Case Brief :: Islamic Marriage and Divorce in English Law: On *Her Majesty's Attorney General v. Nasreen Akhter & Anor., Fatima Hussain & Southall Black Sisters intervening*

Thomas Francis

Abstract

This brief considers the February 2020 judgment of the Court of Appeal of England & Wales in Akhter - v - Khan, an appeal brought by the Attorney General against the decision at first-instance to grant the petitioner wife, Akhter, a decree nisi, or provisional decree of divorce. The decision of the Court of Appeal was against the backdrop of the Law Commission holding a public consultation into the status at law of certain 'religious-only' marriages (including Islamic weddings) and whether, absent a contemporaneous or succeeding civil marriage, they are to be regarded as void (entitling petitioners to ancillary relief, such as spousal support) or 'non-marriages'.

In England and Wales, a legally valid marriage or civil partnership can end only by death or dissolution by court order. Where both spouses are still alive, the usual process of dissolving a marriage is by divorce. One or other spouse files an application under s.1 of the Matrimonial Causes Act 1973 for a *decree nisi* that the marriage has "*broken down irretrievably*"[1]. If admitted or otherwise unopposed, the application moves forward as an undefended suit and after 6 weeks can be converted into a *decree absolute*, thereby dissolving the marriage[2]. If contested, the application remains valid but proceeds to a court hearing. A valid divorce entitles a party to apply for financial remedy orders under the 1973 Act[3]; needless to say, such entitlements do not arise where there had never been a legally valid marriage to dissolve.

On 14 February 2020, the Court of Appeal of England and Wales (Sir Terence Etherton MR, Lady Justice King DBE and Lord Justice Moylan) gave judgment in favour of the Attorney General in her appeal against the decision of the High Court to grant a *decree nisi* with respect to the purported marriage in December 1998 ('the 1998 ceremony') of Nasreen Akhter and Mohammad Shabaz Khan[4]. The 1998 ceremony, a *nikāh* or Islamic wedding, had taken place in London and been conducted by an *imam* in the presence of witnesses, including Miss Akhter's father as authorized agent or *walī* (though the marriage certificate bearing his signature was not produced until 2006). At the first-instance hearing, the judge, Mr. Justice Williams, found that at the time of the 1998 ceremony the parties were aware that without a subsequent civil wedding they would not legally be recognized as married. He also found that the parties had agreed to follow their *nikāh* with a valid civil ceremony, but that such a ceremony never took place, despite Miss Akhter raising the issue with Mr Khan on a number of occasions. The couple subsequently had four children and, at some point, moved to Dubai before separating in 2016; on 4 November of the same

1 Matrimonial Causes Act of 1973, s.1(1)
2 Crime and Courts Act of 2013, c. 22
3 Matrimonial Causes Act of 1973, s.25
4 *HM Attorney General v Akhter & Ors* [2020] EWCA Civ 122, [2020] WLR(D) 95

year Akhter petitioned the court for a divorce.

As first pleaded, Akhter's claim relied on the 1998 ceremony to establish a legal marriage between the parties. However, by the time the matter came to trial, her case before the court was that, although the 1998 ceremony had been a *nikāh* and was thus not legally valid unless succeeded or accompanied by a civil or other wedding at or in "*approved premises*"[5], the court could rely on the presumption that a second, legally valid marriage had taken place when the couple were living in Dubai. In the alternative, Akhter argued that she was entitled to a *decree* on the basis that the marriage was null and void for want of formality under s.11 of the 1973 Act rather than being a (legally irredeemable) 'non-marriage'. By contrast, Khan asserted that the *nikāh* was of no legal effect by itself and that, absent any succeeding civil wedding (as the evidence appeared to demonstrate), the parties had never validly been married. In his judgment, Judge Williams rejected Akhter's argument on the presumption of a second ceremony. However, the judge found that the 1998 ceremony, when considered alongside her human rights claims under Article 8 of the European Convention on Human Rights as transposed into English law[6], could be seen "*… as an attempt to comply with the formalities required in English law to create a valid marriage…*"[7]. Adopting this "*more flexible*" approach, the judge concluded that the 1998 ceremony fell within the scope of s.11 – providing for voided marriages rather than 'non-marriages' – and thus entitled Akhter to the decree sought (and to potential 'ancillary relief', such as financial support).

