



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 241

Record No.: 391/2019

**Donnelly J.
Ní Raifeartaigh J.
Binchy J.**

BETWEEN/

I.H. (AFGHANISTAN)

APPLICANT/APELLANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered this 10th day of August, 2020

Introduction

1. The appellant was declared a refugee on the 21st July, 2016 by the respondent Minister. Afghanistan is his country of origin. His wife from his marriage ("his first marriage") in Afghanistan died there while he was in the process of seeking refugee status. After the death of his first wife, and while waiting for his application for refugee status to be determined, he entered into a marriage in Ireland ("the second marriage"). While that marriage was still subsisting, he entered into a polygamous marriage in Pakistan ("the third marriage"). He made an application for family reunification under the provisions of s. 18 of the Refugee Act, 1996 (hereinafter, "the Act of 1996") in respect of a number of family members. For ease of reference, I will call the woman with whom he entered into his third marriage his third wife, but this does not affect the legal issue that I must determine in this judgment.
2. At issue in this case is his application for reunification with his wife from the third marriage. The appellant claims that she is his spouse within the meaning of the said Act. It is not in dispute that his third marriage was lawfully conducted and recognised by the law of Pakistan, even though he was still married to his second wife. At the time of the application for reunification the appellant was married to his second wife. He divorced his second wife subsequently. The respondent (hereinafter, "the Minister") to these proceedings, refused the appellant's application for family reunification on the basis that his third wife was not his spouse within the meaning of s. 18 of the Act of 1996. The appellant sought review of that decision by way of judicial review. The High Court (Humphreys J.) refused to grant an order of *certiorari* quashing the decision of the Minister to refuse the appellant's application for family reunification under s. 18 of the Act of 1996 and it is against that decision that this appeal was brought.

Section 18

3. Section 18 of the Act of 1996 makes provision for family reunification of the refugee's family. Family reunification is an important aspect of refugee settlement within the country of safety. Since its establishment, the Office of the UN High Commissioner for Refugees has sought to ensure the reunification of separated families. This is for humanitarian and practical purposes and in recognition of the principle of the family unit as the natural and fundamental unit of society and is entitled to protection by society and the State.
4. In brief, s. 18 sets out that where a person is a (defined) member of the refugee's family, the Minister must grant (subject to the requirements of national security and public policy) permission for the person to enter and reside in the State. A spouse is a member of the family and therefore, subject to the requirements of national security and public policy, must be granted permission to enter and reside in the State.
5. Section 18, in so far as it is relevant to the present case provides:
 - "(1) Subject to *section 17(2)* , a refugee in relation to whom a declaration is in force may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to the Commissioner and a notification thereof to be given to the High Commissioner. [...]
 - (3)(a) Subject to *subsection (5)*, if, after consideration of a report of the Commissioner submitted to the Minister under *subsection (2)*, the Minister is satisfied that the person the subject of the application is a member of the family [...] of the refugee, the Minister shall grant permission in writing to the person to enter and reside in the State and the person shall be entitled to the rights and privileges specified in *section 3* for such period as the refugee is entitled to remain in the State.
 - (b) In paragraph (a), "*member of the family*", in relation to a refugee, means—
 - (i) in case the refugee is married, his or her spouse (provided that the marriage is subsisting on the date of the refugee's application pursuant to *subsection (1)*), [...]
 - (5) The Minister may refuse to grant permission to enter and reside in the State to a person referred to in *subsection (3) or (4)* or revoke any permission granted to such a person in the interest of national security or public policy ("*ordre public*")."

Section 29 of the Family Law Act, 1995

6. Section 29 of the Family Law Act, 1995 ("the Act of 1995") permits the Circuit Court to make a declaration that a marriage was at its inception a valid marriage and to make a declaration that the marriage subsisted on a date specified in the application to the Court. The relevant provisions are as follows:
 - "(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.
- [...]

- (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. [...]
- (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.
- (10) Where proceedings under this section, and proceedings in another jurisdiction, in relation to the same marriage have been instituted but have not been finally determined, the court may stay the first-mentioned proceedings until the other proceedings have been finally determined.
- (11) In this section a reference to a spouse includes a reference to a person who is a party to a marriage that has been dissolved under the Family Law (Divorce) Act, 1996."

Judgment of the High Court

7. The trial judge (Humphreys J.) delivered an *ex tempore* ruling on the matter dismissing the appellant's claim for an order of *certiorari* quashing the decision of the respondent

refusing to grant the family reunification application. Humphreys J. later provided his reasoning in a written judgment available at [2019] IEHC 698.

