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The Human Right to Marry: A Refugee's Perspective

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Abstract

In the European Court of Human Rights cases of *Muñoz Díaz v Spain* in 2009² and *Serife Yigit v Turkey* in 2010³, involving unregistered/informal 'marriages' of a Roma couple and a Muslim couple respectively, the Grand Chamber took the position that civil marriages are available to all people in the state without distinction and therefore, no breach of Article 12's right to marry (nor Article 14's prohibition of discrimination) had occurred when the respective states failed to recognise the informal marriages of the applicants. This article considers these two cases, and asks whether the court's position is challenged by migrants/refugees, whose access to formal marriages may be impeded due to a lack of identity and status documentation.

Key words

Muslim marriage; unregistered marriage; human rights; Article 12 ECHR; Article 8 ECHR; refugees

Introduction

Article 12 of the European Convention on Human Rights upholds the right of men and women to marry and found a family, in accordance with the national laws of each state which govern marriages. Article 8 further protects the right to private family life (Draghici, 2017, pp.30-33). The ECtHR's decisions in the cases of *Muñoz Díaz v Spain* in 2009⁴ and *Serife Yigit v Turkey* in 2010⁵ reinforced the position that where civil marriages are available to all people in the state without distinction, no breach of Article 12's right to marry (nor Article 14's prohibition of discrimination) arises. In both cases, non-recognition of the marriage affected the applicants' access to the former partner's pension and other social benefits.

This paper uses the case study of Hasan and Arwa to question whether the Article 12 right to marry is indeed available to all people without distinction or discrimination

where the state imposes marriage formalities, or whether migrants/refugees⁶ may face particular obstacles in meeting the legal requirements to marry due to a lack of documentation proving status. To what extent may these individuals be inhibited from entering civil state recognised marriages, and therefore face discrimination breaching their Article 12 right to marry. Beginning with the case study, this article then details the *Munoz Diaz* and *Serife Yigit* cases, and provides only a brief statement of the problem, which future research will explore in greater detail.

Hasan and Arwa: A Case Study⁷

Hasan and his family fled Somalia as refugees in the early 1990's during the civil war which followed the overthrow of the Barre government in 1991. They arrived in Denmark when Hasan was approximately 5 years old, and were permitted to remain as refugees. They arrived without any documentation proving identity and therefore Hasan never had a birth certificate. Following a number of years of residency, Hasan became a Danish citizen in 2000 and was given a passport and a citizenship certificate which was to be used as an equivalent to a birth certificate for official purposes.

In 2004, Hasan and his family moved to the UK. In 2016, Hasan met Arwa and they conducted the *nikkah* (Muslim marriage ceremony) in Spain where Arwa was studying on a student visa. Arwa was a Moroccan national by birth, and therefore a formal state recognised marriage was essential to enable Hasan and Arwa to live together as a family in Europe.

Hasan and Arwa's journey to a formally recognised marriage involved navigating three European states – the UK, Denmark and Spain. Hasan was required to obtain a Certificate of Permission to Marry (*Certificado de Capacidad Matrimonial*) in order to formally marry in Spain. This required him to produce a document proving his name, his birth certificate and a Matrimonial Status Certificate. With no birth certificate, and no idea how to obtain a Matrimonial Status Certificate Hasan was left to

navigate between local councils in the UK and in Denmark, the Danish Embassy in Spain, the Danish Foreign Ministry in Denmark and the Spanish Civil Registry.

Hasan's citizenship certificate from Denmark was to act as a substitute birth certificate. This certificate had to further be translated into Spanish and stamped by the Danish foreign ministry. Hasan made another trip to Denmark to achieve this. After flying back from Copenhagen to Spain, the documents were presented to the Civil Registry and finally accepted as sufficient documentation. The whole process took 4 months.

