemente en cuenta la imposibilidad por parte del solicitante de aportar la certificación acreditativa de la celebración del matrimonio religioso en Somalia dadas las circunstancias en que se encuentra este país en el momento de la tramitación de este procedimiento.

ANEXO

THE SUPREME COURTAppeal No: 441/2010

Between/ABDI JAMA HASSAN&SAFIYA SAEED Applicants/Respondents - and- THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM Respondent/Appellant

I agree with Fennelly J. that the appeal should be dismissed on the grounds stated in the concluding paragraph of his judgment and with his reasons for dismissing the appeal on those grounds. As Fennelly J. makes clear, his consideration of the notion of a common law marriage and the circumstances in which such a marriage might be recognised as valid is obiter, and I agree that a decision relating to such an issue is not required for the purposes of deciding this appeal. In all events I would find it difficult to envisage that a marriage ceremony, in whatever form, performed in Somalia, where the common law has no application whatsoever, could in itself be the basis for its recognition as a common law marriage. I would add that the applicable common law principles governing the recognition of common law marriages in Ireland would, in a case where the issue arises, fall to be identified and applied subject to Irish statutory law and constitutional framework. These are all matters which would fall to be decided in a future case where a relevant issue arises for decision.

JUDGMENT of Mr. Justice Fennelly delivered the 20th day of February 2013.

1. This is the second of two appeals (respectively Hamza and another v Minister for Justice Equality and Law Reform and the above Hassan and another v Minister for Justice Equality and Law Reform). Each appeal has been taken from a judgment delivered in the High Court on 25th November 2010. In each case, the applicant, a person declared to be a refugee, had applied to the Minister pursuant to s. 18 of the Refugee Act 1996 for family reunificationwith his spouse as well as some other family members. This case, like that of Hamza, concerns only an application in respect of the spouse. In each case the Minister refused the application.

2. In the Hamza case, the refusal was principally on the basis that the marriage had been "by proxy." In the present case, it was principally on the basis that the marriage was "religious."

3. Each decision of refusal was the subject of an application for judicial review. In each case, the High Court (Cooke J.) granted an order of certiorari. The Minister has appealed both decisions of Cooke J.

4. This appeal concerns the application of the first-named respondent (hereinafter "Mr. Hassan") in respect of the second-named respondent (hereinafter "Ms. Saeed"), to whom he says he is married.

5. The terms of s. 18 of the Refugee Act 1996 are set out in my judgment on the case of Hamza and another v Minister for Justice Equality and Law Reform and need not be repeated here. I will, however, quote here the summary provided by Cooke J. of the function of the Minister under the section, with which I agree. It is as follows:

"In that section, the Oireachtas has designated the Minister as the sole authority to decide whether permission should be granted or refused under subsection (3). It is to the Minister that the application for permission is made under subsection (1) and it is the Minister alone who must be satisfied that "the person the subject of the application is a member of the family of the refugee" under subsection (3) (a). It is envisaged by the provision that he will do so on the basis of the report furnished by the Office of the RAC under subs. (2) which has "set out the relationship between the refugee concerned and the person the subject matter of the application". The Minister cannot delegate to any third party, therefore, (including a Circuit Judge) the decision he is required to make under subs. (3)(a), namely, that the person comes within the definition of a family member or, in a case such as the present, that the person concerned and the refugee are parties to a subsisting marriage."

6. In short, the Minister must decide whether the person whom the applicant designates as his spouse in his application for family reunificationis, in fact, his spouse.In the present case, Mr. Hassan claims that he was married to Ms. Saeed in Somalia on 5th December 1998.

7. Mr. Hassan is a national of Somalia, born on 5th October 1975. He came to Ireland and applied for refugee status on 10th April 2003. By a letter dated 6th July 2004, the Minister declared him to be a refugee.