8. In holding that the Minister was precluded from recognising the appellant's third marriage, Humphreys J. relied on *H.A.H. v. S.A.A.* [2017] 1 I.R. 372. He accepted that a "potentially polygamous marriage" should be recognised in Irish law, but held that if a marriage was *de facto* polygamous, then the subsequent wife was not recognised as such in this jurisdiction. Humphreys J. held that the Minister's decision was not a decision made by him on the ground of public policy, rather it was an application of Irish law. Irish law did not recognise the marriage of the appellant to his third wife because it would be contrary to public policy.
9. In reaching his decision, Humphreys J. held that the Minister was correct in basing his decision on s. 18(3)(b)(i) of the Act of 1996, which requires the marriage of the applicant to be recognisable in Irish Law. Section 18(3)(b)(i) requires the marriage to be recognisable in Irish law, even where the marriage was valid in the country of celebration. Secondly, for a reunification application, the requirement is "that marriage is subsisting on the date of the refugee's application pursuant to subsection (1)". Humphreys J. held that the word "spouse" means a spouse of a valid subsisting marriage. If the marriage is contrary to public policy then the wife is not a spouse under this section, per Fennelly J. in *Hassan v. Minister for Justice, Equality and Law Reform* [2013] IESC 8.
10. Humphreys J. held that an alleged breach of Article 41 of the Constitution and Article 8 of the European Convention on Human Rights (hereinafter, "the ECHR") by the Minister does not arise due to the non-recognition of a second marriage. Polygamous marriages are not contrary to the ECHR, as found in *R.B. v. United Kingdom* (Application No. 19628/92, 29th June, 1992).
11. The High Court held that the Minister was correct in holding that the marriage between the applicant and his third wife remains polygamous even where the second marriage had since come to an end. Humphreys J. so held in relying on Costello J. in *B v. R* [1996] 3 I.R. 549 which held that an actually polygamous marriage is invalid *ab initio*. Therefore, divorce from a first spouse does not render a second marriage non-polygamous if it was in fact polygamous on the date the marriage took place.
12. The High Court held that if protection of the applicant's rights require a favourable family reunification decision, then this will presumably happen by way of the Irish Humanitarian Admission Programme 2 (hereinafter, "IHAP") application which has yet to occur. Humphreys J. held, that if he was not dismissing it anyway, he would have held that the application had failed on the grounds that there was an alternative remedy. This finding did not form any part of the argument on this appeal.

Issue in this Appeal

13. The Minister identifies the sole issue in this appeal as whether the High Court was correct to uphold the respondent's determination that the appellant's marriage to his third wife while still married to his second wife was not valid or recognisable by the State and that

accordingly, his third wife was not his spouse within the meaning of s. 18(3)(b)(i) of the Act of 1996.

14. The appellant has identified three issues. These are as follows:
 - (a) Is it significant that the terms "married", "spouse" and "public policy" were dealt with by the Supreme Court in *H.A.H.* in terms of s. 29 of the Act of 1995 rather than s. 18 as it applies in this case?
 - (b) Must *H.A.H.* be interpreted as holding that the Minister has no discretion in recognising the appellant's third wife as his spouse for the purpose of s. 18?
 - (c) Is an individual and case-specific determination required by the Minister to determine if the appellant's third wife was his spouse where he accepted that the marriage was valid according to the *lex loci celebrationis* (the law of the place of celebration)?
15. I consider the issues identified by the appellant to be sub-sets of the overall issue identified by the Minister, but for reasons that will become obvious throughout this judgment, I am of the view that the appellant's argument appears to be premised on a claim that a "spouse" under s. 18(3) is not to be understood as a spouse in a marriage recognised by Irish law but is a spouse in a valid marriage according to the law of its place of celebration. That argument is based upon an assertion that family reunification for refugees presents issues which do not arise in other contexts and therefore the interpretation of the word "spouse" cannot necessarily be transplanted from one legal context to another.
16. In the course of this judgment I refer to terms such as "potentially polygamous marriage" and "actually polygamous marriage". These terms are used in the case-law which has dealt with issues concerning recognition of foreign marriages. In brief, a potentially polygamous marriage is a marriage which is celebrated in a country whose laws permit polygamous marriage but at the time the particular marriage was celebrated neither of the parties was in another valid and subsisting marriage. An actually polygamous marriage is one in which either or both parties were in another valid and subsisting marriage at the time of its celebration. The appellant's marriage to his third wife was valid in the country of its celebration but was an actually polygamous marriage at the time it was celebrated.

Submissions of the Parties

17. The appellant submitted that Humphreys J. was mistaken in concluding that ministerial discretion does not arise in the present case. The appellant submitted that the respondent's decision is in fact inconsistent with European standards, referring in particular, to Article 4.4 of the Family Reunification Directive 2003/86. The appellant submitted that under the said Directive, which is not adopted in Irish Law, a man who has more than one wife is permitted to be joined by one of his wives.

18. The appellant submitted that two cases from the Supreme Court (*Hassan* cited above, and *Hamza v. Minister for Justice, Equality and Law Reform* [2013] IESC 9) determined that the role of the Minister under s. 18 is distinguished from the role of the Court under s. 29 of the Act of 1995. Only the Minister has the authority to decide whether a person should be granted or refused family reunification under s. 18(3). Fennelly J., who delivered judgment in both cases, adopted the test espoused by Cooke J. in the lower Court in relation to the recognition of marriage.
19. The appellant submitted that while the Court in those cases upheld the finding of invalidity, it did so on the specific facts and the principle remained that the Minister cannot delegate his decision making to any third party. The appellant submitted that the Supreme Court did not find it necessary to address the question of whether it was appropriate to adopt a particularly broad interpretation of "marriage" under s. 18. Fennelly J. in *Hassan* approved the test in *Hamza*, namely that:-
- "Irish law will recognise a marriage contracted in a foreign country which complies with the requirements of the laws of that country [...] 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".*
20. The appellant also relies on the *dicta* of Fennelly J., quoting Cooke J. in the lower Court in *Hassan* where he stated that the section "does not require that the Minister be satisfied that the refugee and spouse be parties to 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 the spouse are married and that the marriage is subsisting at the date of the application". Cooke J., who was the presiding judge in the High Court in *Hamza*, noted that the approach of the Family Reunification Directive was an engagement in the assessment of "the reality of the conjugal relationship" rather than "the availability of formal verification of the legality of the marriage contract." The appellant submits however, that the Supreme Court expressly left open the issue of how s. 18 should be interpreted in light of international instruments.
21. The appellant submits that the appellant's current wife meets the first part of the test of Fennelly J. in *Hassan* in so far as the applicant and his wife are married to each other according to the *lex loci celebrationis*. The appellant also submits that the Supreme Court emphasised that the Acts of 1996 and 1995 are not to be read in *pari materia*.
22. The appellant relies on *H.A.H.* to argue that the principle established therein is that a potentially polygamous marriage is valid at its inception and this does not change even if it subsequently becomes *de facto* polygamous. The appellant submits however, that the legal and factual context of *H.A.H.* is different. The factual situation was that the refugee in that case sought permission to bring his wife into Ireland. This was granted. In reality she was his second wife, both marriages being valid in Lebanon. When he sought to bring his first wife into the country permission was refused. The parties then agreed to make a s. 29 application seeking a declaration for the validity of the marriage. These proceedings were initiated in the High Court rather than the Circuit Court. Dunne J. in the High Court