In the case of Hasan and Awra, the barriers to registration were numerous including the absence of relevant identity and personal status documents, the language in which the guidelines were available, the requirement for official translations of documentation, the documentation itself, and the lack of clear and accessible information about the process. Each of these potentially place added impediments to the journey of a migrant/refugee in formally marrying.

Marriage formalities

This article shall not detail marriage formalities in any particular European jurisdiction and is intended instead to generically focus on the treatment of religious only/informal marriages by the ECtHR. Each state of course has its own legal regime of marriage and family laws. This paper raises questions, the answers to which would be determined by each state's own legal regime and paves the way for further research in this area in individual state contexts.

The issue of access to a formal marriage is significant as it has the effect of transforming a couple's legal position. This impacts on their obligations to each other and their engagement with the outside world. Therefore, the requirement to undertake public formalities is clearly to be expected (Harris-Short, 2011, p.63). Such formalities also ensure that it is clear who is entitled to the legal rights enjoyed by married couples under state law. The impact of this differs from state to state

dependent on the wider legal treatment of cohabiting couples. For example, in the England and Wales context, the court's have no power to distribute assets between a couple who are simply cohabiting regardless of the duration of the relationship. Thus, there is no equivalent of divorce law for such couples (Barlow & James, 2004, p. 148). Children of the relationship will still benefit from protections under the Child Maintenance Service provisions and also, for the more wealthy parents, Schedule 1 Children Act 1989.⁸ These are limited protections and do not extend to assets such as the family home, which upon breakdown of a legally recognised marriage, would be open to division.

The necessity to comply with state formalities for marriages was confirmed to be compatible with the Article 12 ECHR right to marry, in *X v Germany* in 1974.⁹ This case reinforces the right of individuals to celebrate their marriages according to their religious rites, but also upholds the state's right to require that certain civil marriage formalities are also adhered to (Draghici, 2017, p.43). The issue of the non-recognition of religious/ informal marriages arose again in the cases of *Munoz Diaz* and *Serfie Yigit*, and in both instances, the ECtHR held that non-state recognition did not amount to discrimination or a breach of Articles 14 in conjunction with Article 12 or Article 8.

Munoz Diaz v. Spain and Serife Yigit v. Turkey

The lack of recognition afforded to unregistered religious-only or other informal marriages raises a number of human rights questions which were identified in these two cases. For couples who perform a marriage ceremony, consider themselves married, and conduct their lives in accordance with this belief, the question of discrimination potentially arises when the state excludes them from the family law provisions available to registered married couples (Lucic & Grigic, 2015, p.58). *Muñoz Díaz v Spain* was decided in 2009 and this involved an unregistered Roma marriage performed in 1971 in Madrid, in accordance with the couple's Roma customs and traditions, resulting in a family unit recognised by the Roma community as a marriage. The couple had 6 children, and they were all registered within the

Family Record Book issued by Spanish Civil Registration Authorities on 11 August 1983.¹⁰ Further to this, in October 1986 the family was granted first-category large-family status by the state pursuant to the Large Family Protection Act.¹¹ Both of these facts were significant in the decision made by the ECtHR.¹²

The couple enjoyed the social effects of marriage within their community. Upon the death of the husband 19 years later, the applicant claimed the 'survivors pension' in relation to the husband's social security payments made throughout the duration of their marriage in his trade as a builder. The state's *Instituto Nacional de la Seguridad Social* refused to grant her the pension as they did not accept that she had ever been the wife of the deceased. Thus, the couple's 1971 marriage was considered invalid, as it did not abide by the requisite legal requirement of the Civil Code 1971 (as amended by Law no. 30/1981), and the General Social Security Act 1994. The applicant began national legal proceedings in 2002, and the relationship was eventually concluded to be one of cohabitation and not marriage in Spain.