8. On 22nd November 2005, Mr. Hassan applied, pursuant to s. 18 of the Act of 1996 for a visa so that Ms. Saeed, who he says is his wife, could enter and reside in the State. He made a similar application in respect of a niece and a nephew. The application was duly acknowledged and referred, in accordance with the provisions of the section, to the Refugee Applications Commissioner ("ORAC"), for investigation as required by the Act. Mr. Hassan completed a standard questionnaire as required by ORAC.

9. Mr. Hassan provided answers in relation to his marriage to Ms. Saeed. He said that she was of Somalian nationality, that her place of birth was Mogadishu, which was also her current address. One question asked whether the marriage was Legal, Religious or Traditional with the indication: "please tick all that apply." Mr. Hassan ticked only the box opposite "Religious." He answered "no" to the question whether the marriage had taken place by proxy and to the question as to whether it was a polygamous marriage. However, in response to the requirement that he provide evidence in the form of a civil or religious certificate, Mr. Hassan provided no documentary evidence. In reply to a letter from ORAC relating to family documentation generally, Mr. Hassan wrote to say that he was not in a position to provide documents on account of the on-going conflict in Somalia. ORAC in its report to the Minister on 22nd August 2006 stated:

"Mr. Hassan states that he married his wife on 5/12/98 and were married [sic] 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 the on-going difficulties in Somalia.

The information in relation to his wife during his FR application is entirely consistent with that submitted during his asylum process."

10. The FRS on behalf of the Minister made an initial decision refusing the application by letter dated the 22nd July 2008, stating:

"You have provided insufficient documentary evidence in support of MsSafiyaSaeed."

11. Mr. Hassan's solicitors wrote on 6th April 2009, seeking a review of the decision. They argued that the explanation for the absence of documentation in 2006 was "both reasonable and acceptable." On 28th April 2009, the FRS wrote upholding the original decision and repeating that no documentary evidence of the marriage had been received. On 28th May 2009, the solicitors wrote contesting the decision. The letter enclosed what it described as an original marriage certificate. This brief form of certificate in English was dated 14th September 2008. It had been obtained from the Somali Embassy in Addis Ababa. It purports to certify the marriage of Mr. Hassan and Ms. Saeed at "Mogadisho" on 5th December 1998.

12. On 4th June 2009 the FRS wrote acknowledging receipt of the "original marriage certificate" and saying that the file had been reviewed once again. Again the application was refused. The letter stated:

"With regard to Ms. SafiyaSaeed, 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."

13. Mr. Hassan's solicitors in their letter of 3rd July 2009 took issue with the statement that "a religious marriage does not enjoy automatic recognition under Irish law." They pointed out that a religious marriage celebrated in the State, e.g. a Roman Catholic wedding ceremony, is entitled to legal recognition once registered. The solicitors asked to be furnished with any guidelines used by the FRS in determining whether a marriage is lawful under Irish law for the purpose of granting family reunification. It then stated:

"Regarding our client's marriage, we are instructed that this marriage was conducted by Islamic religious ceremony and subsequently registered, in accordance with Somali law. As such, this marriage is legal in Somalia."

14. The solicitors were critical of the suggestion that an application be made to the Circuit Court pursuant to the Family Law Act 1995 and complained of the delay and expense that procedure would involve. The FRS replied on 31st July 2009 as follows:

"In his family reunificationapplication, he [Mr. Hassan] 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 added:

"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."

15. Again Mr. Hassan's solicitors complained. In a letter of 10th August 2009, they said:

"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."

16. On 2nd September 2009, the FRS conveyed the Minister's final position:

"In relation to your query about your client's marriage, it was a religious marriage which occurred abroad. Therefore, it is unclear whether the marriage is valid in this jurisdiction. 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, the lex loci celebrationis, were observed and complied with."

17. For a third time, the FRS referred to the possibility of seeking a declaration:

"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."

18. On 19th October 2009, the High Court (Cooke J.) granted leave to Mr. Hassan and Ms. Saeed to apply for judicial review of the Minister's decisions refusing the application. The respondents, in their application for judicial review claimed that:

(a) in the circumstances if their case, they were entitled to a presumption that their marriage in Somalia was valid;

(b) that, even if their marriage was, in some way, procedurally defective, they are a de facto couple and that s. 18 of the Refugee Act 1996 should be interpreted in the light of Article 8 of the European Convention on Human Rights such that a de facto spouse should be interpreted as being a spouse regardless of compliance with procedural requirements.

