Briefings

Resolution International Committee: Non-recognition of Islamic marriages in England and Wales

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A marriage conducted in England and Wales is legally recognised if it complies with the Marriage Act of 1949 as amended by various Acts, in particular, by the Marriage Act of 1983. In summary, marriages that are recognised in this jurisdiction are:

(1) Civil marriages conducted in register office (s 4).
(2) Marriages solemnised in a church or chapel of the Church of England (ss 18, 20 and 69).
(3) Marriages in a non-conformist church or building registered for the solemnisation of marriage (s 41). This covers marriages for Roman Catholics and various other non C of E churches as well as a few mosques which have applied to be certified.
(4) Marriages for Jews and Quakers if both parties are Jews, or one or both parties are Quakers, under a Superintendent Registrar's Certificate or licence. The ceremony has to be in accordance with the Jewish and Quakers' own practices although does not necessarily have to be celebrated in a particular building. The certificate or licence must be delivered to the registering officer either at the synagogue or the Society of Friends who must then themselves be satisfied the marriage has been celebrated in accordance with the Jewish faith or the rules of the Members of a Society of Friends.
(5) Marriage conducted in special circumstances such as when a person ought not to move or be moved by reason of illness or disability, or they are detained under legislation due to mental health issues or are in prison.

The clear omission is that marriage ceremonies celebrated by any other religion in England and Wales apart from the Church of England, Roman Catholics, Jews and Quakers will not be recognised unless the building in which their marriage ceremony occurred is licensed.

The issue in relation to Islamic marriages

According to a report in 2010 on 'Muslim networks and movements in Western Europe' prepared by the Pew Centre, there are 2.87m Muslims living in Britain. In fact, the UK has the third largest Muslim community after Germany and France. There are at least 1,600 mosques in the country and a significant number of Imams (the religious clergy) are attached to each mosque.

It is clear that there will be a significant number of people from this community who are undergoing Islamic marriage ceremonies. Although there is no precise data available, it is a fact that Islamic marriages are frequently conducted outside mosques at venues such as hotels or in one of the couple's homes. From the number of cases that are coming to the attention of the courts in respect of recognition of these marriages, it seems that many of those couples do not follow this up with, or have before their Islamic marriage, a civil marriage to register their marriage legally. As a consequence, while these couples may consider themselves to be married, they are not legally defined to be married in accordance with the law of England and Wales and will be not recognised as such if they present themselves to a court of England and Wales.

This is in contrast to the situation where a couple marry under an Islamic ceremony outside the UK. Such an overseas marriage is recognised in England and Wales, providing the couple marry in accordance with the form required by law of the country of the marriage ceremony (lex loci celebrationis) and each party has capacity by their pre-marriage domicile. If for any reason the ceremony is invalid, it is still possible for couples to seek relief on separation by way of nullity proceedings.

In effect, this covers not only Muslims who live overseas (either because this is their domicile of origin or choice) but also those Muslims who live in the UK and choose to get married abroad. The only caveat to this is that in the case of a polygamous marriage it will only be recognised if both parties are domiciled overseas and not in the UK. Having such an anomaly where a Muslim marriage overseas is recognised, but not a marriage celebrated in this country, may seem strange particularly in the light of the overall population of Muslims in the UK.

Impact of the non-recognition of Islamic marriages in the UK

The fact that an Islamic marriage conducted in this country is not recognised has a significant impact upon a couple, affecting a variety of their rights including the legitimacy of children, wills, inheritance tax implications and, of course, the availability of financial claims upon a separation and divorce. This is without mentioning anything about human rights and equal treatment. The consequences for a couple whose Islamic marriage is not recognised effectively limit their options. If legal proceedings are taken, it will inevitably be more complicated as they are treated as cohabitees. Instead of their financial affairs

being dealt with in one case, it has to be done on a piecemeal basis through various legal actions such as:

(1) Breach of contract for non payment of a dowry (the Mahr). The relief sought is usually for specific performance.
(2) Claim under the Married Women's Property Act 1882 for a declaration of rights and a declaration as to property on the basis that the couple are treated as 'engaged to be married'.
(3) Claim under Sch 1 to the Children Act 1989 for maintenance for the children, lump sum and settlement of property.
(4) Claim under the Trusts of Land and Appointment of Trustees Act 1996 for a declaration of a property interest on a disputed property and an order for sale.

Clearly this causes a legal minefield and a costly set of proceedings. This excludes either party from getting any form of spousal maintenance and basic division of assets on an assumption of fair sharing of the matrimonial resources. It is unsurprising in these circumstances that couples frequently choose not to avail themselves of the court's remedies, but to seek to resolve these matters between themselves by negotiation or following Sharia law, which in some aspects makes more provision (at least in the initial stages of separation) than the legal remedies set out above.

