[2010–12 Gib LR 193]

R. (RODRIGUES) v. MARRIAGE REGISTRAR

SUPREME COURT (Dudley, C.J.): May 13th, 2011

Family Law—marriage—right to marry—residency status—different marriage procedures for legal and illegal residents in Marriage Act 1948, ss. 7 and 13 not contrary to constitutional right to marry (2006 Constitution, s.15)—only permitting illegal residents to use s.13 (special marriage licence procedure) necessary to give Minister discretion to stop sham marriages with sole aim of circumventing immigration restrictions—discretion to be exercised reasonably in accordance with constitutional rights

Family Law—marriage—sham marriage—sham marriage if sole aim to circumvent immigration restrictions—not sham marriage if context of ongoing, long-term relationship with children in common

The claimant sought judicial review of a decision of the Marriage Registrar on the ground that it was contrary to her constitutional right to marry.

The claimant was a Brazilian national residing in Gibraltar without a residence permit. Her partner, also a Brazilian national, had obtained a residence permit. They intended to marry by Registrar's certificate and gave notice to the Marriage Registrar in accordance with the procedure in s.7 of the Marriage Act 1948. They were informed that as the claimant had not been legally resident in Gibraltar for the minimum period of seven days, as required by s.7, they would be unable to marry without a special licence, issued at the discretion of the Minister responsible for personal status pursuant to s.13 of the Act. The claimant wrote to the Registrar expressing her willingness to apply for a special licence without prejudice to her constitutional claim in respect of s.7. The defendant replied that the "without prejudice" terms of her proposed application were unacceptable. In unrelated judicial review proceedings (reported at 2010–12 Gib LR 21), brought by the claimant against the Director of Education, the Attorney-General had intimated that the Government would refuse to grant special licences to illegal residents.

The claimant applied for a declaration that the Registrar's decision violated her constitutional right to marry, submitting that (a) her intended marriage was in the context of an ongoing, long-term relationship with children in common and was not a sham aimed at circumventing immigration rules; (b) s.13 of the Act did not provide her with a realistic

alternative to s.7, as it might prejudice her ability to apply for a residency permit and the Government had already intimated its reluctance to grant special licences to illegal residents; and (c) as s.7 was not expressly limited to legal residents and was the only practical procedure by which she could marry, the decision therefore violated her right to marry.

The Registrar submitted in reply that (a) although the claimant's intended marriage was not a sham, the Government was entitled to guard against marriages of convenience by providing different marriage procedures for legal and illegal residents; (b) s.13 provided a genuine alternative to s.7 as it gave the Minister a broad discretion that could be exercised reasonably and in accordance with constitutional rights; and (c) s.7 was therefore not the only practical procedure by which the claimant could be married and limiting its availability only to those legally resident in Gibraltar was necessary to prevent sham marriages.

Held, refusing to declare that the Marriage Registrar's decision had violated s.15 of the Constitution:

(1) The provisions of the Marriage Act 1948 did not violate the claimant's right to marry under s.15 of the Constitution. Any individual, including an illegal resident, was, by s.1 of the Constitution, entitled to the protection of the fundamental rights and freedoms in Chapter 1, including the right to marry. Strasbourg jurisprudence affirmed that the State was entitled to regulate marriage to avoid sham weddings, entered into with the sole purpose of circumventing immigration rules. However, as in the present case, marriages taking place in the context of an ongoing, long-term relationship with children in common could not be treated as marriages of convenience. Nevertheless, the need to avoid sham marriages justified having different marriage procedures for legal and illegal residents. This difference was reflected in ss. 7 and 13 of the Marriage Act. Section 7 permitted marriage by Registrar's certificate if both parties had resided in Gibraltar for at least seven days. Although "residence" was capable of bearing different meanings according to its context, it clearly denoted "legal residence" in s.7. Otherwise the provisions would give a public official no discretion to prevent sham marriages (paras. 7–19).

(2) If s.7 of the Act were the only marriage procedure available, then to restrict it to those legally resident in Gibraltar would clearly violate the claimant's constitutional right to marry. However, s.13 of the Act allowed illegal residents to apply to the Minister responsible for personal status for a special licence to marry, which he had a wide discretion to grant. This alternative process made it impossible for the claimant to challenge the constitutional validity of s.7, notwithstanding her residence permit concerns and that the government, through its instructions to the Attorney-General, had previously expressed a reluctance to exercise its discretion in favour of illegal residents. The fact remained that no application had been made, no decision had been taken, and there had therefore been no violation of the claimant's constitutional right to marry. Moreover, the

discretion to grant a special licence could not be exercised in a *Wednesbury* unreasonable manner whereby constitutional rights were violated (paras. 20–24).

