

## THE HIGH COURT

[2011 No. 111JR]

BETWEEN:-

LELIA ISMAIL TAHIR AND RAYMOND PAUL SHEEHAN

APPLICANTS

v.

REGISTRAR FOR COUNTY CORK AND AN tARD CHLAIRITHEOIR

RESPONDENTS

**Judgment of Mr. Justice Hedigan delivered the 16th of May 2012**

1. The first named applicant resides at Drishane Castle Accommodation Centre, Millstreet, Co. Cork. The second named applicant resides at 2 Shandon Way, Shandon Street, Cork. The first and second named respondents are responsible pursuant to the Civil Registration Act 2004, for the management and control of the system of registration of births, deaths and marriages occurring in the State.

**2. The applicants seek the following relief:-**

- (a) An Order of *Mandamus* directing the First Named Respondent to issue to the Applicants within a reasonable period of time a marriage registration form.
- (b) If necessary, an Order of *Mandamus* directing the Second Named Respondent to issue to the Applicants a marriage registration form or to direct the First Named Respondent to issue such form to the Applicants within a reasonable period of time.
- (c) If necessary, a Declaration that the First Named Applicant has provided sufficient evidence of identity for the purposes of the Civil Registration Act 2004.
- (d) A Declaration that the Respondents have failed to vindicate the Applicants' right to marry pursuant to Article 40.3 of the Constitution of Ireland and/or Article 12 of the European Convention on Human Rights.
- (e) An order of *Certiorari* quashing the decision of the first named respondent refusing to issue a marriage registration form to the applicants.

**Background Facts**

3.1 Ms. Tahir claims to be a Somali national. She arrived in the State in June 2008. She made an application for asylum at that time. Her application was refused by the Office of the Refugee Applications Commissioner ("ORAC"). Ms. Tahir appealed against that refusal and her appeal was in turn refused by the Refugee Appeals Tribunal ("RAT") on 28th January, 2010. Some weeks later, Ms. Tahir and the second named applicant decided to marry. They engaged the firm of Stanley & Co. as their solicitors. In May 2010, the applicants were given an appointment for the end of June 2010 to fulfil the necessary requirements to provide the requisite three-month notification of their intention to marry. On the 31st of May 2010 and again on the 11th of June 2010 Stanley & Co. wrote to the Cork Registrar stating that Ms Tahir was a Somali national who was not able to obtain any identity documents. On the 14th of June the Cork Registrar replied to the applicant's solicitor stating that pursuant to s. 46(7) of the Civil Registration Act 2004, evidence of identity was required and that an affidavit of identity would not be sufficient. On the 17th June, 2010 the applicant's solicitors wrote to the Cork Registrar indicating the difficulty in obtaining identity documents and referring to the absence of any functioning government in Somalia since 1991.

3.2 On 28th June, 2010 the applicants attended at the office of the first named respondent. The first named applicant produced by way of identity her Refugee Applications Commissioner registration certificate, medical card and sworn affidavit of identity. The first named applicant was informed that she must submit an identity document such as a passport. On 21st July 2010 the applicants again attended at the offices of the first named respondent where they completed a declaration of freedom to marry. The applicants were requested to attend for a further appointment on 12th August, 2010 with a professional interpreter.

3.3 On 12th August, 2010 the applicants attended at the offices of the first named respondent where they completed a declaration of no impediment in respect of their intended marriage. The applicants were advised that their marriage could not proceed until such time as a marriage registration form issued. However, when the applicants left the Registration Office, a Detective Garda from the Garda National Immigration Bureau ("GNIB") called to the Registrar's Office and informed the Registrar that he believed that Ms. Tahir was not in fact from Somalia. In the circumstances, the Registrar decided to refer the file to the second named respondent, An tArd Chláraitheoir. An tArd Chláraitheoir made contact with the GNIB and was advised that there were serious questions as to the true identity of the first named applicant.