declined the application. By the time the appeal was heard in the Supreme Court, the second wife was an Irish citizen and the first wife had received asylum seeker status. While the applicant lost the appeal, the first wife had permission to remain in any event.

23. The appellant submits that unsurprisingly no reference was made to s. 18 as the appeal was under s. 29 of the Act of 1995. The appellant argues that no consideration was given to whether or how the discretion given to the Minister under s. 18(5) might impact on whether a spouse to a marriage whether valid or contracted, might nonetheless be refused permission to join her refugee husband in the State and/or whether the *context* in which the discretion under s. 18 was conferred might have a bearing on the outcome of that question.
24. As regards s. 18, the appellant submitted that had the Oireachtas intended to permit the Minister to invoke public policy when considering whether a person was a spouse, it would have said so in s.18(3)(b)(i) of the Act. To interpret it otherwise would render the express reference to public policy in s. 18(5) superfluous. The appellant argued that the Minister did not mention public policy in its Statement of Opposition and that the issue had been determined by *H.A.H.* The appellant submitted that per *H.A.H.*, public policy should only be deployed where necessary. Secondly, s. 18(5) requires the Minister to invoke an issue of public policy only after he has satisfied himself that the parties are married. Where public policy is invoked, it is confined to the refusal of permission and not to the denial of recognition. The appellant submits that the respondent incorrectly asserts he is obliged to invoke public policy under s. 18(3).
25. The appellant submits that the recognition of *de facto* monogamous marriages which were at one time *de jure* polygamous can have no adverse effect on the institution of marriage contemplated by the Constitution. Thus, the appellant submits there is no public policy ground for denying recognition to the marriage which was valid at the time and place of its celebration in another country.
26. The Minister on the other hand submitted that in order for a person to be a spouse within the meaning of s. 18(3) of the Act of 1996, the marriage had to be conducted in accordance with the law of the country where it was celebrated and be a marriage recognisable in the State. In accordance with the decision in *H.A.H.*, a second or subsequent marriage entered into while a first marriage was in being, cannot be recognised as valid in Irish law. It was not therefore open to the Minister to recognise the appellant's third marriage. The Minister did not have to address public policy *per se* in the individual circumstances as the Supreme Court had already determined it was contrary to public policy as it was inconsistent with the Constitution.
27. The Minister also submitted that the later termination of the second marriage did not render the third marriage valid. An actually or *de facto* polygamous marriage is void at inception and must remain so. There being no change in Irish law or public policy since *H.A.H.*, the Minister was obliged to follow the law as clarified by the Supreme Court.

Analysis and Determination

28. *H.A.H.* was a major decision regarding the recognition of polygamous marriages entered into in accordance with the law of another country. It is important to understand exactly what was decided. O'Malley J. gave the main judgment and Clarke J. gave a concurring judgment in which he made specific remarks about the circumstances where public policy issues may arise and also remarking that there may be areas where *de facto* recognition is given to marriages for specific purposes. The opening sentence of the judgment of O'Malley J. sets the context of the case in unequivocal terms: "*In this case this Court is asked, apparently for the first time, to give full consideration to the legal consequences within this State of a polygamous marriage entered into in another country*" (emphasis added).
29. O'Malley J. went on to outline that the basic rule for the recognition of a foreign marriage is "*that Irish law will recognise a marriage contracted in a foreign country which complies with 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.*"
30. The judgment stated that public policy was generally a matter for the Oireachtas but foreign marriages were rarely the subject of legislation in the State and historically any issue in relation thereto had fallen to the courts to determine in accordance with the rules of private international law. O'Malley J. explained that there was no universal consensus on the nature of marital relationships or how they should be regulated and that any national legal system that is called upon to make a judgment as to what marital arrangement it will or will not accept must determine the matter in accordance with its own rules. I consider that both the judgments in *H.A.H.* not only expressly permit the Oireachtas to make public policy decisions in relation to recognition of foreign marriage for general or specific circumstances but state that it would be preferable if the Oireachtas were to act in determining the precise rules for such recognition (see in particular para 22 of the judgment of Clarke J.). It is however, in the absence of legislative intervention that the courts have to deal with the issues of public policy that are raised. It is necessary to emphasise that the Supreme Court judgment in *H.A.H.* "*in no way interferes with the right of the legislature to enact such measures on the issue as it sees fit subject only to the requirements of the Constitution*". (per O'Malley J. at para. 3).
31. Under the heading "*Irish public policy and polygamy*", O'Malley J. addressed the factors that contribute to a decision made on public policy grounds. As Fennelly J. said in *Hassan*, when the word "marriage" is included without definition in a statute, it must be given its constitutional interpretation, but it must be remembered that the rules of private international law are themselves part of the body of laws carried over by Article 50 of the Constitution. O'Malley J. referred in the judgment to various constitutional provisions relevant to the consideration of public policy. She also referred to legislative provisions dealing with issues such as bigamy. Where a provision of European Union law extends to a given question of law, that will be decisive save in so far as any relevant legislation provides for exceptions. O'Malley J. referred to the fact that as the EU Family Reunification Directive does not apply to Ireland, it could not be decisive, but she did note