Cases cited:
(1) *Jaremowicz* v. *Poland*, E.C.H.R., App. No. 24023/03, January 5th, 2010, considered.
(2) *R. (Baiai)* v. *Home Secy. (Nos. 1 & 2)*, [2009] 1 A.C. 287; [2008] 3 W.L.R. 549; [2008] 3 All E.R. 1094; [2008] UKHL 53, followed.
(3) *Turray*, *In re*, Supreme Ct., March 24th, 2005, unreported, distinguished.

Legislation construed:
Marriage Act 1948, s.7(1): The relevant terms of this sub-section are set out at para. 7.
s.13: The relevant terms of this section are set out at paras. 21–22.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.1: The relevant terms of this section are set out at para. 13.
s.15: The relevant terms of this section are set out at para. 14.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 17 (1953)), art. 12:
"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

J. Restano for the claimant;
L. Yeats for the Marriage Registrar.

1 **DUDLEY, C.J.:** The claimant is a Brazilian national who, together with her two sons, born on September 23rd, 2002 and January 28th, 2005 respectively, has been residing in Gibraltar without a residence permit since about August 2006. The claimant's partner, and father of the children, Marco Aurelio Benjamin, also a Brazilian national, has been legally resident in Gibraltar since about October 2005, having first been granted a work permit in July 2006.

2 On September 25th, 2009, the claimant's solicitors wrote to the defendant by way of application to enable her to marry her partner. The head of the Civil Status & Registration Office replied, informing the claimant's solicitors that parties intending to marry in accordance with the procedures governed by the Marriage Act 1948, ss. 7, 8 and 9 must have resided in Gibraltar for a period of not less than seven days and went on to interpret the word "resided" as meaning legal residence. He therefore expressed the view that the claimant was unable to marry in Gibraltar except by virtue of a special licence issued pursuant to the provisions of

s.13. Given the claimant's and her partner's nationality, it is clear from the provisions of s.13 that it could only be a "special licence" issued by the Minister responsible for personal status ("the Minister").

3 By letter dated November 4th, 2009, the claimant's solicitors wrote to the head of the Civil Status & Registration Office indicating that the claimant was willing to make an application under that section on the following basis:

> "Without prejudice to the fact that our client considers that she is entitled for her application to be dealt with without the need to apply for such a licence, our client is concerned that making such an application would lead to the argument that in doing so her rights have been prejudiced. If, however, both you and the Minister for personal status agree that an application for a special licence would be considered without prejudice to our client's rights generally and in particular without prejudice to our client's rights under the Marriage Act without the need for a special licence and that it would not affect the progress of our client's judicial review, our client would be prepared to consider authorizing you to refer the matter to the Minister as necessary."

4 By letter dated November 13th, 2009, the head of the Civil Status & Registration Office informed the claimant's solicitors that the terms upon which the claimant was willing to consider getting married under the provisions of the Marriage Act, s.13 were not acceptable.

5 The claimant seeks, *inter alia*, a declaration that the Marriage Registrar's decision refusing to allow the claimant to marry violates s.15 of the Gibraltar Constitution Order 2006.

6 Fundamentally, what is said for the claimant is that by importing legal residence as a pre-requisite to an application for marriage, the defendant has fettered his discretion and, more significantly, interpreted the provisions of the Marriage Act in a manner which violates the right to marry protected by s.15 of the Constitution.

The Marriage Act

7 Section 7(1) of the Marriage Act provides that—

> "In every case of a marriage intended to be contracted under the authority of the Registrar's certificate, one of the parties, both having resided in Gibraltar for a period of not less than seven days then next preceding, shall give notice of the intended marriage, in the prescribed form . . . to the Registrar."

8 A similar requirement of residence is to be found in relation to marriages to be solemnized by a minister of a religious community.

9 The first issue arising is whether the seven-day residence requirement is to be construed as one of legal residence or whether *de facto* residence, albeit illegal, suffices.

10 In a short ruling handed down by me on March 24th, 2005, concerning an appeal from a refusal of legal assistance in favour of Gbassey Turray, I ruled that for the purposes of r.6 of the Legal Aid and Assistance Rules, 1960, that "ordinarily resident" should be given its natural meaning and the requirement that such residence be legal could not be imported into the meaning. It is noteworthy that the application for legal assistance related to an intended judicial review of the Principal Immigration Officer who it was said had failed to take a decision upon an application for a temporary residency permit. Legal assistance appeals are dealt with on the papers and without the benefit of argument by a respondent—therefore, with some ease, particularly because it is my own decision, I am of the view that *In re Turray* (3) is a ruling which has to be read in the context of its own very particular facts and one which does not establish any broader principles.

