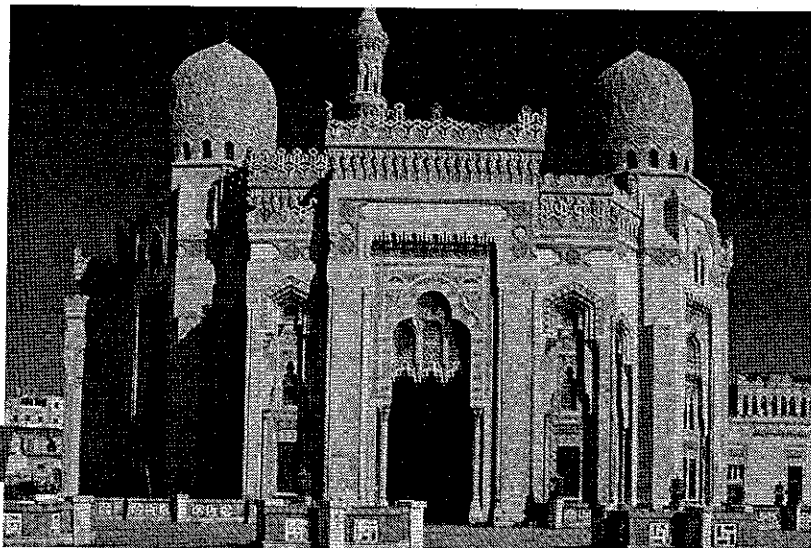


Practice trends: Islamic family law



With an increasing number of Muslim clients keen to abide by Islamic law principles in their personal lives, practitioners need to understand how Islamic family law principles are given effect in English law, says Raffia Arshad

MUSLIMS ARE REQUIRED TO ABIDE BY sharia law wherever they are in the world. In England, Muslims contract marriage and divorce according to their religious beliefs and values. What significance does this have when the only legal redress they can seek is within English courts?

Sharia literally means 'the path to follow'. There are two main sources of sharia law. The first and most important source is the Qur'an, a revelation from Allah to the Prophet Muhammad (peace be upon him). The second source of sharia is found in the Sunnah, that is, the teachings, sayings and conduct of the Prophet Muhammad (pbuh) in living and explaining the Qur'an.

Marriage

According to the sharia, a marriage (nikah) need not be conducted in a registered or specified place and can take place anywhere so long as it is contracted in the presence of witnesses and with the husband agreeing to pay a stipulated dowry (mahr).

It is not unusual for the actual nikah to be conducted in the home of the bride and the wedding party to take place that evening. Whilst a nikah entered into in Britain will not be recognised here, if conducted in a country, for example Pakistan, whose law and customs recognise the ceremony and if the nikah is conducted in accordance with these rules, then it would be recognised as a valid marriage in Britain.

It may be surprising for many that the

marriage contract can be conducted without the presence of the woman provided her wali (male guardian – usually her father) consents on her behalf and is acting on her instructions. Unfortunately, because of this, some parents have subjected their children to forced marriages both in England and overseas.

Case study 1: Did Ayesha consent to her marriage?

Ayesha has discovered her father has consented to her marriage without consulting her properly. She told her father when he sought her consent that she wanted to complete her university studies before considering marriage. She says her father has told her in no uncertain terms that she will have to live with this man. Her father has threatened to beat her if she disrespects his wishes and does not uphold the family honour. He has used violence in the past. Ayesha says she did not consent to the marriage. Ayesha is 19.

● Ayesha's main aim will be to set aside the nikah contract. The English courts cannot offer a remedy in this regard but the Sharia Council can. The Sharia Council are able to set aside a nikah that has been undertaken without consent and on some occasions can abrogate the responsibility a wali has if that responsibility has been abused. In other words, a responsible person of the community will in the future act as Ayesha's wali instead of father. Ayesha could issue an application for a non-molestation injunction

since her father has threatened to use violence and has in fact used violence in the past. Attaching a Power of Arrest to the order would assist the Sharia Council in their conclusions as a court has already deemed that there have been threats of violence. Obviously, Ayesha may be reluctant in pursuing an injunction against her father but the options should be presented to her.

The Mahr

Mahr is an essential element of Muslim marriages prescribed by the Qur'an and is an obligatory gift by the husband to the wife at the time of contracting the marriage. The mahr is considered as a mark of honour and respect. Under Islamic law, the responsibility of maintaining the family in providing food, shelter and clothing rests solely on the shoulders of the husband. The wife can contribute to household expenses if she so chooses. Thus, the mahr at an early stage places a sense of responsibility on the husband.

Because the nikah contract sometimes contains financial provisions, it can be a useful indicator of the parties' intentions if the marriage breaks down within a few years (i.e. it is a short marriage for the purposes of English law). If the parties conducted a civil ceremony as well as the nikah, they will be entitled to pursue an ancillary relief application. In these circumstances, the nikah contract, which is rather like a pre-nuptial agreement, could be used to support a party's case. English courts have recognised

and upheld the concept of the mahr. In *Qureshi v Qureshi* [1971] 2 WLR 518, the court accepted the wife ought to be awarded her mahr as promised by her husband before he effected the marriage contract.