Application of Sharia law

Under Sharia Law a marriage is treated as a 'contract' (Nikah) and upon a divorce financial consequences will flow from this. Sharia law is enforced/administered by the Sharia Council. Decisions made by Sharia Councils can be variable depending upon who conducts them but unlike the court there is no appeal system. As a general rule, any financial provision will be made for a wife and not a husband, albeit that a wife's right to make claims in respect of a Mahr may be limited if she is the person who starts the divorce. In summary, on capital the division of assets is as follows:

(1) Enforcing the Mahr (depending on the type). The Mahr is a cash sum either paid up or promised and not paid up as a gift by the husband upon marriage. It is not intended to provide for needs upon a couple separating.
(2) Personal possessions will remain with the party who owns them, but frequently there are arguments over this. There is general encouragement for the Nikah to state the ownership of jewellery given by either party or their family to combat this issue.
(3) On the income side, a husband must provide maintenance during the period in which a Declaration of Divorce (Talaq) is being made. This is known as the 'Iddat' which usually covers three monthly cycles. The level of provision is that it should be reasonable in all the circumstances but is decided by a subjective test. Any assets in the wife's sole name will always remain hers and any assets in joint names will be dealt with by agreement in 'an equitable and courteous manner'. The basis of the division is usually done on the parties' contributions to the purchase. If they cannot agree on this matter, the division can be determined by a judge (Qadi).

Maintenance should also be paid during any period in which a wife is still breastfeeding. Beyond this there is no further provision for a spouse.

There is ongoing support that a husband must pay for children including to provide maintenance for a daughter until her marriage and for a son until he starts work.

A wife, who frequently is in a weaker economic position than her husband, will have some financial certainty from Sharia law but it is far less than she would otherwise be entitled to apply for if the marriage is recognised under the law of England and Wales.

Does this create a problem?

Although on the face of it there seems to be an obvious issue, it is hard to know whether this is causing a significant problem for wives in particular. Some enquiries have been made into the number of people in the UK who are getting married under Islamic ceremonies, how many mosques are undertaking these marriages and how many divorces the Sharia Council are dealing with. Regrettably there are no reliable statistics. There are only a relatively few mosques that have applied for their buildings to be licensed for the purpose of conducting marriage ceremonies. This is despite the fact that it is a straightforward procedure to apply. However, as many marriages do not take place in mosques, this may not be a particularly high priority. There are a few mosques in the country that insist upon a couple producing evidence of civil registration before they conduct a marriage, but this is the exception rather than the rule.

The problem is recognised by certain academics and lawyers and other pressure groups. The Muslim Women's Network has provided a fact sheet about the issue (see http://www.mwnuk.co.uk/Information_and_Advice_on_Muslim_Marriages_9_factsheets.php). This was produced in January 2012 but the extent of its distribution is unknown. It is a pdf download found under the resources section of the website and therefore not obvious to identify. To what extent this and other articles have changed the perspective of couples choosing to have an Islamic marriage is not known, but based on family campaigns to highlight the non-existence of the common law wife it is unlikely this issue over Islamic marriage will be common knowledge yet. Consequently there is a lack of information and understanding about the issue. It also cannot be counted out that there may be a desire by some not to have to submit to the English legal

system in preference of using Sharia law, particularly for the spouse who holds the financial resources for the parties.

What is the solution?

If change is needed, leaving aside an alteration to statute, one option would be an extension or development of the existing law on nullity to permit relief to be sought on 'invalid marriages' conducted in the UK and, in particular, with reference to Islamic marriages.

The current case-law leads to a two-stage test on marriage recognition cases. First, the ceremony of marriage has to be defined as capable of falling in the scope of the Marriage Act of 1949. If it falls into the scope, the second question is whether the marriage is valid or void or voidable (ss 11–12 of the Matrimonial Causes Act 1973). In the last two instances, the court can declare the marriage is null but still permit financial remedy claims to be made.

The recent spate of reported Islamic marriage cases do not reach the standard required under the Marriage Act, and fall into a category of non marriage or non-existent marriage cases following *Hudson v Leigh* [2009] EWCA Civ 1442. This is a relatively new interpretation of the rules, but there is no reason for these type of cases (subject to the ceremony being sufficient to be considered by the Islamic community to be a marriage) to fall into the category of void marriages under s 11, namely that the parties married in disregard of certain requirements as to the formation of the marriage. This would offer spouses in such marriages the right to make claims without changing statute, albeit that a practice direction may be needed given the impact of recent case-law. This might, therefore, permit those who are married under Islamic ceremonies access to legal remedies which they cannot now avail themselves of, because under English law they are not treated as married.

Something to think about ...