ISLAMIC MARRIAGES – UNDERSTOOD OR MISUNDERSTOOD.

Introduction

There is a growing area of litigation and continuing uncertainty as to the status of these marriages in the UK. As far back as 2016 I seem to be delivering lectures on the same point and beating the same drum on the question of the legal status of Muslim marriages in the UK. One would be forgiven for thinking that after all the publicity about these marriages, society and the communities in which we live, would by now be clear in what is expected of them and how to safeguard their rights in respect of their homes, property, children and most importantly their marital status. Sadly, that is not the case. The confusion and uncertainty was not helped by the first instance decisions such as Akhter v Khan[1] which took the country by storm and pushed the legal community into chaos. More about that later.

Marriage

Marriage in Islam is a contract and can be performed in a house, a mosque, a restaurant or an open space. There is no requirement for a recognized or solemn venue. What you need are 2 witnesses. There is no need for a religious ceremony however, marriages performed by parties are either religious or quasi religious.

Practical example

Marriage in Islam is called a Nikah. It is a ceremony that is frequently performed in many parts of the UK.

Parties commence their married lives after a Nikah. They have children. Then they fall out. Parties generally live in the husband's house. He tells her to get out of 'his house'. The wife was the homemaker, and the husband was the breadwinner. She thought it was her home too. Communication breaks down. Mediation amongst the extended families fail – next option - Lawyers.

The wife rightfully thinking she was legally married goes off to see a matrimonial lawyer to get advice as to her matrimonial rights, only to find out that there is no 'matrimony', and shock horror - she is not a 'wife' under English Law and thus not entitled to any matrimonial rights. She always believed she was married and cannot begin to comprehend how it can be that she is not. She has the wedding pictures to prove it, plus all the expensive gold and jewellery, the clothes, the bills of costs that go with a wedding and most important her Nikah document. The wife is told that the marriage she contracted is deemed a 'non marriage' in England. Herein lies the problem.

[1] [2018] EWCA Civ 122

Examples of non-marriages of the Islamic ceremonies conducted in England are for instances the cases of - *A v H (Registrar General for England and Wales intervening)*[2], *Al Saedy v Musawi*[3] and *El-Gamal*[4].

How is this possible?

Quite simply the parties involved have different understandings of the effect of a Nikah and may have had their own private reasons why they had a Nikah.

For example (and they may be more) -

a) the women generally are under the mistaken belief that they have entered into a ceremony that is valid and will be recognized in the UK;
b) the husbands may hold one or another belief - either they are genuinely ignorant of the effect of the Nikah or they fully understand the effect so well, such that it will not be recognized by law, so all their assets in the event of a breakdown are better protected.
c) Where a husband wants to marry two wives – thus chooses to have a Nikah with each; they may know of each other or they may not. Hard to say. Suspicions may exist but no real proof and life carries on until the day communication breaks down and the lawyers are called and all is revealed.
d) Where a woman does not want to be exposed to a claim on her assets she chooses to have a Nikah ceremony only. Common amongst the women who are in a second marriage or simply wealthy. These would then be the husband's who are left out on a limb. It may be their choice to be in such a marriage – often entered by them, as for them, the woman is their 'second wife' and their first wife is a lawfully registered wife.
e) Where parties may simply wish to have 'legitimate sexual intercourse' with no strings attached.

Is this common?

Sadly, this is extremely common and in particular in areas where there is a high population of Muslims living in communities such as Bradford, Leicester, Manchester or indeed in some areas of London.

[2] *2009] EWHC 636 (Fam)*, *[2009] 4 All ER 641*.

[3] *(2010) EWHC 3293 (Fam)*.

[4] *El Gamal v Maktoum [2011] EWHC B27 (Fam) Division (22 December 2011)* Bodey J. See para 2A [1513]–[1520]ff.