The case was appealed to the ECtHR on the grounds of a breach of Article 14's prohibition of discrimination in conjunction with Article 1 of Protocol 1's right to peaceful enjoyment of possessions.¹³ This argument was advanced on the basis that Article 14 protected against discrimination on the grounds of race and social origin. It was put forward that by failing to recognise the Roma marriage, the state was discriminatory on the grounds of race. She further argued that her relationship was treated differently to equivalent cases where statutory formalities had not been adequately adhered to. In addition, she argued her social condition was one of economic dependence which was not being recognised by the state in denying her access to the pension, and thus a breach of Article 1 of Protocol 1's right to peaceful enjoyment of possessions. Further, the applicant argued breach of Article 14 in conjunction with Article 12's right to marry.¹⁴ This was based on the state's failure to recognise the Roma marriage as valid despite this form of marriage being the only one recognised within her community. Thus, she argued that this breached her right to marry.

The state's counter-argument was that it was the failure of the couple to adhere to marriage formalities and enter a formally registered/ recognised marriage which resulted in the denial of the pension, not any positive discrimination by the state. Thus, the right to marry was not being infringed by the state as it imposed the same set of statutory formalities on *all* citizens equally, which this couple voluntarily chose not to observe. The state argued against the breach of Article 14 in conjunction with Article 12, on the basis that the right to marry was being upheld in the same way in which it applies to all other citizens.

The Grand Chamber's verdict with a majority of 6 to 1, was that the state's refusal to 'recognise the applicant's entitlement to a survivor's pension constituted a difference in treatment in relation to the treatment afforded, by statute or case-law, to other situations that must be considered equivalent in terms of the effects of good faith, such as belief in good faith in the existence of a marriage that is null and void.'¹⁵ The issue of good faith was key, and the court assessed her good faith in entering the Roma marriage, and the expectations resulting from the behaviour of the state civil authorities in granting the family the status of a 'large family' which required recognition of the parents as spouses. Thus, the state confirmed her belief in good faith that she was in a recognised marriage. It was held that the state's treatment of the relationship gave rise to her *legitimate expectation of entitlement*.¹⁶ Thus, based on the facts of this case, the issue of her good faith resulted in the finding of a breach of Article 1 Protocol 1 in conjunction with Article 14.

However, with regards to an Article 14 breach taken together with Article 12, they found no breach by the state occurred, accepting the state's contention that civil marriages were available in Spain without distinction between people since 1981. Therefore, the state was not in breach of her right to marry by failing to recognise her Roma marriage.

This verdict was reinforced in the 2010 decision from the Grand Chamber in *Serife Yigit v Turkey*¹⁷ involving an Islamic religious marriage in Turkey. Here, the outcome

was different although upholding the same principles. The applicant similarly argued a breach of Article 14 non-discrimination in conjunction with Article 1 of Protocol 1, right to peaceful enjoyment of possessions. She further argued a breach of Article 8 right to respect for private family life. She failed on both grounds.

The religious marriage took place in 1976, and the couple had 6 children. The husband was a farmer and he died in September 2002 at a time when the couple were planning to enter an official marriage. Following his death, the lack of registration of the religious marriage resulted in the state excluding the applicant from being recorded as the deceased's wife on the civil status register in 2003.¹⁸ She was therefore excluded from obtaining survivor's pension and social security benefits which her husband had accrued. The state refused to recognise the religious marriage which remained unregistered for awarding 'survivors benefit', and following a long legal journey, in 2010 the ECtHR held that it was the couple's choice to live in a religious marriage only, and that they had in fact enjoyed peaceful family life within this union and therefore no breaches occurred. The state's regulation of civil marriages through the imposition of marriage formalities are in accordance with Article 12 rights.¹⁹

With regards to Article 14 and Article 1 Protocol 1, the test was whether the entitlement to the welfare benefits was being withheld on discriminatory grounds as compared with another person in a similar situation. The two comparators here are the person in a civil marriage and the one in a religious-only marriage, and the question the court addressed was whether there was an objective and reasonable justification for treating these two differently. The ECtHR accepted that the difference in treatment was in pursuance of an objective and legitimate aim of protecting public order and protecting the rights and freedoms of others²⁰, namely protecting women from polygamy and upholding Turkey's secular tradition.²¹