3.4 On 14th September 2010 the applicants' solicitor wrote to the first and second named respondents noting that the applicants were anxious to be married and requesting communication as to the status of their application. On 16th September 2010 the second named respondent replied and outlined the requirements pursuant to s.46 (7). The letter further stated

"For secondary documentation, and in the absence of a birth certificate, it may be possible to confirm Ms Ismail's identity by using other documentation, eg payslips, bank statements, insurance certificate, social welfare documents/card, health services card etc",

However it was stated that this was at the discretion of the said respondent who must be satisfied as to the identity of the person. A further exchange of correspondence occurred in October 2010 between the applicants' solicitor and the second named respondent. By letter of 15th October 2010 the respondents emphasized that it was a matter of discretion for the first respondent to be satisfied as to the first applicant's identity.

3.5 By letter dated 22nd December 2010 the applicants' solicitor wrote to the respondents complaining of the delay in progressing matters and stating that the applicants were anxious to marry. The applicants' solicitor noted that the first named respondent had informed the first named applicant that an age card issued by An Garda Síochána would be acceptable as evidence of identity, but that notwithstanding the said applicant having submitted such a card, this had not been accepted. The applicants' solicitor also submitted to the respondents a certified copy of the first named applicant's Irish driving license by way of further proof of her identity. The letter emphasized:-

"Our clients have done everything in their power to substantiate their entitlement to marry one another in the State."

The applicants' solicitor called for confirmation of the applicants' entitlement to marry within 30 days failing which judicial review proceedings would issue. On 7th February 2011 the applicants were granted leave to seek judicial review.

### **Applicants Submissions**

4.1 The applicants have signed a declaration that there is no impediment to their marriage. This declaration has not been questioned. Nor is there any suggestion that the respondents wish to conduct further investigations as to whether or not there exists an impediment to the marriage. The applicant's submit that it is clear that the respondents or either of them have failed to issue the marriage registration form on the basis of the evidence submitted to them by the applicants who have done everything in their power to substantiate their entitlement to marry.

4.2 The functions of the respondents are set out in the Civil Registration Act 2004. This Act repeals the Marriages (Ireland) Act 1844. Section 16 of the Act of 1844 provided that the registrar should issue a certificate in the prescribed form:-

"Provided that no lawful impediment be shown to the satisfaction of the registrar why such certificate should not issue."

In *Lambert v. An tArd-Chláraitheoir* [1995] 2 I.R. 373 the High Court examined the powers of the Registrar General under the 1844 Act. An issue arose as to the recognition of a foreign divorce of one of the parties to a marriage. The respondent urged that his decision should not be set aside in Judicial Review proceedings unless it was made in excess of jurisdiction or was unreasonable. This argument was rejected by Kinlen J. who stated at page 384:-

"It seems to the court that the respondent's reliance on the doctrine of unreasonableness, and, in particular, the latitude which that doctrine affords to decision making tribunals, is misconceived. This case is not concerned with a situation where an administrative tribunal has been afforded a discretion in an administrative matter and to this extent it can be distinguished from, for example, the *Stardust* case. The present case turns on the determination of a legal issue. The Registrar General is only entitled to refuse to issue a licence or certificate in a case where there is a 'lawful impediment' to a marriage."

4.3 The Civil Registration Act 2004 sets out the procedures to be observed in respect of marriage, Section 46(1) requires the persons concerned to notify the registrar in writing of their intention to marry not less than 3 months prior to the date on which the marriage is to take place and to attend at the office of that registrar and sign a declaration in his or her presence that there is no impediment to the said marriage. The concept of an "impediment to marriage" is defined in s.2 (2) of the 2004 Act. There is an impediment to a marriage if for example one or both of the parties to the marriage are already married, or one or both of the parties is under the age of 18 or both parties are of the same sex. Of particular relevance to the present proceedings is s.46 (7) of the 2004 Act, which provides:-

"The registrar concerned may require each party to an intended marriage to provide him or her with such evidence relating to that party's forename, surname, address, marital status, age and nationality as may be specified by an tArd Chláraitheoir."

4.4 At paragraph 8 of the statement of opposition filed on behalf of the respondents, it is stated that:-

"The first named respondent was not satisfied that the first named applicant had provided the requisite evidence of her true identity, in particular by reason of information conveyed to her by the Garda National Immigration Bureau".