Legal Effect

The fall out of these Nikah only marriages can be devastating on some families. Take an example where a wife has been living with her husband in a property, which is in his sole name and had 2 children when the marriage breaks down. Her name is not on the title of the property – she has no right to a share of the house under the **Matrimonial Causes Act 1973** – as she is not a spouse who is recognized. One could equate her to a 'common law wife' – but as we all know too well, even that does not give her any matrimonial rights.

Her remedy would be to start an action in the **Trusts of Land and Appointment of Trustees Act 1996** if she had contributed towards the property to an extent that she could claim a beneficial interest. This would probably be evidentially harder and if she was a homemaker rather unlikely. Effectively she is left high and dry. Her lack of knowledge of the legal status of her Nikah has cost her dearly.

A long and windy process awaits her should she wish to make a claim for her children – under the **Financial Provision for Children Schedule I of the 1989 Act**. This is available to parties even if they are not married. The claims are for the 'benefit of the child' but the courts construe the power widely and make orders where the benefit for the mother also benefits the child.

However, what should be a straightforward claim under the **Matrimonial Causes Act 1973** for these women now becomes a litigation minefield.

Effect on the Children

The children will be illegitimate as far as the English Law is concerned. As to whether the father has what is called 'parental responsibility' for the child will depend on whether his name is on the birth certificate at the time of registration.

Usually if the parents were validly **married at the time** of the child's birth, then a father would automatically have parental responsibility, and if not then he would need to apply.

However, due to changes in the law and to recognize that marriage was not the be all and end all in creating family life, since 1st December 2003 a father who was **not married** at the time of the birth but has his name placed on the birth certificate at the time of registration will assume parental responsibility from the date of the registration rather than the birth.

In reality, an unmarried father will not be able to register his name without the consent of the mother.

But, if the parties Nikah was not a valid marriage, it would follow that unless the father has his name on the birth certificate at the time of registration – he does not automatically have parental responsibility and would need to apply.

Furthermore, it would mean that the children were born out of wedlock – and thus illegitimate. An illegitimate child carries a huge stigma in the Islamic society and families would do their best to cover up this knowledge and from becoming public.

Why does society allow this?

This is a difficult one. We live in a free society. Society does not interfere in your life and allows most people to live their lives and regulate their private lives as and how they choose. I am sure most people will not tolerate being told how to regulate their personal lives and the choices they wish to make unless they are living in a pandemic.

This is after all a democracy we live in. The reality in my view, is that ignorance of the law and culture plays a large part in the contracting of marriages in the Muslim communities. Though they do not choose to live their lives on the sidelines nevertheless, due to a basic lack of knowledge and understanding they have ended up in a parallel life stream.

Personal Law
Muslims place a great deal of weight on their personal laws such as having the Nikah as being what is relevant and compulsory in order to be validly married. The fact that unless the marriage has been registered it confers no rights on them is something they are ignorant or have in some cases deliberately chosen to ignore.

What appears to be common is the complete lack of appreciation by mainly the women in these marriages. There needs to be a lot of education as to the impact of having a "Nikah only" marriage in the UK.

There is a duty in my view on the elders, the Imams and the educated family members to ensure that before a woman enters into the Nikah she is told that her marriage has no legal effect in the event of a breakdown and the courts will be unable to assist in protecting her interests and her children's position. However, it is with regret that I have come across many stories where educated families still do not involve the bride (their daughter) in negotiations that precede in the agreeing of the terms of the Nikah. This attitude to exclude their children, who themselves would be educated and expected to take up their role in society as starting a family and or working and living with their husband and possibly his family in a joint family setting needs to stop. They should be involved as in the event of a breakdown they do not understand the contract that they signed leave alone any legal implications that may follow. Until there is a huge culture shift these problems will continue.

Has the law changed?

In the case of - **Akhter v Khan** – at first instance

Facts - Nasreen Akhter and Mohammed Shabaz Khan held an Islamic wedding ceremony in a West London restaurant in 1998.