The key distinguishing issue between *Munoz Diaz* and *Serfie Yigit* was the awareness of the applicant of the need to regularise her marriage in accordance with the Civil Code, thus not giving rise to a legitimate expectation of entitlement, as was the case

with the former. Further, the conditions for entering into a formal marriage were clear and accessible leaving no room for doubt that her religious marriage ceremony did not adhere to the requisite formalities.²² In contrast to *Munoz Diaz*, the family record book received at the end of an official marriage ceremony was not received by the couple in *Serife Yigit*, and it was held that there were no excessive burdens placed²³ on the couple and they had the long time period of their 26 year marriage to contract the civil marriage.²⁴ The subsequent objective and reasonable difference in treatment between a civil and religious marriage resulted in the finding of no breach of Article 1 Protocol 1 taken in conjunction with Article 14.

The arguments contending a breach of Article 8 were also rejected on the grounds that the couple's choice of religious-only marriage was not interfered with by the state and drew no penalties nor sanctions, and the couple were able to lead effective family life in accordance with their Article 8 rights without any arbitrary state interference.²⁵ Article 8 does not oblige states to recognise religious marriages (Draghici, 2017, p.43), rather it provides that everyone has the right to respect for his or her private family life, and 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' The key issue here is that access to 'family life' under this Article does not require a state recognised marriage,²⁶ and any cohabiting relationship is also protected. This means that access to religious-only marriages without state interference enables Article 8 rights to be fulfilled.

The ECtHR's treatment of these two applicants clarifies the parameters of Article 8 and 12 rights. However, questions do arise with regards to the rights of those who are impeded from entering a formal marriage due to their status.

A Refugee's Perspective

This brings us the pivotal question of how the legal positions established in the cases of *Munoz Diaz* and confirmed in *Serife Yigit* may potentially be challenged by migrants/refugees? The case law of the ECtHR has established that human rights principles cannot be invoked to give legal effect to unregistered religious-only marriages (Rutten, 2010, p.91). Both cases cited breach of Article 14 in conjunction with Article 1 Protocol 1. *Munoz Diaz* further cited a breach of Article 14 in conjunction with Article 12 and *Serife Yigit* cited a breach of Article 8, both failing on each ground.

Migrants/Refugees would face no special treatment where Article 14 in conjunction with Article 1 Protocol 1 is concerned, unless facts can be established which support legitimate expectations arising from the state's actions. In addition, it is clear from *Serife Yigit* that where a couple can cohabit and enjoy family life (Draghici, 2017, p.29), Article 8 is not breached in the absence of a state recognised marriage. Therefore, refugees would not face any obvious breach of this right in the case of those who enter a religious-only marriage.

It is the breach of Article 14 in conjunction with Article 12's right to marry which becomes potentially problematic. In *Munoz Diaz*, the court held that civil marriage is available to all people equally, confirmed in *Serife Yigit*. This decision has been criticised as a 'missed opportunity' (Ruiz Vieytez, 2013, p.417) where the needs of a culturally diverse European society are concerned. However, as pointed out by Draghici (2017, p.45), the calls for recognition of diversity do not effectively challenge the state's requirement of a civil ceremony in *addition to* any other ceremony of marriage which citizens are free to undertake, in the interests of cohesion. She states 'the court would have arguably exceeded the remit of its supervision if it had not given proper weight to the deference of this provision to State regulation, the legislator's views on matters affecting status ..., and society's interest in safeguarding public order (protecting a prospective spouse from entering a bigamous marriage, ensuring a transparent system for social benefits eligibility etc)' (Draghici, 2017, p.45). She goes on to state that intervention by the court where Article 12 rights are concerned would be appropriate where the 'official civil

ceremony were burdensome, inaccessible on an equal basis' and this is indeed the potential point of contention in refugee cases.