that that the Directive explicitly accepts that restrictive measures are justified in the case of polygamous households. She also discussed the ECHR and the decision of *R.B. v. United Kingdom*. She further addressed relevant UN agreements to which the State is a party.

32. O'Malley J. stated that because of the importance of public policy in the determination of a dispute involving conflicts of laws, the binding force normally accorded to previous decisions of the Supreme Court may have to be regarded as weaker in this area because public policy changes over time.
33. O'Malley J. held that "*the defining characteristic of marriage as envisaged by the Constitution in this era is that it entails the voluntary entry into mutual personal and legal commitments on the basis of an equal partnership between two persons, both of whom possess capacity to enter into such commitments, in accordance with the requirements laid down by law*". Based on that model of marriage, which the Constitution required to be guarded with special care, the question for the Supreme Court was whether that obligation compels the courts to refuse recognition to either potentially or actually polygamous marriages.
34. O'Malley J. entered into a comprehensive examination of how public policy of the State manifested itself through the Constitution, through legislation (including the criminalisation of bigamy), through actions of the Executive and through other sources such as EU law and international conventions. The important findings in the case were made at paras. 109, 110 and 111 as follows:

"I would therefore consider that a marriage that is potentially polygamous only is capable of being recognised as legally valid in this State. If that is so, it seems to follow, for the same policy reasons, that it should be recognised as of the date of inception.

The next question, then, is whether the recognition afforded to a potentially polygamous marriage should be withdrawn if the husband contracts a further marriage.

In my view it should not. Quite apart from an uneasiness with the notion that a legal status attached to one person can be lost retrospectively through the actions of another person rather than through a legal process, the logic of the preceding discussion would lead to the conclusion that the position of the first marriage remains as it was – that is, that it did not and does not present a threat to the Irish institution of marriage. The withdrawal of recognition would interfere unnecessarily with the rights of at least some of the individuals concerned and would go further than necessary for the protection of the institution of marriage. It is not required by public policy."

35. The Supreme Court then went on to deal with the position of the second spouse of the appellant in that case. Her status was not strictly speaking at issue before the Court, but

she had been represented before the Court and it was argued that her marriage should be recognised. Having discussed the issues arising, O'Malley J. unequivocally stated: "*I therefore consider that recognition of an actually polygamous marriage would be contrary to a fundamental constitutional principle and therefore contrary to public policy.*"

O'Malley J. went on to say that this was an opinion formed as a matter of Irish law, but it was also consistent with the international commitments made by the State. She would therefore "*take the view that any second or subsequent marriage entered into while the marriage to a first wife is in being cannot be recognised as valid in Irish law.*"

36. O'Malley J. went on to say that the decision did not compel the State or its agents to deny all legal effect to polygamous marriages in all contexts. She stressed that they were policy matters, which were primarily for the Oireachtas to consider.
37. Turning now to the specific points raised by the appellant in these proceedings based upon the legal provisions contained in s. 18 of the Act of 1996, I will observe first, that under the provisions of s. 18, the Minister must grant a spouse of a refugee the right to enter and reside in the State, subject to the interests of national security or public policy and secondly, that there is no definition of spouse contained within the Act of 1996. The appellant contests the Minister's right to make a determination that the appellant's third spouse was not a spouse within the meaning of s. 18(3) where the marriage was valid in accordance with the law of the place of celebration. Instead, the appellant argues that the Minister was bound to make a case by case determination under s. 18(5) as to whether he was entitled to refuse the appellant's wife permission to enter the State, an assessment which the Minister did not do in this case.
38. When the meaning of a word used in an Act is contested, it is necessary for the Court to seek to interpret that word through the application of accepted canons of statutory interpretation. What is required in this case is to determine if "spouse" within the meaning of s. 18 includes a person who became the refugee's spouse at a time when the refugee was already in a valid and subsisting marriage i.e. who became a spouse by entering into an actually polygamous marriage. The answer to that question is, in light of the decision of the Supreme Court in *H.A.H.*, straightforward. That answer is no; "spouse" within the meaning of s. 18 does not include a person who became the refugee's spouse at a time when the refugee was already in a valid and subsisting marriage.
39. As can be seen from the extracts of the judgment of O'Malley J. in *H.A.H.* above, there can be no doubt but that the Supreme Court gave clarity to the position with regard to considerations of public policy in the recognition of both potentially polygamous marriages and *de facto* or actually polygamous marriages. The former is recognised even if subsequently it becomes a polygamous marriage. The latter is not recognised at the time it is entered into as a valid marriage for the purposes of Irish law.
40. The appellant raised a point that the finding in *H.A.H.* concerning "*actually polygamous marriages*" was *obiter dicta* as the granting of a declaration in respect of the first marriage *i.e.* the potentially polygamous marriage was sufficient to dispose of the matter. The respondent has relied upon the clearly expressed view of the Supreme Court, stated