The applicants submit that they have never been informed as to the content of any information conveyed to the first named respondent by the Garda National Immigration Bureau. Whilst it is true, as stated at paragraph 9 of the statement of opposition, that the applicants were aware that the issue of the first named applicant's identity had been referred to the second named respondent, they were unaware that this was done on the basis of communication by the Garda National Immigration Bureau.

4.5 The first applicant has sworn an affidavit in these proceedings setting out the alleged unsatisfactory nature of the treating of her asylum claim, the expert evidence she has obtained from an international expert linguist and an explanation for her fingerprints appearing on a visa application in the name of another person. All of these matters will be examined in the context of separate judicial review proceedings. However it is noteworthy that Ms. Walsh on behalf of the respondents swears in her affidavit that she was unaware of the judicial review proceedings and was also unaware that INIS had indicated that the applicant's fingerprints matched those of a Tanzanian national. Accordingly the applicants remain entirely unaware as to the nature of the information given to the first respondent on the 12th of August, 2010, by a Detective from GNIB who happened to be in the first respondent's office.

4.6 In *Akram v Minister for Justice, Equality and Law Reform* [2004] IEHC 33, the applicant sought to challenge a decision to refuse to recognise his post-nuptial declaration of citizenship on the basis of concerns by the State in respect of the applicant's marriage. In the course of his judgment, Kearns J. (as he then was) referred to an earlier decision of the High Court in respect of the same application, wherein Finnegan P:-

"granted an order of *certiorari* by virtue of the failure of the respondents to comply with principles of natural and constitutional justice, in particular, in arriving at a decision the respondent had failed to furnish the applicant with a statement from the applicant's Irish wife which said statement had been considered and relied upon by the respondent in arriving at the decision in question."

It is submitted that having regard to the decision of *Akram* that the failure to inform the first named applicant of such communication and to afford her an opportunity of responding is a flagrant breach of the said applicant's right to fair procedures as it deprived the applicant of any opportunity of addressing same. In the context of these proceedings, affidavits have been sworn by the GNIB and others in relation to the question of the fingerprints. The respondents and the GNIB are aware of the applicant's explanation for this and the expert evidence which she has obtained in relation to her case that she is a Somali national. The applicants have done all they can to substantiate their case. It is evident that there has been a refusal to allow the applicants to marry on the basis of the evidence which is now before the respondents.

4.7 The right to marry is protected by both the Constitution of Ireland and Article 12 of the European Convention on Human Rights. The right to marry was first recognised as an unenumerated personal right pursuant to Article 40.3 in *Ryan v Attorney General* (1965] 1 I.R. 294. At issue in the within proceedings are the procedural rules and/or requirements associated with marriage in Ireland, and whether same amount to a denial or substantial interference with the right of the applicants to marry. The applicants submit that the respondents have clearly reached a decision not to permit the marriage to proceed on the basis of the information submitted, presumably on the basis that they do not find the first applicant's version of events to be credible. In the alternative, the respondents are in possession of the entirety of the applicant's case including her expert evidence. Insofar as the respondents are relying on the belief of an unnamed Garda that the applicant was not from Somalia, the respondents have ample evidence to examine the case on its merits and reach a conclusion. Notwithstanding that the first named applicant has submitted a number of documents which establish her identity, including an age card issued by An Garda Síochána, an Irish driving licence and a medical card, all of which remain extant and valid, the respondents have refused to issue the marriage registration form required by the applicants in order to marry. In the circumstances, the national procedures are entirely unforeseeable as even now the applicants do not know what further requirements are sought by the respondents. Accordingly, they are not in accordance with law. It is submitted that respondents have acted unlawfully and in breach of fair procedures and/or natural justice.