Specifically, what can be said for refugees who are unable to meet the state's formal requirements in order to marry? It is clear that while the right to family life remains intact for refugees in religious-only marriages, the right to marry, which gives enhanced legal affects to family life (Lucic & Grigic, 2015, p.69), is significantly important. The case study of Hassan and Arwa highlights the significantly burdensome journey which a lack of legitimate documentation can give rise to, in that case for one who had arrived as a refugee in the 1990's. The issue is more pressing with Europe's million plus Syrian refugees who have arrived in the very recent past. What impediments might these individuals face in accessing a formal marriage? Hassan and Arwa contended with missing identity and personal status documents, the language in which the guidelines were available, the financial burden arising from the requirement for official translations of documentation, and the lack of clear and accessible information about the process. These added impediments are easily foreseeable in the case of many migrant/refugee groups and Rutten (2010, p.79) identifies practical impediments to formal marriages in the form of a lack of documents, which results in difficulties in evidencing personal status. The pivotal question which arises is - to what extent can the state foresee this and does the lack of a resolution to address it amount to discrimination on the basis of race and social position under Article 14 in conjunction with Article 12's right to marry?

Conclusion

The approach of the ECtHR in both *Munoz Diaz* and *Serife Yigit* culminated in the position that an unregistered religious-only or informal marriage cannot be equated with a civil marriage on the basis of equality arguments, except in exceptional circumstances whereby reasonable expectations arose from the state's treatment of the couple. Article 12's right to marry is not undermined by the state's lack of recognition of informal marriages where the obligation of marriage formalities for recognition is imposed equally on all people. Even where reasonable expectations

arise, the latter scenario does not result in a civil marriage status being granted to the informal marriage.

This article highlights the potential challenge to this position by migrants/ refugees who may not have access to a state recognised formal marriage, on the basis of their status as refugees whose irregular migration often means they arrive in Europe without adequate documentation to prove status and thereby satisfy marriage formalities. Further research is required here to ascertain the extent of the potential breach of Article 12's right to marry in such circumstances, and this will require individual attention to the legal formalities for marriage in individual European states. In the case of England and Wales, this is the focus of a further study by this author.

Notes on Contributor:

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ENDNOTES

¹ Leicester De Montfort Law School, De Montfort University, Leicester.

² Muñoz Díaz v Spain [2009], Application No. 49151/07.

³ Serife Yegit [2010].

⁴ Muñoz Díaz [2009].

⁵ Serife Yegit [2010].

⁶ For the purposes of this paper, migrants/refugees refers specifically to Muslim refugees arriving from Syria, and other conflict zones.

⁷ The details of this case study came to light during a focus group discussion on Muslim marriage practices for a separate project. Real names have been concealed.

⁸ In *Dickson v Rennie* [2014] EWHC 4306 (Fam), it was confirmed that both of these provisions can in fact be used together where the payer's income exceeds the maximum maintenance assessment figure.

⁹ *X v Federal Republic of Germany* (App No 6167/73, ECHR) (1974).

¹⁰ Muñoz Díaz v Spain [2009], Application No. 49151/07, para 9.

¹¹ Law no. 25/1971 of 19 June 1971.

¹² *Munoz Diaz* [2009], para. 10.

¹³ *Ibid*, para 35.

¹⁴ *Ibid*, para 72.

¹⁵ *Ibid*, para 65.

¹⁶ *Ibid*, para 63.

¹⁷ Serife Yegit [2010].

¹⁸ *Ibid*, para 12.

¹⁹ *Ibid*, para 72.

²⁰ *Ibid*, paras 82, 87.

²¹ *Ibid*, para 75.

²² *Ibid*, para 84.

²³ *Ibid*, paras 18, 86.

²⁴ *Ibid*, para 86.

²⁵ *Ibid*, paras 100-103.

²⁶ *Ibid*, para 94.