in the judgment of O'Malley J. that the issues in the case went further and it was necessary to express a view on the status of the second marriage. This view was given in the context of having heard submissions from counsel for the second wife. Even if it is arguable that the direct statement of the Supreme Court that "*recognition of an actually polygamous marriage would be contrary to a fundamental constitutional principle and therefore contrary to public policy*" was *obiter dicta*, I see no ground for treating this as anything other than a clear statement of the law. As will become clear from the paragraphs below, there is no argument advanced by the appellant, save perhaps for an argument about the *de facto* monogamous nature of his polygamous marriage, that was not advanced before the Supreme Court. The Supreme Court gave a considered and extensive judgment after hearing on the very issue of whether actually polygamous marriages can be recognised in this State. I am satisfied, for the reasons set out in this judgment, that the decision was not incorrectly or wrongly decided. I am satisfied that it represents the law. I should add however that the appellant's arguments were more forcefully addressed to whether that decision covered the role of the Minister in this case and the facts of his own personal situation.

41. The appellant has sought to advance an argument that because his marriage is now *de facto* monogamous that it is in law a marriage recognised in Irish law. I consider that the reasoning of the Supreme Court makes it clear, an actually polygamous marriage is void *ab initio*. Therefore, such a marriage does not become valid at some later date when through death or divorce it is *de facto* monogamous. *A fortiori* an actually polygamous marriage at the time of its celebration does not become valid merely because the parties to that marriage behave as if they were in a monogamous marriage. In Irish law a person cannot be recognised as a spouse if at the time of the marriage they entered into an actually polygamous marriage. The reference in the provisions of s. 18(3) to "spouse" could not therefore include a spouse who entered into an actually polygamous marriage. The appellant's submissions as to why *H.A.H.* supports this reasoning can be and are rejected for the reasons set out hereafter.
42. Counsel for the appellant placed emphasis on what was, in her submission, the limited nature of the Supreme Court's finding in *H.A.H.*; a finding limited to the role of a court under s. 29. In her submission, under s. 18, the decision as to who is or is not a spouse for the purpose of s. 18(3) is a matter solely for the Minister, relying on *Hamza* and *Hassan* and affirmed in *H.A.H.* Thus, counsel submits, *H.A.H.* is not the final word on the issue but leaves open the determination in each individual case as to whether recognition of that particular marriage will offend public policy.
43. The appellant relied on *D.M. v. C.F.* [2011] IEHC 415 where Clark J. made a distinction between general recognition of marriages *versus* recognition for refugee family reunification purposes. Clark J. held that s. 29 of the Act of 1995 is appropriate for determining matrimonial status and access to relief under inheritance law, divorce or nullity. Clark J. held that s. 29 is not "*relevant to determining for the purposes of s.18 of the Refugee Act 1996 the validity of a marriage celebrated according to the legal requirements and rites of a refugee's country of origin*".

44. The decision in *D.M. v. C.F.* was made on appeal from the Circuit Court under s. 29 of the Act of 1995. To the extent that there was a criticism of the appropriateness of its use, that was *obiter* on behalf of the High Court judge. I consider that the decision must now be read in light of the subsequent Supreme Court decisions of *Hamza, Hassan* and *H.A.H.* Undoubtedly, those cases confirmed that it was not appropriate for the Minister to cede the decision-making function to the courts. In *H.A.H.* however, the Supreme Court was aware that the reason the proceedings had come before the High Court under s. 29 of the Act of 1995 was because of a compromise of judicial review proceedings. Those proceedings had sought to quash the Minister's decision to refuse to admit the refugee's first wife into the State pursuant to the provisions of s. 18 of the Act of 1996. There is no reason to doubt that the Supreme Court was aware of the implications of their grant of a declaration that the marriage of the husband with the first wife was valid as of the date of its inception. Throughout the two judgments of the Supreme Court, the fact that recognition of marriage is especially important in refugee law is apparent. Indeed O'Malley J. stated as follows, in disposing of one of the refugee's arguments in that case:

"The appellants claim that the first wife has a legal right under Irish law, on foot of her status as a wife of the husband, to enter and reside in the State. The ruling of the Court will therefore determine a question of personal status for the purpose of the law of, and within, this State. That is manifestly a matter for the application of national law, which in this case means the application of conflict of law rules including the question of public policy" (emphasis added).

45. Insofar as Clark J. in *D.M. v. C.F.* may be said to have stated for the purpose of family reunification under the Act of 1996, it was sufficient for the marriage to be valid according to the laws of the country in which it was celebrated, I am satisfied that this must yield to the decision in *H.A.H.* Another interpretation of her judgment however, is that public policy may still have a role to play in the consideration and that her decision is confined to the fact that it was wrong of the Minister to abdicate his (or her) responsibility to the courts under s. 29 of the Act of 1995.