Case study 2: Nikah as a quasi pre-nuptial agreement

Sairah and Ahmad are introduced through family. They meet on several occasions and agree they may be a suitable match for each other. Within three months of meeting and with their parents' approval they undertake a civil ceremony on 1 March and the nikah on 2 March. The nikah is conducted by the local Imam in the usual way in the presence of two witnesses. Ahmad promises to Sairah in an oral and written agreement that, should the parties divorce, she will retain all the jewellery given to her as gifts from Ahmad's family totalling £4,000 and her mahr of £3,000. Six months later, Ahmad gives Sairah the talaq (notice to divorce) but refuses to return her jewellery. Sairah seeks financial relief.

● The parties have conducted both a religious and civil ceremony and therefore Sairah is entitled to pursue an application for ancillary relief. As the marriage is short, any financial provisions within the nikah contract could be used to reflect the intention of the parties as would happen if a formal pre-nuptial contract had been drawn up. English courts do give consideration to the financial agreement the parties reached before effecting the marriage contract and this carries more weight if the marriage is short.

Divorce and the right to separate

Although divorce (talaq) is disliked in Islam, the right to separate is conferred on both the husband and wife. For the husband, the right to divorce is automatic whereas for the wife, this right has to be acquired (khula) upon satisfying an Imam or scholar. However, the primary emphasis, when a couple are facing problems within the marriage, is striving to achieve reconciliation. Thus, services such as Relate should certainly be offered to Muslim clients undergoing matrimonial difficulties. It may also be useful to find out whether there are Muslim marriage counsellors available through local mosques.

It is sometimes the case that Muslim men separate from their wives but refuse to grant a divorce. In such a situation, the wife can go to the Sharia Council who will investigate her request and if reconciliation is impossible, will grant her the khula – divorce initiated by the wife. It is important for

practitioners to note that because of the investigative nature of granting a khula, the Sharia Council is far more likely to grant one swiftly if a Decree Nisi or Decree Absolute has already been obtained.

For a Muslim couple who have only conducted the nikah, financial protection under Trusts of Land and Appointment of Trustees Act 1996 (TLATA), as with any other cohabiting couple is available. If there are children involved, an application under Schedule One of the Children Act 1989 can also be made.

If the relationship is a very long one, the courts may recognise the marriage and the parties may then be entitled to a financial settlement under ancillary relief proceedings. In the recent case of *Chief Adjudication Officer v Bath* [2000] 1 FLR 8, the parties were not aware that their marriage celebrated according to the Sikh rites was not valid. The courts held their mistaken belief and the fact that they lived as man and wife for 37 years gave rise to the presumption of validity in common law. Further, the case of *A-M v A-M* [2001] 2 FLR 6 held that cohabitation and reputation of being man and wife amounted to strong evidence that a lawful marriage had taken place even when the marriage in question was the nikah.

Case study 3: Spouses or cohabittees?

Umar is married with three young children. His wife recently left him for another man. She told Umar that she never really loved him and was forced to marry him. He has not pronounced the talaq yet but wants to know what his position is with regards to the finances. Through some initial questioning you elicit that the main asset is the former matrimonial home (FMH). Umar intends to care for all three children. The length of the

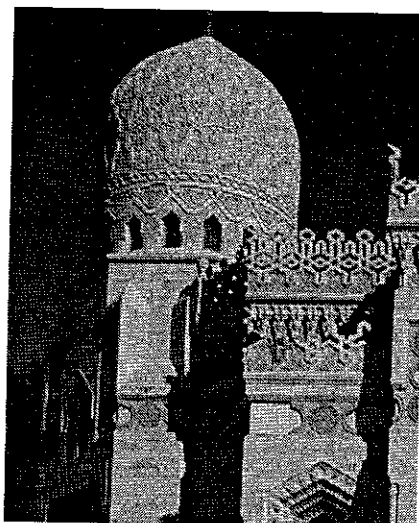
marriage is six years. The parties contributed equally to the FMH. She wants to see the children but is happy for them to stay with Umar. Upon further questioning you discover that Umar and his wife had not undertaken a civil ceremony and the nikah was conducted in England. Umar wants to know what he can do to secure the FMH as a home for his children.

● Even though Umar and his wife believe they are married, because they have only conducted the nikah, they are regarded as mere cohabittees under English law. The length of the marriage is not sufficient to give rise to the presumption of validity. Umar's wife has raised the issue that she felt she was forced to marry him six years ago. Islamic scholars have stated unanimously that when parties behave and demonstrate a relationship that is consistent with that of a husband and wife and have children of the family, the nikah will not be held as invalid. Umar's wife ought to have stated from the outset she was not agreeable to the nikah and years later after three children cannot use regret as a means to set aside the nikah – especially when children are involved.

Although Umar has not yet pronounced the talaq, it would make no difference to any application he makes. The English courts cannot deal with his Islamic divorce. In Islamic law, he ought not to withhold divorce from his wife if the relationship is at an end. Umar could issue TLATA proceedings but this would not take into account the children's interest. His primary aim is to secure the FMH for the children and therefore a Schedule One application may be more appropriate.

Dealing with clients' needs

Every practitioner knows that in order to meet the needs of a client, you must first understand what their needs are. There are now around two million Muslims living in England who wish to practise their religion and as a consequence apply aspects of Islamic law to their personal lives. This is particularly true in the family law arena and has consequences for practitioners dealing with Muslim clients.



Raffia Arshad is a barrister practising from St Mary's Chambers who regularly advises on various aspects of Islamic family law. She has been involved in advising the Home Office on forced marriages. She can be contacted on 01 15 950 3503. The Sharia Council was established in 1982 to advise Muslims in the UK on Islamic law. Their website can found at www.islamic-sharia.co.uk