19. The substantive application for judicial review was heard by Cooke J. He delivered judgment on 25th November 2010, the same date as his judgment in Hamza and another v Minister for Justice Equality and Law Reform. The learned judge pointed out that he had determined a number of the relevant issues of law in that case. In addition, he had given careful consideration in that case to the much broader question of whether the Minister had adopted a correct approach to the interpretation of s. 18 and, in particular the meaning that should be given to marriage, bearing in mind the family-reunificationobjective of the section and the difficulty, in the cases of many refugees, of providing satisfactory proof of marriage ceremonies.

20. Cooke J. summarised the essential facts of the case and identified the difficulties facing Mr. Hassan in satisfying the requirement to prove marriage for the purposes of the section in the following passage:

"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 reunificationas 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.

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 Reunificationsection ("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.""

21. The learned judge decided that the Minister's decision was invalid and should be quashed, essentially on two grounds.

22. Firstly, he addressed the references in the several letters to the fact that the marriage was a religious one. It will be recalled that, in describing his marriage as "religious," Mr. Hassan was merely ticking a box in the questionnaire he had to complete for ORAC. The learned judge rightly held that the 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 was mistaken. He described as "incomplete" the statement in the later letter of 31st July that it was "unclear whether the marriage is valid in this jurisdiction" even 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." By "incomplete," he meant 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."

The last sentence raises an important question of law. I will return to the question of recognition of a "common law marriage" in some detail at a later point.

23. At this point, I would make two points. In this case, as in the case of Hamza, the Minister referred the applicant to the possibility of seeking a declaration pursuant to s. 29 of the Family Law Act 1995. Firstly, while the learned judge in this case also held that the Minister had not refused the application on this ground, again it seems to me that, in making this statement, the Minister was, at least partially, dispensing himself from the obligation to decide the question of whether the marriage had been proved. Secondly, and more importantly, it is clear that the Minister does not now defend his refusal to recognise the marriage on the ground that it was religious.

24. The first and principal reason for the decision of the learned judge to declare invalid the Minister's decision to refuse Mr. Hassan's application was the statement that the marriage was religious.

25. The second reason for the decision of the High Court to quash the decision was 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. Cooke J. explained this ground as follows:

"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."

26. This statement should not be understood as requiring the Minister to recognise a "common-law marriage" in the modern colloquial sense of a cohabiting relationship where there has been no marriage ceremony. The learned judge did not suggest that marriage, for the purposes of the section should be held to include a relationship based on cohabitation and no more. His decision was based on the proposition of Barron J. in his judgment in Conlan v. Mohammad [1987] ILRM 172 that "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." Cooke J. declined to comment on whether, on the facts, the necessary corroboration of the marriage consent in the Somali marriage ceremony existed in the circumstances of the present case. He did observe, nonetheless, 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."

27. The learned judge also thought that the representative nature of the case called for comment on the correctness of approach to interpretation of s. 18(3)(b) which had been adopted by the Minister. He noted that the context of s. 18 is the provision of family reunificationfor refugees and thought that decisions in that context should not depend on arcane or uncertain rules. He correctly remarked on the existence of cases where formal proof of a marriage ceremony will be either "non-existent or impossible to obtain." He noted, nonetheless that the section "does not require that the Minister be satisfied that the refugee and spouse be parties to a marriage which is

recognisable as valid in Irish law, or that any particular documentary proof of the foreign ceremony be produced," but "merely, that the refugee and spouse are married and that the marriage is subsisting at the date of the application."

28. He made reference to the 'UNHCR Resettlement Handbook (Geneva, November 2004)'; the 'UNHCR Guidelines on Reunification of Refugee Families 1983' and the 'Conclusions of the UNHCR Executive Committee on Family Reunification of 21st October, 1981)' He noted that the approach of Council Directive 2003/86/EC of 22nd September, 2003, on the right to family reunification(O.J.L. 251/12 of 3rd October, 2003) (which does not apply to Ireland) to the assessment of "the reality of the conjugal relationship" rather than upon the availability of formal verification of the legality of the marriage contract.