46. The main point made on behalf of the appellant is that public policy may only be invoked to deny a spouse of a marriage validly contracted according to the laws of another State in accordance with s. 18(5) of the Act of 1996. The appellant submits that the Minister had singularly failed to make such a public policy decision in this case. In counsel's submission, the Minister's interpretation of *H.A.H.* was simplistic. Instead, what was submitted was that the Supreme Court had emphasised the absence of moral and practical impediments to the recognition of *de facto* monogamous marriages, an approach which supports the recognition of the appellant's marriage.

47. The appellant makes the point that to interpret s. 18(3) as permitting the Minister to invoke public policy when considering whether a person is a spouse would be to permit the invocation of the question of public policy twice and render the reference in s. 18(5) superfluous. That is not an answer to the argument that the Minister makes. The

Minister's case is that public policy as it applies to recognition of marriage in its broadest sense has been clarified recently by the Supreme Court in *H.A.H.* and that the Minister is doing no more than applying the law to the facts here.

48. The appellant's submission as to the role of public policy lies at the heart of this case. Counsel's main point is that relying on public policy to deny that his third wife is a spouse for the purposes of s. 18(3) is incorrect; if public policy is to be deployed it is confined to the refusal of permission, not the denial of recognition. I find an inherent difficulty with the logic of the appellant's carefully crafted arguments. The difficulty stems from the appellant's reluctance to move from the position as outlined in his grounds seeking relief set out at 5(d) in the statement grounding the application for judicial review; that the Minister erred in law in holding that under s. 18(3) the appellant's third marriage had to be recognisable in Irish law. The appellant submitted in various ways and under different guises that a different definition had to be given to spouse in that section because the case was dealing with refugees and family reunification.
49. The appellant referred to the decision of O'Malley J. where she spoke of public policy being a matter for the Oireachtas, but submitted that O'Malley J. qualifies this by stating that "[h]owever, since this Court must embark on the exercise in this case, it is useful to spell out factors which, in my view, should contribute to a decision made on public policy grounds". The appellant submitted that O'Malley J. relied on Dicey, Morris and Collins' formulation of the "substantially incontestable" test in discerning when public policy should operate to prevent recognition of a foreign marriage: "the doctrine of public policy must [...] be invoked only 'in clear cases in which the harm to the public is substantially incontestable' and does not depend on the idiosyncratic inferences of a few judicial minds".
50. In the appellant's submission, applying the "substantially incontestable" test assists his position as there is no harm or threat in recognising his particular marriage in circumstances where it was a *de facto* monogamous one at all material times.
51. The appellant relies on the following passage from O'Malley J. in support of his contention:

"In my view there is no such harm or threat in the case of a couple living in this State in a monogamous relationship, arising purely out of the fact that they are married under a system of law that permits polygamy. There is no principle at stake here, no damage to the core of the values of our constitutional concept of marriage, that can be said to require the withholding of recognition. Nor can I see there is any practical difficulty in applying the current range of legislation, either civil or criminal, to a couple living in the State in a marriage that is de facto monogamous. Indeed, it seems apparent that State agencies in practice treat such marriages as valid save where doubts arise. [...] it does not appear that there are many instances of actually polygamous households in the State. In those circumstances, it seems to me that a refusal to recognise the validity of potentially polygamous marriages that are de facto monogamous would be likely to cause

distress, disruption and confusion amongst a significant number of people living in the Irish community. I cannot see that there is a corresponding gain in terms of the protection of marriage."

52. In my view, the above passage does no more than outline the factors or the test that the Supreme Court (and courts in general) must exercise in assessing those rare cases where public policy must be invoked. It does not represent a general invitation to the Minister to reassess public policy as to which marriage he (or she) must recognise in an individual case on the basis that it cannot be said to be substantially incontestable that the individual's now monogamous marriage would harm the public. The Supreme Court was directing its mind "to the legal consequences within this State of a polygamous marriage entered into in another country". Those legal consequences touch and concern the right of refugees to have reunification with their spouses (that was the underlying basis of the application made in *H.A.H.*). The pronouncements made in *H.A.H.* were of a general nature in terms of the matters of public policy which will limit the recognition in Irish law of otherwise valid marriages according to the law of the place of celebration.
53. No matter how carefully one looks within or without s. 18(3) there is little to no support for the wide proposition that all persons who enter into a valid marriage in the country of celebration are recognisable as spouses within this jurisdiction for the purpose of the Act of 1996. The submission centres on the reference in s. 18(5) to public policy, the *obiter* reference in *D.M. v. C.F.* above and the finding in *Hamza and Hassan* that the Minister's role under s. 18(3) could not be abdicated to the courts for determination under s. 29 of the Act of 1995. There is nothing in the wider s. 18, in the other sections of the Act, in the long title or in any other case law to support such a meaning.
54. In my view, the starting point is that in accordance with principles of statutory interpretation, the use of the word "spouse" in s. 18(3) must be given its ordinary and natural meaning. In the ordinary and natural meaning and in the absence of any specific definition to the contrary in the Act, spouse would mean a spouse as understood (and recognised) by Irish law. It will, of course, mean all marriages lawfully celebrated in this State, but it can, and it has to be said, usually does, include those lawfully celebrated in another jurisdiction. Yet lawful celebration in another country is not the only consideration as to whether a marriage will be recognised. There may be occasions when, for public policy reasons, a foreign marriage will not be recognised. As O'Malley J. said at para. 104: -

"[u]nder the rules of private international law, recognition of a marriage entered into in compliance with a foreign legal system should be refused only if refusal is required for the protection of the values and principles represented in our public policy."