Mr Khan, 46, wanted to block a divorce application on the basis that they are not legally married under English law.
But Mrs Akhter, 46, said the Islamic faith marriage was valid as was her application for divorce.
Mr Justice Williams analysed the couple's dispute at a recent trial in the Family Division of the High Court in London and announced his decision in a written ruling.
Businessman Mr Khan had wanted to stop solicitor Ms Akhter staging a fight over money.
It was ruled that the marriage falls within the scope of the 1973 Matrimonial Causes Act, despite Mr Khan arguing the marriage was "under Sharia law only".
The judge decided that the marriage was "entered into in disregard of certain requirements as to the formation of marriage".
Nevertheless, Mr Justice Williams ruled that an estranged couple's Islamic faith marriage falls within the scope of English matrimonial law.
He said Mrs Akhter was therefore entitled to a decree of nullity.

This case opened the floodgates but was swiftly overturned on appeal.[5]

A Brief look at Nikahs abroad.
A Muslim ceremony of marriage or Nikah performed overseas will be considered a valid marriage and recognized in the UK if the ceremony was conducted in accordance with the law of the land in which it was celebrated. Lex Loci Celebrationis.
Part of the misunderstanding and genuine confusion that exists in the UK amongst the Muslim communities arises from this fact.

Families go on holiday and celebrate a marriage and all they have undergone is a Nikah ceremony; they return to the UK and the parties marriage is recognized and the wife has all the rights and protection under the Matrimonial Causes Act 1973. This causes genuine confusion.

Lesson – Notwithstanding the above decision all Muslim marriages in the UK need to be registered in order for them to be recognized in the UK. It is important that the word is spread through the NGO's, Mosques, Community Centres, Islamic Schools and even at the time of the Nikah ceremony itself that these marriages have no validity in the UK unless the parties have a civil ceremony and register the marriage.

Human Rights
The right to marry has always been a right recognised by the English law long before the **Human Rights Act** came into force[6].
Despite the UK having left the European Union, it is still a participant in the **Convention for the Protection of Human Rights 1950.**

[5] [2020] EWCA Civ. 122
[6] *R (on the application of the Crown Prosecution Service) v Registrar General of Births, Deaths and Marriages [2002] EWCA Civ 1661 at [20], [2003] QB 1222, [2003] 1 FCR 110.*

Article 12 provides that men and women of marriageable age have the right to marry and to found a family according to the national law governing the exercise of the right. European case law has adopted a restrictive approach to national laws in this context. While they may recognise public interest considerations such as capacity, consent, prohibited degrees or bigamy, they may not prevent or interfere otherwise with that right.[7]

Article 8 of the Convention providing the right to respect for family life further reinforces Art 12. The Convention follows and reinforces the **Universal Declaration of Human Rights 1948, Art 16** and anticipates the **International Covenant on Civil and Political Rights 1966, Art 23(2).**

As regards an Islamic marriage in England in general, it has been suggested that consideration be given to requiring a civil marriage ceremony beforehand or at the same time. That is not though the law at present.

Under the terms of the Convention, the UK had until June 2020 to report back to the Council of Europe on a previous government recommendation[8] requiring Muslim couples to undergo a civil marriage ceremony before or alongside their Islamic marriage ceremony. However, nothing further has been reported as regards any such report despite the passing of that deadline.

Conclusion

The confusion and misconceptions about Islamic marriages that still prevail in society seems set to continue for some time to come. No government has felt the need to tackle this wholesale problem, but as the case of Akhter showed, different courts interpret facts differently. The range of different orders deeming marriages 'void', voidable', 'non marriage' and 'nullity' on the facts give little clarity; such that litigation appears to be only solution to resolve these issues as to marital status.

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[7] *F v Switzerland (1988) 10 EHRR 411*; *Saunders v France (App No 31401/96) (1997) 87 B-DR 160*.

[8] Parliamentary Assembly of the Council of Europe Resolution 2253 (2019), 22 January 2019.