11 It is evident that "residence" is a concept capable of bearing various meanings dependent on context. Indeed this is highlighted by the legislative provisions which fall to be construed in that whilst the concept of "residence" normally imports an element of permanence and one which is associated with being an inhabitant, the legislation merely requires residence for seven days, which may mean that the requirement of residency for the purposes of the legislation can be achieved by a traveller or holidaymaker wishing to marry in the jurisdiction. The issue in the present case is of course not about the length of residence but whether such residence has to be legal. To my mind this court cannot (absent a constitutional imperative) interpret residence as being anything other than legal residence, otherwise the court would be interpreting provisions (and asking public officials to interpret them) in complete disregard of the laws that it administers.

The Constitution, s.15—right to marry

12 Consequently, the issue which arises is whether such an interpretation offends the right to marry protected by s.15 of the Constitution.

13 The preliminary point to be made is that, as is made clear by the reference to "any individual" in s.1 of the Constitution, the protection of fundamental rights and freedoms afforded by Ch. 1 extends to the claimant notwithstanding that she may be in Gibraltar without the benefit of a residence permit.

14 Section 15 is not an absolute right but rather provides that—

"Men and women of marriageable age have the right to marry and to found a family as prescribed by any law governing the exercise of this right."

15 Guidance as to the meaning of the provision can be derived from the jurisprudence of the European Court of Human Rights, which, by virtue of s.18(8) of the Constitution, this court is enjoined, *inter alia*, to take into account when dealing with any question which has arisen in connection with the rights and freedoms protected by Ch. 1 of the Constitution.

16 In *Jaremowicz* v. *Poland* (1), the European Court, reviewing its case law in relation to art. 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, stated (App. No. 24023/03, at paras. 48–49):

"48. Article 12 secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. Both as to procedure and substance it is subject to the national law of the Contracting States, but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired . . .

49. The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnization of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws, and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, the relevant laws . . . may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice . . ."

17 The interplay between art. 12 and the imposition of conditions in relation to the right of a third-country national to marry fell for consideration in *R. (Baiai)* v. *Home Secy. (Nos. 1 & 2)* (2). That was a case involving the regime in the United Kingdom whereby a non-EEA national subject to immigration control requiring leave to enter or remain in the United Kingdom, and who wished to marry, had to apply to the Home Secretary for a certificate of approval. The policy adopted in pursuance of the statutory regime required an applicant to have six months' leave to enter with at least three months of this leave remaining at the time of the application. The House of Lords, applying Strasbourg jurisprudence, held that the scheme, to the extent that it operated to prevent marriages of convenience, was justified because these were not genuine marriages and

therefore were not protected by the right. However, their Lordships held that by restricting the right to marry to a greater extent the scheme was disproportionate and to that extent violated art. 12. In his opinion, Lord Bingham described the essence of the art. 12 right as follows ([2009] 1 A.C. 287, at para. 16):

> "The Strasbourg jurisprudence requires the right to marry to be treated as a strong right which may be regulated by national law both as to procedure and substance but may not be subjected to conditions which impair the essence of the right."

18 It is instructive that the court in *Baiai*, in defining the concept of "marriage of convenience," adopted the definition in EC Council Resolution 97/C 382/01 of December 4th, 1997, art. 1 (*ibid.*, at para. 6):

> "[A] marriage concluded between a national of a member state or a third-country national legally resident in a member state and a third-country national, *with the sole aim* of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a member state." [Emphasis supplied.]

19 In the present case, also adopting the definition in the EC Council Resolution, it cannot properly be said that the intended marriage between the claimant and her long-term partner could be described as a marriage of convenience. There are very many reasons why couples marry, and securing rights of residence may be one of many such reasons, as might in other cases be pension rights or tax benefits. But in circumstances where there is an ongoing long-term relationship with children in common, such a marriage cannot be described as a marriage of convenience irrespective of any immigration advantage it may afford. As Baroness Hale put it in *Baiai* (*ibid.*, at para. 35):

> "There are many perfectly genuine marriages which may bring some immigration advantage to one or both of the parties depending on where for the time being they wish to make their home. That does not make them 'sham' marriages."

