



UK immigration law to prevent sham marriages breached the right to marry and was discriminatory

In today's Chamber judgment in the case [O'Donoghue and Others v. the United Kingdom](#) (application no. 34848/07), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

Violation of Article 12 (right to marry) and of Article 14 (prohibition of discrimination) in conjunction with Articles 9 (freedom of religion) and 12 of the European Convention on Human Rights.

The case concerned a Certificate of Approval Scheme requiring people subject to immigration control to pay a fee in order to marry

Principal facts

The applicants are a Nigerian national, Osita Chris Iwu, and three dual British and Irish nationals, Sinead O'Donoghue (Mr Iwu's wife), Ashton Osita Iwu, their son, and Tiernan Robert O'Donoghue, Ms O'Donoghue's son from a previous relationship. They were born in 1974, 1979, 2006 and 2000 respectively and live in Londonderry (Northern Ireland). They are practising Roman Catholics.

Mr Iwu arrived in Northern Ireland in 2004 and claimed asylum in 2006. In November 2009 he was granted "discretionary leave to remain", which runs until November 2011. He is not entitled to work. Ms O'Donoghue has disabled parents and receives benefits and income support. They met in November 2004 and began living together in December 2005. In May 2006 Mr Iwu proposed to Ms O'Donoghue and she accepted.

Under a scheme first introduced in the UK in 2005, Mr Iwu, as a person subject to immigration control², had to have either entry clearance expressly granted for the purpose of enabling him to marry or a certificate of approval granted under Section 19 of the Asylum and Immigration Act 2004. In order to obtain such a certificate he had to submit an application to the Secretary of State for the Home Department together with an application fee of 295 British pounds (GBP). Furthermore, only those foreign nationals with sufficient leave to enter or remain (that is those who had been granted leave to enter or remain for a period of more than six months and who had at least three months of that leave remaining at the time of making the application) could qualify for a

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

² The definition of « a person subject to immigration control » excluded European Economic area nationals and those who had been granted Indefinite Leave to Remain.

certificate. The scheme did not apply to those couples seeking to marry in accordance with the rites of the Church of England.

Following domestic judgments delivered in April 2006 in which it was held that the scheme substantially interfered with the right to marry guaranteed by the European Convention on Human Rights, the first version of the scheme was amended. Under the new procedure those who had insufficient leave to enter or remain could be asked to submit further information in support of their applications to satisfy the Home Office that the proposed marriage was genuine.

Mr Iwu and Ms O'Donoghue could not marry, however, under that second version of the scheme as Mr Iwu, who had no leave to remain in the UK at the time, did not qualify for a certificate of approval.

On 19 June 2007 a third version of the scheme was introduced which extended the possibility of qualifying for a certificate of approval to those who were awaiting the outcome of an application for leave to remain.

Although Mr Iwu thus qualified for a certificate from then on, he could not afford the application fee. He nevertheless submitted an application in July 2007 requesting exemption from the fee, explaining that he was not allowed to work and therefore destitute and that his partner survived on a carer's allowance and income support. That application was refused outright for non-payment of the fee, it being considered that an exception could not be applied in his case.

The couple obtained a certificate of approval on 8 July 2008 after friends helped them to pay the fee. They married on 18 October 2008.

Complaints, procedure and composition of the Court

The applicants complained about the Certificate of Approval Scheme, which required people subject to immigration control to pay a fee in order to marry, and about how that scheme had been applied to them. They relied in particular on Article 12 (right to marry) and Article 14 (prohibition of discrimination). Relying further on Article 9 (freedom of religion) alone and in conjunction with Article 14, and Article 8 (right to respect for private and family life) alone and in conjunction with Article 14, the applicants also complained that they had not been able to marry, unless they did so in an Anglican church.

The application was lodged with the European Court of Human Rights on 31 July 2007. The Equality and Human Rights Commission and the Immigrant Council of Ireland were authorised to submit written observations as third parties.

Judgment was given by a Chamber of seven, composed as follows:

Lech **Garlicki** (Poland), *President*,
Nicolas **Bratza** (the United Kingdom),
Ljiljana **Mijović** (Bosnia and Herzegovina),
David Thór **Björgvinsson** (Iceland),
Ján **Šikuta** (Slovakia),
Päivi **Hirvelä** (Finland),
Mihai **Poalelungi** (Moldova), *Judges*,

and also Lawrence **Early**, *Section Registrar*.

Decision of the Court

Article 12

The Court recalled that a contracting State would not necessarily be acting in violation of Article 12 by imposing reasonable conditions – to establish if a proposed marriage was one of convenience – on a foreign national’s ability to marry.

However, the Court had a number of grave concerns about the scheme operating in the UK. First, the decision whether or not to grant a certificate of approval had not been, and continued not to be, based solely on the genuineness of the proposed marriage. Indeed, under all three versions of the scheme applicants with “sufficient” leave to remain qualified for certificates of approval without any apparent requirement that they submit information concerning the genuineness of the proposed marriage.

Secondly, the Court was especially concerned that the first and second versions of the scheme imposed a blanket prohibition on the exercise of the right to marry on all persons in a specified category (ie those, like Mr Iwu who had no leave to enter), regardless of whether the proposed marriage was one of convenience or not.

Thirdly, the Court found, like the House of Lords in the domestic judgments on the matter, that a fee fixed at a level which a needy applicant could not afford could impair the essence of the right to marry, especially given that many of those subject to immigration control would either be unable to work in the UK – such as Mr Iwu – or would fall into the lower income bracket. Moreover, the system of refunding fees to needy applicants, introduced in July 2010, was not an effective means of removing any breach of Article 12 as the very requirement to pay a fee acted as a powerful disincentive to marriage.

In conclusion, the right to marry of the applicant couple, clearly in a longstanding and permanent relationship, had been breached from May 2006 (the date from which they formed the intention marry) to 19 June 2007 (when the third version of the domestic scheme was introduced), because Mr Iwu had not been eligible for a certificate of approval and, from 19 June 2007 to 8 July 2008, that right had been breached by the level of the fee charged. There had accordingly been a violation of Article 12.

Article 14 in conjunction with Articles 9 and 12

In order for an issue to arise under Article 14 there had to be a difference in treatment of persons in relevantly similar situations. A person without leave to remain who was willing and able to marry in the Church of England was free to marry unhindered. Mr Iwu, in a relatively similar position to such a person, was however both unwilling (on account of his religious beliefs) and unable (on account of his residence in Northern Ireland) to enter into such a marriage. Consequently he was initially prohibited from marrying at all in the UK and, following amendments to the scheme, was unable to marry due to the sizeable fee required to obtain authorisation. There had therefore been a clear difference in treatment between Mr Iwu and a person who was willing and able to marry in the Church of England. As the Government had not reasonably or objectively justified such a difference in treatment, the Court held that there had been a violation of Article 14 in conjunction with Article 12. It did not consider it necessary to examine whether the scheme had been discriminatory on any other ground (such as nationality).

As concerned discrimination on the ground of religion, the Court noted that the Government had conceded that there had been a breach of Mr Iwu’s Convention rights as he had been subject to a regime to which those wishing to marry in the Church of England would not have been subject. It therefore held that there had also been a violation of Article 14 in conjunction with Article 9.

Other Articles

Given its findings under Article 12, the Court held that there was no need to examine separately the applicants' complaints under Article 8, either read alone or in conjunction with Article 14.

Article 41 (just satisfaction)

The Court held that the United Kingdom was to pay the applicant 8,500 euros (EUR) in respect of non pecuniary damage, 295 British pounds (GBP) in respect of pecuniary damage and EUR 16,000 for costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.