29. These are large and complex issues of law and fact. There may be good reason for adopting a broad and flexible approach to proof, where the very difficult personal circumstances of a refugee so requires, of the fact of a marriage ceremony. But the considerations which prompt such openness to proof of marriage do not suggest, at least not necessarily, that such proof can be dispensed with entirely in favour of ehat the judge called "the reality of the conjugal relationship."

30. The Minister's principal concern on the appeal related to the issue of "common-law marriage." Counsel submitted that the test to be applied by the Minister in dealing with applications under s. 18 of the Refugee Act 1996 is that applied by Irish rules of conflicts of law. Marriage as defined in the Oxford English Dictionary (2nd ed. Vol. 9) as "the condition of being a husband or wife; the relation between married persons; spouse, wedlock." When the word "marriage" is included in a statute and is not defined, it falls to be given a constitutional interpretation.

31. The Minister submits that the learned judge erred in law in taking into account, in considering his interpretation of section 18(3)(b), the fact that there might be circumstances where formal proof of marriage ceremony would be either non-existent or impossible to obtain. On the other hand, the Minister accepts that, as recognised in Dicey, Morris & Collin Conflicts of Law, 14th Ed. (London, 2006), (at p. 806),

alternative evidence of the celebration of marriage may be received by the courts, or a presumption of marriage may be applied.

32. In my view, this appeal may be determined without addressing any question of whether it is appropriate to adopt a particularly broad interpretation of marriage. In particular, the facts of the present case do not require consideration of marriage based solely on "the reality of the conjugal relationship." The primary test is that applied by Cooke J. in the case of Hamza v Minister for Justice Equality and Law Reform, which I have approved in my judgment delivered today on the appeal in that case. Irish law will recognise a marriage contracted in a foreign country which complies with the requirements of the laws of that country, the lex loci celebrationis, unless it conflicts with fundamental requirements relating to validity based on the domicile of the parties or public policy in our law, in particular capacity to marry. In Conlan v Mohamed, recognition of a common-law marriage was ultimately refused because the marriage was potentially polygamous.

33. However, as the Minister observes in his submissions, the applicants did not seek recognition of a "common law marriage," certainly not in the colloquial sense. They did argue for an interpretation that would take account of the fact that it was difficult if not impossible for them to produce a certificate of their marriage in Somalia, a country in which all law and order and legal systems had effectively ceased to exist. At all times, they maintained that they were married at a religious ceremony conducted in Somalia on 5th December 1998. Their solicitors, on their behalf, maintained that it was "an Islamic religious ceremony and subsequently registered, in accordance with Somali law," which was "legal in Somalia."

34. In deciding this appeal, it is essential to emphasise that, as the learned judge very clearly held, it is a matter of the Minister and for him alone to decide whether the applicant under s. 18 is married to the person he wishes to have admitted to the State as his spouse. Whether the parties are married is a question of fact, but the Minister must apply the law correctly in deciding it. For the avoidance of any remaining doubt, it is not open to the Minister to decline to decide that question by suggesting that the applicant seek a declaration pursuant to s. 29 of the Family Law Act 1995. Cooke J., in his judgment in the Hamza case gave a number of reasons why that procedure would not, in any event, be particularly relevant or useful.

35. The essential problem in the present case is one of evidence. The respondents say that they were married in an Islamic ceremony in Somalia in 1998, but that they are unable to produce any evidence of that ceremony beyond their own assertion of the fact.