55. The decision in *H.A.H.* was itself a discussion as to why the courts are left with a role to play in the recognition or non-recognition of foreign marriages and the factors to be taken into account when making a decision on public policy grounds. For now, it is sufficient to say that it is apparent from *H.A.H.* that recognition and in particular non-recognition of

foreign marriages under the rules of private international law, may require more than a determination that the marriage was valid according to the laws of the jurisdiction in which it was celebrated. If the rules of private international law permit refusal where such refusal is required for public policy reasons, the ordinary and natural meaning of "spouse" must mean a spouse in a marriage which is to be recognised within those principles.

56. Moreover, if the appellant's argument is correct, all those who have entered with a refugee into a legally valid marriage in the country of celebration are spouses within the meaning of the Act of 1996. No further legal consideration of whether the marriage is to be recognised within Irish law would take place. I am of the opinion that such an approach is clearly contrary to general principles of statutory interpretation and thus the application of the law relating to recognition of foreign marriages. As I have already said above, the Supreme Court in *H.A.H.* was fully aware of the impact its decision would have for rights under s. 18 when it gave its decision on the application for a declaration under s. 29 of the Act of 1995.
57. I return to the principal argument of the appellant which is that because the Minister is entitled to refuse to permit a spouse enter or reside in the State for public policy reasons under s. 18(5), there can be no consideration of public policy as to whether the marriage is recognised in Irish law so long as it was valid in the place it was entered into. In my view, the powers referable to public policy in s. 18(5) serve an entirely different function to the reference to public policy in the recognition of foreign marriages as set out in *H.A.H.* In s. 18(5), the Minister may refuse to allow a person who is a spouse within the meaning of s. 18(3) to enter or reside in the jurisdiction. It is a residual power granted to the Minister to restrict immigration but one which is only exercised for the purpose of national security or on the grounds of public policy. Counsel for the Minister explained it well when she said "subsection (5) operates to limit/disentitle a person who otherwise qualifies but does not expand the people who are entitled under subsection (3)". It is not for this Court in this case to describe what is the extent or limit to the Minister's powers under s. 18(5) of the Act of 1996. It is enough to say that it is restrictive of the right of a refugee to have reunification with his or her spouse where public policy requires otherwise. It applies to all spouses who are recognised in Irish law as spouses. In my view, there is nothing inherent in the reference to public order in s. 18(5) that demands an expansion of s. 18(3) to include spouses who are not recognised by Irish law.
58. On the other hand, the issue of public policy arises in the determination of which marriages are recognised by Irish law; the decision in *H.A.H.* clearly decided that it does so. Whether a marriage is recognised is a question of law. The use of the word "spouse" in s. 18(3) is a spouse as recognised by Irish law, therefore the determination the Minister must make on a case by case basis is whether any particular marriage is recognised as valid in Irish law. The decisions in *Hamza* and *Hassan* clarify that it is the Minister's obligation to do so; indeed, the Supreme Court recognised that the Minister has the inquisitorial competence/investigative function to investigate disputed issues. The Minister has an obligation to investigate the facts and make a determination as to

whether on the agreed (or established) facts the marriage is one that is recognised in Irish law. Where the Oireachtas have legislated in respect of recognition, the application to the present facts may be straightforward. Where the courts have identified public policy reasons as to why a particular type of marriage cannot be recognised then the Minister's role may also be straightforward. The Minister is bound to apply the law as to what kind of marriage may be recognised in this jurisdiction, having regard to the public policy reasons identified by the courts.

59. In so far as the *Hamza* and *Hassan* cases were relied upon by the appellant to contend for a different basis for recognition, these cases were considered by the Supreme Court in *H.A.H.* and it cannot be suggested, nor indeed was it suggested, that *H.A.H.* was wrongly decided. Instead, counsel for the appellant sought to restrict the ambit of *H.A.H.* and to rely on *Hamza* and *Hassan* in support of her argument. In so far as *Hamza* and *Hassan* dealt with the issue of recognition of marriage, I am of the view that there is no conflict with the decision in *H.A.H.* At the very least, they are consistent. On the aspect of recognition of marriage, it is of particular note, that at para. 32 of *Hassan*, Fennelly J. stated as follows:-

"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" (emphasis added).

60. The appellant made various other arguments based upon fundamental rights. In support of her argument in respect of the ECHR, counsel for the appellant submits that the policy objective which was seen to justify the margin of appreciation was "to prevent the formation of polygamous households", as per O'Malley J. in *H.A.H.* The appellant submits therefore, that it would be illogical to suggest that the granting of family reunification to the appellant's one wife would likely lead to the formation of a polygamous household, in light of the *de facto* monogamous nature of it. The appellant also relies on *Tanda-Muzinga v. France* (Application No. 2660/10, 10 July, 2014) to argue that the European Court of Human Rights acknowledges that Article 8 does not impose on Contracting States any general obligation to respect an immigrant's choice of the country of residence and to authorise family reunion in its territory. However, it should take into account, "the extent to which family life would effectively be ruptured, the extent of the ties of the persons concerned in the Contracting State, whether there are insurmountable obstacles in the way the family living in the Country of origin of the alien concerned and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion [...]. [F]amily unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life".
61. In my view, the above comment is of a general nature regarding the importance of family unity to the resumption of normal life for refugees. Polygamous marriages raise a very

specific issue however and there is nothing in the ECHR that demands Convention States to recognise polygamous marriage *per se* (See *R.B. v United Kingdom*). In any event, Ireland's obligations under international agreements were fully considered by the Supreme Court in its clear decision on Irish public policy regarding polygamous marriages.