20 In the circumstances, if the only procedural route to marriage open to the claimant were s.7(1) of the Marriage Act then those provisions as earlier construed would in my view violate her s.15 constitutional right and, as required by Annex 2, s.2 of the Constitution, would fall to be construed in a manner which brought them into conformity with the Constitution. However, s.7 is not the only route.

Marriage Act, s.13—special licence

21 Although extensive, it is useful to set out the provisions of s.13(1) of the Act:

> "Notwithstanding the other provisions of this Act, in the case of persons intending that a marriage shall be solemnized or contracted in Gibraltar between them, it shall be lawful for one of the authorities hereinafter specified, if he shall think fit and upon the payment of the proper fee, and upon presentation to him of an affidavit or statutory declaration containing the particulars set out in Schedule 2, and upon receiving such other information as the authority shall in his discretion require, to dispense with the giving of notice, and with the issue of any certificate of the Registrar or a minister, and to grant a special licence, in the prescribed or the like form, authorizing the solemnization or contraction of marriage between the parties named in such licence at the place therein stated within a period of three months from the date of issue of such licence."

22 Sub-section (2) then sets out the authorities capable of issuing the special licences, which in the present case, as aforesaid, could only be the Minister. The s.13 procedure does not require any minimum period of residence, although the particulars to be provided by virtue of Schedule 2 include the requirement, at para. 4, of providing details of "the period during which one of the parties has had his or her usual place of abode within Gibraltar." In the context of information provided by affidavit or statutory declaration, "place of abode" calls for a statement of pure fact but does not create a requirement of residence. Whether or not it was the intention of the legislature, it establishes a process whereby the authorities can undertake the necessary inquiries to determine whether the marriage which the parties intend to contract is genuine.

23 For the claimant, it is said that (other than on the basis set out in the letter of November 9th, 2009) she has chosen not to go down the s.13 route for two reasons. First, because she is concerned that adopting a route designed for couples who are not resident in Gibraltar might prejudice any entitlement to a residency permit. Secondly, because s.13 affords a wide discretion whether or not to authorize the marriage. At a practical level it is also said, accurately, that at a hearing before me on November 16th, 2009 (reported at 2010–12 Gib LR 21), in relation to a judicial review claim against the Director of Education touching upon the claimant's children and their right to education, the Attorney-General said that his instructions were that where somebody is regarded as being illegally in Gibraltar the Government would not grant a special licence.

24 I am of the view that whether or not as a matter of routine the s.13 route is used by non-residents is of no consequence. It is a route which is open to the claimant and therefore it cannot be said that the Marriage Act or the requirements of s.7 violate her constitutional right to marry. It may be that s.13 grants the Minister a wide discretion, but it is a discretion which cannot be exercised in a *Wednesbury* unreasonable manner whereby constitutional rights are violated. Whilst the Government, through its

instructions to the Attorney-General, may have expressed views as to how it would exercise its discretion, the fact remains that, no application having been made, no decision has been taken and therefore there has been no violation of the claimant's constitutional right to marry.

25 For these reasons the claim is dismissed and I shall hear the parties as to costs.

Declaration refused.

[2010–12 Gib LR 201]

REAL MADRID CLUB DE FÚTBOL v. GLOBETVIP.COM LIMITED

SUPREME COURT (Butler, J.): September 5th, 2011

Arbitration—foreign arbitral award—enforcement—enforcement proceedings to be stayed if good arguable case that, contrary to public policy, award obtained by fraud or perjury—may adjourn proceedings to hear more evidence—stay until, if possible, arbitration court determines existence of fraud or perjury—delay in applying to arbitration court to have matter re-opened to be met with enforcement

The claimant applied to the Supreme Court to enforce an arbitral award.

The claimant football club and defendant company entered into a three-year sponsorship agreement in May 2006. By its terms, either party was permitted to terminate the agreement upon breach of contract by the other, which the claimant did in March 2007, upon the defendant's failure to make various payments and bank guarantees in its favour. The contract was governed by Spanish law and contained an arbitration clause. The defendant commenced arbitration proceedings in the ICC International Court of Arbitration alleging that the claimant had breached its pre-emptive rights by entering into sponsorship negotiations with a third party, contrary to cl. 6.2 of the contract, by which if such negotiations were entered into before termination the claimant was to inform the defendant of the terms of any offer from the third party and allow the defendant to match it. The claimant, through its former General Executive Director, Mr. Perianez, had maintained during the arbitration that no third-party negotiations had taken place before the termination of the contract, but the contract with the third party referred to an agreement between them in December 2006. The Court of Arbitration decided that it was highly likely