36. The learned High Court judge suggests that the marriage might be recognised in Irish law as a common-law marriage, in the sense in which that term has been applied at common law for a long time and which was considered by Barron J. in Conlon v Mohamed. In that case, the plaintiff wife, an Irish citizen, and the defendant husband, a citizen of South Africa, participated in an Islamic religious marriage in South Africa. The expert evidence was that such a marriage was not recognised as valid in South Africa on the ground that it was potentially polygamous. It is not clear whether it would have been valid in law in that jurisdiction apart from that fact and leaving aside its inter-racial character. The marriage between the parties would not have been valid in law at that time in South Africa, since the parties were of different races. The parties intended to be married in a later civil ceremony in Dublin, but that never took place. Barron J. traced the history of the notion of common-law marriage through a number of authorities and concluded, at page 179 of the report, 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." Accordingly, since the parties intended to be married, the validity of the marriage would not be affected by their belief that they could not be legally married in South Africa. In the final analysis, Barron J. held that the marriage could not be recognised in Irish law since it was potentially polygamous. But for that fact, however, it is clear that the marriage would have been capable of recognition as a valid common-law marriage.

37. For the reasons already given, it is not strictly necessary to rule in this appeal on the precise meaning and relevance, in the case of applications under s. 18 of the Refugee Act 1996, of the concept of common-law marriage. However, I recognise that the learned High Court judge considered the present case and the contemporaneous case of Hamza v Minister for Justice, Equality and Law Reform to have a representative character. It is true that the Minister is likely to be confronted with similar questions in other cases. It would be

undesirable to pass over the entire matter without some attempt to address it, even though the following remarks cannot, in any sense, be regarded as definitive. I will confine myself essentially to referring to cases cited by Barron J. in his judgment in Conlan v Mohamed.

38. The common law relating to marriage, prior to any statutory regulation, was the common law of England, which also applied to Ireland. Prior to the Reformation, the common law was the same as the Canon Law of the Roman Catholic Church as it was prior to the Council of Trent (1545 to 1563). The essence of that common law is described in the several judgments delivered in the celebrated Irish case of Ussher v Ussher [1912] 2 I.R. 445. Kenny J. pronounced the judgment at first instance. The Court of Appeal consisted of Lord O'Brien L.C.J., Chief Barron Palles and Gibson L.J. As it was expressed by Kenny J., at page 458, the "Common Law and the Canon Law of England and Ireland were identical down to the reign of Henry VIII." The common law recognised a valid and effective marriage as taking place by "sponsalia per verba de praesenti, whereby the spouses declared that they take one another as husband and wife at that very moment." Lord O'Brien answered the question of what "was regarded as a Common-Law marriage" stating, at page 481, that: "Marriages that were made without formalities....., but by the mere consent of the parties, were at one time regarded by many as Common-Law marriages."

39. The absence of formal rules led to what was described as the scandal of clandestine marriages. The sorts of irregularities considered in the cases were insufficiency of witnesses (Ussher v Ussher) and the absence of a properly qualified clergyman. The common law, being based on the pre-Trent Canon Law, did not require either witnesses or, though this was more debated, an officiating clergyman. The absence of a second witness (as required by the Decrees of the Council of Trent) was held, in Ussher v Ussher, not to affect the validity of the marriage. For different reasons, the fact that the officiating minister was not a clergyman of the established church after the Reformation, but a Roman Catholic priest was, in spite of objections that might be raised as to the validity of his orders, also held not to be a bar to validity. Lord Hardwicke's Marriage Act of 1753 (26 Geo II, c. 33) required all marriages to be solemnised in the parish church, or a public chapel, of the Church of England by licence or after due

publication of the banns. That Act invalidated any non-compliant marriage. But this Act did not apply to Ireland. The Council of Trent and the legislature at Westminster, respectively, at an interval of some two hundred years acted to counteract the contracting of clandestine marriages.

40. Rayden& Jackson, Divorce and Family Matters, 16th Ed., (London,1991), page 159 says that clandestine marriages were common in England prior to 1753. In Ireland, the possibility of a common-law marriage survived at least to the extent that it provided the solution in Ussher v Ussher. Kenny J. summed up the situation as follows, at pages 465 to 466, of his judgment in that case as follows:

> 1. "The Common Law of England and Ireland relating to marriages were identical up to the Reformation, and marriage by a Minister in holy orders required no witness for its validity.
>
> 2. Since the Reformation the marriages of Roman Catholics by a Roman Catholic clergyman have continued to be deemed valid notwithstanding the change in the National Church, and are governed by the same Common Law that theretofore existed, and
>
> 3. Such marriages are in law unaffected by the Decree of the Council of Trent, and, therefore exempt from the necessity for witnesses."