### Respondents Submissions

5.1 The applicant swore her grounding affidavit in these proceedings, claiming to be a Somali National and referring to the fact that her application for asylum had been refused and was the subject of judicial review proceedings. At no stage did Ms. Tahir indicate what the basis of the refusal of her application for refugee status was. Nor was this issue addressed by her solicitors in the correspondence sent to the respondent. Rather, the applicants' solicitors sought to query the nature of the information provided by the GNIB. In August 2010, the GNIB advised the respondents that Ms. Tahir's true identity might be Pendo Mongo George, a Tanzanian National. In effect, as appears from the affidavit sworn by Anne Marie Kelly of the GNIB in these proceedings, the GNIB was advised by the Irish Naturalisation and Immigration Service ("INIS") that Ms. Tahir might be one and the same person as Pendo Mongo George, who had applied for a UK visa in Dar Es Salaam, Tanzania in December 2006 and who was the holder of a Tanzanian passport which issued in August 2005 in Dar Es Salaam. The applicants' solicitors took issue

with the communication of the fact that the GNIB considered Ms. Tahir might be the same person as Pendo Mongo George, claiming that this issue, which at no stage was disclosed by Ms. Tahir or her solicitors in the instant proceedings, should have been "put" to Ms. Tahir. In April 2011, the Office of the Chief State Solicitors advised that the GNIB had now clarified that there was a fingerprint match between Pendo Mongo George and Ms. Tahir. The applicants' solicitors again complained that there had not been full disclosure of the communication between the GNIB and the respondents. However, it now transpires that the applicant accepts not only that there is in fact a fingerprint match between Ms. Tahir and Pendo Mongo George who held a Tanzanian passport and obtained a visa for the United Kingdom in Dar Es Salaam in December 2006 but that the applicant was also well aware of this issue as it had arisen in the context of Ms. Tahir's asylum application and was a factor taken into account in refusing her asylum application on the basis it was not credible. Not only this, but the INIS had advised that, for the purposes of Ms. Tahir's claim for subsidiary protection subsequent to the refusal of her asylum application, Ms. Tahir was to be treated as a Tanzanian National. None of this information was disclosed to the respondents either before or after the institution of these proceedings. Rather, the information came to light by reason of the interaction between GNIB and the respondents. In the circumstances, and as is clear from the amended statement of grounds of opposition, the second named respondent has indicated that he is not satisfied that Ms. Tahir has proven her identity and, on that basis, the decision has been taken not to issue Ms. Tahir with a marriage registration form at present.

5.2 The principal functions of An tArd Chláraitheoir are set out in the Civil Registration Act, 2004 ("the 2004 Act"). They include *inter alia*, the maintenance, management and control of the system of registration of births, marriages and deaths. Section 46 (7) of the 2004 Act provides that:-

"The Registrar concerned may require each party to an intended marriage to provide him or her with such evidence relating to that party's forename, surname, address, marital status, age and nationality as may be specified by An tArd Chláraitheoir".

The respondents submit that An tArd Chláraitheoir was entitled to take the view that the requirements of Section 46 (7) had not been met in this case in view of the issues raised by the GNIB regarding the identity of Ms. Tahir. Ms. Tahir does not dispute the fact that her fingerprints match those of Pendo Mongo George and that she held a Tanzanian passport and applied for a visa for the United Kingdom in December 2006 at the UK Embassy in Dar Es Salaam.

5.3 Ms. Tahir applied for asylum on her arrival in the State in June 2008. She completed her application for refugee status on the 11th June, 2008. In that application form she claimed to be a Somali National born in 1984. At no stage did she refer to having ever been in Tanzania. However, in June 2009, she was written to by ORAC and provided with information from the UK Border Agency in which the UK Border Agency confirmed that her fingerprints matched those of Pendo Mongo George and indicated that that person, born in 1978, had been issued with a six month visa for the UK in Dar Es Salaam in December 2006. In July 2009, having received this information, Ms. Tahir was interviewed by ORAC and indicated, for the first time, that she had left Somalia in November 2006 and returned to Somalia in January 2007. She said while she was away she was taken to an office to get an ID card to allow her travel. She said that her fingerprints could have been taken when she went to this office. ORAC concluded that the applicant's version of events lacked credibility. On appeal, the RAT concluded that Ms. Tahir's explanations were "simply not capable of being believed". On the 28th April 2010, Ms. Tahir was advised that, having regard to the information from the UK Border Agency and in the absence of any proof that Ms. Tahir was Somali, the Minister for Justice intended to process her application for subsidiary protection on the basis that she was a Tanzanian National.