62. The appellant submitted that the respondent's blanket exclusion under s. 18 amounts to unwarranted discrimination on account of national or social origin contrary to Article 14 of the ECHR and Article 40.1 of the Constitution and would amount to a violation of the Article 12 ECHR right to marry. The appellant relies on *Hode and Abdi v. United Kingdom* (Application No. 22341/09, 6 November, 2012) where an Article 14 violation was found, when taken in conjunction with Article 8. In that case, the UK immigration rule which treated refugees who married after they fled their country of origin differently to those who married before they fled, was held to be discriminatory.
63. Neither the Constitution nor Article 12 of the ECHR guarantee the right to enter into polygamous marriages (see *H.A.H. and R.B. v. United Kingdom* above). *Hode and Abdi* is based upon entirely different facts. The appellant's second marriage freely entered into by him after he left his country of origin, has been recognised as valid for the purposes of Irish law. There is simply nothing discriminatory about the manner in which the appellant has been treated.
64. The only way in which the appellant could succeed in any claim to be a spouse would be to show that Irish law had changed since the decision in *H.A.H.* and that now *de facto* polygamous as distinct from potentially polygamous marriages were, since the decision in *H.A.H.*, to be recognised on the basis that public policy no longer requires that such marriages are not to be recognised. O'Malley J. stated with respect to the value of precedents in this area:-

"[b]ecause of the importance of public policy in the determination of a dispute involving conflicts of laws, it seems to me that the binding force normally accorded to previous decisions of this Court may have to be regarded as weaker in this area. This is because public policy, by its nature, changes over time. The relevant legal and factual context can both alter, necessitating recognition of new public policy considerations. Older propositions once taken as axiomatic become more doubtful."

65. There has been no change in the legal or factual context since the Supreme Court gave that decision. Put simply, there is nothing new in Irish constitutional law or in EU law or in international human rights/refugee treaties that requires the courts to make a different assessment of public policy. Indeed, one could make the observation that it would be extraordinary if in a few short years since the seminal decision in *H.A.H.*, public policy could have changed so much. Of course, however, if the Oireachtas changed the policy through legislation for the specific situation of spouses of refugees in *de facto* polygamous marriages that would change the law (absent a successful constitutional challenge to such recognition).

66. I am therefore satisfied that the word "spouse" as used in s. 18(3) of the Act of 1996 means a "spouse" as recognised in Irish law. The Supreme Court has declared that while Irish law recognises a spouse who entered into a valid but potentially polygamous marriage according to the law of the country in which it was celebrated, a *de facto* polygamous marriage is not recognised in Irish law and for Irish legal purposes it is void *ab initio*. The Minister's role under s. 18(3) is to permit a spouse who is recognised as such under Irish law to enter and reside in the State. Under s. 18(5) the Minister has a residual right to refuse entry to a recognised spouse on public policy (or national security) grounds. The Minister has a single assessment of public policy, that is the individual assessment required under s. 18(5) if he (or she) is to deny entry or residence on that basis. The other role is simply to give effect to the legal provisions of s. 18(3) and for the purposes of ensuring that only validly married spouses are permitted to avail of the provision, the Minister can conduct enquiries.
67. Therefore, I consider that the case of *H.A.H.* is the authoritative decision on the determination of what marriages are to be recognised in Irish law. It is a recent decision reached after representation by all relevant parties to the polygamous marriages. There is and was no basis for the Minister or the High Court to reach any other decision but that an actually polygamous marriage is not recognisable in Irish law.

Conclusion

68. For the reasons set out in this judgment, I am satisfied that the High Court was correct in upholding the Minister's determination that the appellant's marriage to his third wife while still married to his second wife was not valid or recognisable by the State and that accordingly his third wife was not his spouse within the meaning of s. 18(3)(b)(i) of the Act of 1996. That finding follows inexorably from the decision of the Supreme Court in *H.A.H.* in the absence of any evidence of a change in public policy on the issue of recognition of actually polygamous marriages.
69. The appellant in this case was in a subsisting marriage at the time he entered into his third marriage in Pakistan. Simply because the appellant does not have an automatic right to family reunification with his third wife does not mean that he has no opportunity of residing with her in this jurisdiction. He has applied for a determination in accordance with the IHAP provisions and he is entitled to a determination in respect of that matter. I do not consider it helpful or appropriate for me to give an opinion on whether that should succeed or otherwise. No doubt the appropriate decision maker/makers will take all relevant matters into consideration.
70. I would therefore dismiss this appeal. The usual rule is that costs follow the event and therefore the Minister would appear entitled to the costs of this appeal. If the appellant wishes to contend for an alternative order, he will have 4 weeks to deliver a written submission not exceeding 2,000 words and the Minister will have 4 weeks to reply. In default, an order for the costs of the appeal to be paid by the appellant to the Minister will be made. If the parties agree to an alternative order for costs then such an order will be made by consent.

71. As this judgment is being delivered electronically, it is appropriate to record the agreement of the other members of the Court.

Ní Raifeartaigh J.: I agree with this judgment and the proposed orders.

Binchy J.: I agree with this judgment and the proposed orders.