41. Thus, the common law continued to recognise marriages contracted per verba de praesenti and was prepared to overlook certain formal irregularities. These matters are now, however, regulated by statute and common-law marriage in the sense of Ussher v Ussher is no longer possible.

42. The notion of common-law marriage came to be extended over time to British overseas colonies or possessions or to places to which the common law had been applied.

43. The following passage from Rayden& Jackson, op. cit., page 158, provides a useful general outline of the circumstances of recognition of "common-law" marriages contracted overseas:

"Common law marriages cannot now take place in England; but they can be validly contracted in any place abroad where the English Common law prevails, and where either local law is inapplicable or cannot be complied with, or the local law does not invalidate such a

marriage. In the case of members of an occupying army or of persons in a strictly analogous situation, as for example members of an organised body of escaped prisoners of war, if the parties show that they have not subjected themselves to the law of the country in question, the common law applies, for it is the law prima facie to be administered by the courts of this country. Further, since a British subject takes abroad to a colony only so much English law as is applicable to his situation, the provision of the common law that the marriage, to be valid, must be celebrated before an episcopally ordained clergyman of either the Church of England or the Church of Rome does not apply: Solemnisation before any minister in holy orders is sufficient. Indeed, probably the only essentials are that both have the capacity to marry and that they accept one another per verba de praesenti. It is not essential that one party is British."

44. Lord Merriman P. traced the authorities on the subject at some length in Wolfenden v Wolfenden [1945] 2 All ER 539. Both from his own statements and from the citations in that judgment it seems implicit that the starting point had to be the extent to which the common law applied in the place of the marriage in question. Lord Merriman spoke of "the theory on which the incorporation of British law into a colony was based..." and cited a decision of a court in Bombay to the effect that though "colonists take the law of England with them to their new home, they only take so much of it as is applicable to their situation and condition."

45. One of the other cases cited by Barron J. was the Privy Council decision in Penhas v Eng[1953] AC 304. The marriage was contracted in the then colony of Singapore. The Board took care to rule that the common law of England applied at the date of the unusual marriage ceremony, which was between a Jewish man and a Chinese woman. A church ceremony was not possible. The parties devised a composite ceremony described as follows in the report:

"The old Chinese gentleman brought by the deceased solemnized the marriage. We stood before him. We worshipped the Heavenly God and I worshipped with joss sticks and he asked us each separately whether we were willing to be man and wife, and we both said Yes.

Deceased put a handkerchief over his head while I worshipped I bowed twice (curtsied) (stooped) holding joss sticks (illustration by witness) and worshipped to Heaven. Deceased told me it was their

custom to put a handkerchief on the head. He raised his right hand the whole time while I was worshipping. I was murmuring a prayer to Heaven for long life. I could not understand what he was murmuring, it was in his language."

46. The Board considered that whether "there was in 1937 anything in the religions, manners or customs of Jews or Chinese domiciled in Singapore which prevented them from contracting a common law monogamous marriage." It held, in a passage cited by Barron J., that:

The wishes expressed by the respondent and her mother for a Church marriage, the reason why a modified Chinese ceremony was substituted, the presence of Jewish friends at the ceremony, the words spoken by the Chinese gentleman who performed the ceremony as to a life-long union, the cohabitation as man and wife which followed and continued till the husband's death, and the introduction by the deceased to a Christian pastor of the respondent as his wife, and last, but not least, the baptism of their children as Christians with the approval of their father, all indicate that the spouses intended to contract a common law monogamous marriage."