5.5 The respondents submit that the respondents were entitled to take the view that Ms Tahir had not provided sufficient evidence as to her identity. The orders of *mandamus* sought are predicated on the assumption that, as sufficient evidence has been provided of Ms. Tahir's identity, the respondents are required to issue a marriage registration form. The applicants' argue that the respondents have acted unlawfully or failed to have regard to relevant considerations, being the evidence of identity furnished by Ms. Tahir and have failed to have regard to the fact that Ms. Tahir is unable to obtain a Somali birth certificate or passport. It is noteworthy that the grounds advanced fail to advert at all to the acknowledged fact that Ms. Tahir's fingerprints match those of a person holding a

Tanzanian passport and visa for the UK. The grounds also fail to advert to the fact that the explanations proffered in other proceedings (but not in these proceedings) as to the basis for this dual identity have been considered by both ORAC and RAT to be incredible. In circumstances where the Minister for Justice has already determined that Ms. Tahir should be treated as a Tanzanian National, the respondents submit that it would be almost perverse were they to conclude that Ms. Tahir has provided sufficient proof of her claimed Somali identity.

### Decision of the Court

6.1 These proceedings were brought on the 7th February 2011 by the applicants who wish to marry each other. The first applicant claims to be a Somali National. She arrived in the State in June 2008, and made an application for asylum at that time. Her application was refused by the Office of the Refugee Applications Commissioner and her appeal was refused by the Refugee Appeals Tribunal in January 2010. Shortly thereafter the first and the second named applicant's decided to marry. They were given an appointment to meet the first respondent for the 28th June 2010. In advance of the appointment the applicant's solicitors Stanley & Co. wrote to the Cork Registrar indicating that the first applicant Ms Tahir was a Somali national who was not able to obtain any identity documents and enclosing an affidavit of identity on behalf of Ms Tahir. On the 14th of June 2010 the Cork Registrar replied to the applicant's solicitor stating that pursuant to s. 46(7) of the Civil Registration Act 2004, evidence of identity was required and that an affidavit of identity would not be sufficient. The letter stated "if your client can obtain evidence from her embassy confirming her age and place of birth we may be in a position to review her case further. On the 28th June 2010 the applicants attended at the office of the first named respondent. The first named applicant produced by way of identity her Refugee Applications Commissioner registration certificate, medical card and sworn affidavit of identity. She was informed that these documents were not sufficient evidence of her identity. On the 21st July 2010 and the 12th August 2010 the applicants again attended at the offices of the first named respondent. On the later occasion the applicants were advised that their marriage could not proceed until such time as a marriage registration form issued. However, when the applicants left the Registration Office, a Detective Garda from the Garda National Immigration Bureau ("GNIB") called to the Registrar's Office and informed the Registrar that he believed that the first named applicant was not in fact from Somalia. In the circumstances, the Registrar decided to refer the file to the second named respondent, An tArd Chláraitheoir. An tArd Chláraitheoir made contact with the GNIB and was advised that there were serious questions as to the true identity of the first named applicant. In September and October 2010 there was correspondence between the applicants' solicitor and the second named respondent concerning the applicant's identity. By letter dated 22nd December 2010 the applicants' solicitor called for confirmation of the applicants' entitlement to marry within 30 days failing which judicial review proceedings would issue. On 7th February 2011 the applicants were granted leave to seek judicial review. The applicants seek an order of *mandamus* directing the respondents to issue a marriage registration form. The applicants seek declaratory relief to the effect that sufficient evidence of the first applicant's identity was provided. The applicants also seek an order of *certiorari* to quash the decision made by the first named respondent to the effect that Ms. Tahir had not provided evidence of her true identity.