By the time the case came before the Court of Appeal, Akhter and Khan had reached a settlement and thereby ceased to participate in the appeal. The Attorney General, however, had already been granted leave to appeal, and the Court of Appeal also granted leave to participate in the proceedings to Fatima

5 The Marriage Act of 1994

6 The Petitioner had also pleaded a breach of her rights under Articles 12 and 14 and Article 1 of the First Protocol ("A1P1") of the ECHR

7 *Akhter v Khan (Rev 4)* [2018] EWFC 54 (31 July 2018), [2019] Fam 247

Hussain, a petitioner in separate nullity proceedings, and to the Southall Black Sisters, a not-for-profit focusing on domestic violence, immigration issues and forced marriage. After hearing from counsel for the AG, for Miss Hussain and for the Southall Black Sisters, the Court concerned itself with two issues: (1) whether there are ceremonies or other acts that do not create a marriage, even a void marriage, within the scope of s.11 of the 1973 Act; and (2) if there are, whether, *pace* Mr Justice Williams, the 1998 ceremony was one such act (and thus the *decree* wrongly awarded).

By way of background, the Court of Appeal noted in its judgment that the Law Commission of England and Wales, the independent statutory body that reviews the law and recommends reforms, had since 2019 hosted an open consultation on the law governing how and where couples may marry, concerned by "*the perceived rise in religious-only marriages… without legal status*"[8]. (The Law Commission has said that it will publish its recommendations later this year.) To have legal status in England and Wales, a religious marriage other than according to the rites and/or ceremonies of the Church of England, Church in Wales, Jewish or Quaker marriage must take place ("*be solemnized*") in a registered building[9]. As such, the validity in civil law of a 'valid Islamic wedding' is conferred by its non-Islamic component: a contemporaneous or subsequent civil marriage in a registered building. Echoing the Law Commission's concerns – that the parties to such 'non-marriages' "*have no protection in the event of the relationship breaking down*" – the Southall Black Sisters argued that the "*total non-recognition [of such 'marriages']… operates to the detriment of women and children*" and that the very concept in law of 'non-marriage' is discriminatory to those with religious-only marriages, including many Muslims.

That notwithstanding, the Court of Appeal concluded that the question of whether a person is recognized by the state as being legally married "*should be capable of being easily as-*

8 Law Commission, "Getting Married: A Consultation Paper on Weddings Law," Consultation Paper No 247 (2020), p. 13

9 The Marriage Act of 1949, s.44

certained" (by implication without the need for the Court to rely on or entertain a 'presumption' in law or fact). Proceeding on this basis, the Court reversed the 'pragmatic' decision of Judge Williams and re-asserted the 'orthodox' rule(s) on the recognition of (certain) religious marriages under English law. Placing emphasis in its reasoning on the public interest in upholding the formal requirements of a valid marriage as being necessary to the legibility of such marriages in the eyes of the state, the Court of Appeal held that the 1998 ceremony – despite the long subsequent period in which the *decree* parties held themselves out as husband and wife – was a non-qualifying ceremony under s.73 and thus a 'non-marriage'. Refusing to apply by analogy the importance placed on the intention of the parties to follow the 1998 ceremony with a civil wedding (as, say, in the law of contract), the Court held that the *nikāh* had been in non-approved premises, in the absence of a (necessary) authorised person and had not been preceded by a judicial notice. Finally, in regards to Akhter's human rights claims, the Court further held that Judge Williams was wrong to place reliance on the 'horizontal' effect of Art. 12, the right to marry and found a family (i.e. that the right contained no implied right also to divorce); and wrong to find that to deny Akhter the *decree* would be a breach of her rights under Art. 8.[10]

It is unclear whether the respondent interveners – Miss Hussain and the Southall Black Sisters – have been granted leave to appeal to the United Kingdom Supreme Court. Absent such a hearing, the law in this area has been clarified even if the practical result may be, as the interveners argued, an increase in applications on the part of prospective Muslim divorcées to the Islamic Sharia Council or similar organizations. Any change to the position as laid down by the Court of Appeal is likely to turn on the conclusions of the Law Commission's consultation and on the passing, if any, of new legislation in this area.

10 The EWCA also found that a petition for a decree of nullity was not an action "*concerning children*" for the purpose of engaging Art. 3 of the UN Convention on the Rights of the Child as it concerned the status of the wedding ceremony.