47. It seems from a consideration of all these cases that the a common-law marriage may be recognised in spite of irregularities of form but that it is, nonetheless, predicated on there having been a marriage ceremony of some sort as well, of course, as full consent of the parties and intention to be married. It is, however, unclear whether a common-law marriage, capable of recognition in our law, includes the case of persons such as the respondents to this appeal who rely on a marriage ceremony conducted in a jurisdiction having no connection with the common law and where neither of the parties is alleged ever to have been a subject of the common law in Ireland or anywhere else. Rayden& Jackson, op. cit., page 159 list in a footnote a number of places where a common-law marriage may be validly contracted. They include: British colonies, where the common law runs; countries where, by capitulatory agreement, the Queen exercises extra-territorial jurisdiction over British subjects; HM ships of war abroad outside foreign territorial waters; British merchant ships. I would add that the Republic of South Africa, the place of the marriage ceremony considered in Conlan v Mohamed, may have been perceived as being a country of the common law, though Barron J. does not seems to have made explicit reference to that issue. I would not, however, wish

to reach any final conclusion on the matter without full argument in a case where the issue was directly raised.

48. I am not convinced that the possibility of recognition of a common-law marriage is necessarily of particular assistance on the facts of the present case. Essentially, it permits recognition of a marriage lacking in usual form, where there is evidence of intention to contract a marriage. That is not really the problem here. The marriage alleged is one which is alleged to comply in all respects with Shari'ah law and the laws of Somalia. Thus, the question will remain as to the evidence of that ceremony.

49. At this point, the Minister's written submissions are of assistance. He submits that the established principles of private international law recognise situations of absence of proof and provide for alternative proofs where the marriage certificate might not be available. Referring to Dicey, Morris & Collins Conflicts of Law, 14th Ed. (London, 2006), (at p. 806), he submits that alternative evidence of the celebration of marriage may be received by the Courts, or that a presumption of marriage may be applied.

50. In the normal way, a marriage contracted outside Ireland should be proved by the production of a certificate of the marriage. However, the production of the certificate may be dispensed with where it is unobtainable or very difficult to obtain. (Dicey, Morris & Collins, page 806, 17-044). The authors refer to two forms of presumption. Firstly, there is a rebuttable presumption of law that, if a couple go through a ceremony of marriage, and thereafter live as man and wife, the marriage is valid in all respects. Secondly, there is a rebuttable presumption of law that a couple who co-habit with the reputation of being married in accordance with law are validly married. Mere cohabitation, without more, would not suffice to bring either of these presumptions into effect.

51. In the present case, the Minister was not called upon to recognise a non-marital relationship based on long-term cohabitation. I would prefer not to express any view as to whether s. 18, interpreted in the light of international instruments, should be extended to include such relationships. Certainly, a number of potential countervailing considerations would have to be born in mind, including the constitutional context.

52. In the present case, the Minister was confronted with an application based on a clear assertion of a marriage ceremony with legal effect in Somalia, combined with the total loss of any possibility of producing documentary proof. The Minister is essentially required to make an assessment based on all the evidence and with the assistance of the report from ORAC. He must consider the assertion made by the applicant that a marriage has taken place and assess it's credibility, based on all the circumstances. He is not bound to accept a bald assertion but should consider it in combination with all other circumstances. One of those circumstances will be the reason offered for inability to produce a certificate. He should take into account such evidence as is provided that the parties have cohabited as a married couple. None of these considerations is decisive.

53. It is true, for example, that the learned trial judge did not consider the Minister was bound to accept the purported certificate provided via the Somali Embassy in Addis Ababa. The respondents are not, however, precluded from providing further justification to the Minister for accepting that evidence which responds to the specific point made by the trial judge that no explanation had been provided as to the basis on which the Somali Embassy in Addis Ababa came to issue such a certificate.

54. In conclusion, I would dismiss the appeal. Firstly, it is clear that the Minister was not entitled to rely on the fact of the marriage as being religious as a ground for refusal. Secondly, the Minister did not take sufficient account of the explanation given for the inability to produce a marriage certificate from Somalia in the circumstances of that country at the relevant time. It remains exclusively a matter for the Minister to reconsider the application

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