6.2 One of the main roles of Registrar's and An tArd Chláraitheoir as set out in the Civil Registration Act, 2004 is the maintenance and control of the system of registration of marriages. Section 46 (7) of the 2004 Act provides that:-

"The Registrar concerned may require each party to an intended marriage to provide him or her with such evidence relating to that party's forename, surname, address, marital status, age and nationality as may be specified by An tArd Chláraitheoir".

The central issue in this case is whether the respondents were entitled to consider that the requirements of Section 46 (7) had not been met. The applicant's argue that the respondents failed to have regard to the fact that Ms. Tahir is unable to obtain a Somali birth certificate or passport as Somalia is a failed state and have failed to have regard to the evidence of identity furnished by Ms Tahir.

6.3 The applicant swore her grounding affidavit in these proceedings, claiming to be a Somali National and referring to the fact that her application for asylum had been refused and was the subject of judicial review proceedings. The applicant omitted to refer to the fact that the basis for her refusal was that her fingerprints matched those of a Tanzanian National. In June 2009, Ms Tahir was written to by ORAC and provided with information that her fingerprints matched those of a Tanzanian National Pendo Mongo George who had been issued with a six month visa for the UK in Dar Es Salaam in December 2006.

When Ms. Tahir was interviewed by ORAC she indicated, for the first time, that she had left Somalia in November 2006 and returned in January 2007. She stated that she met a man in Kenya who said he could get Ms. Tahir ID cards for travelling and that she was "taken to an office" to get an ID card. She said that her fingerprints could have been taken when she went to this office which was "very far from Kenya". ORAC concluded that the applicant's explanation for the matching fingerprints lacked credibility. In her initial questionnaire she made no reference to having left Somalia in late 2006 and to having returned there in early 2007. Her account of how she travelled to Ireland also raised credibility issues. On appeal, the RAT concluded that the applicants explanations regarding her lack of knowledge as to being in Dar Es Salaam and the circumstances surrounding having her fingerprints taken was "simply not capable of being believed". The RAT concluded that the applicant had not satisfied the Tribunal "at any level" that she was a Somali National. In her initial asylum questionnaire Ms Tahir failed to refer to having left Somalia in 2006, and in her application for a marriage registration form she failed to refer to the fingerprint match with a Tanzanian National. It seems to me that the applicant's interactions with the respondent have been characterised by a distinct lack of candour.

6.4 The applicant complains that the respondent's failure to inform her of the information received from Garda National Immigration Bureau and to afford her an opportunity of responding is a flagrant breach of the her right to fair procedures as it deprived the applicant of any opportunity of addressing same. In fact during all this time , the applicant was well aware of the fingerprint match as this issue had arisen in the context of her asylum application. Therefore the claim that she was denied fair procedures is entirely without substance. The applicant points to a so called "contra expert report" which takes issue with the findings of the Sprakab Report relied on by the respondents to conclude that the applicant was from Kenya. The applicants report is just one of two conflicting reports. This report did not provide the respondents with conclusive proof of her identity.

6.5 The documents produced by Ms. Tahir as evidence of her identity included her Refugee Applications Commissioner registration certificate, a medical card and a sworn affidavit of identity. It seems to me that the respondents were not under an obligation to accept the documents produced by Ms. Tahir as they are Irish documents that do not demonstrate her claimed Somali nationality. In concealing from the respondents relevant and important information concerning the existence of a second identity, the applicant attempted to deceive the respondents. She thereby through her own actions raised the strongest possible doubt that she is who she claims to be. The onus is on the applicant to provide satisfactory evidence as to her identity. Manifestly she has failed to do so. Quite the reverse is the case. It is now clear that she has at least two identities. The door is open for her to submit further evidence of her claim to Somali identity for review by the respondents to prove her claim that she is who she claims to be in these proceedings. She would be well advised to conduct her further dealings with the authorities in an open and honest fashion. Only in this way can she resolve the doubts as to her identity which she herself has created by her efforts to deceive the respondents. To date, Ms Tahir

has been less than forthright in her dealings with the authorities. She has been the author of her own difficulties. I am not satisfied that the respondents have acted unlawfully or in breach of fair procedures and/or natural justice. The relief sought will be refused.