

## *Akhter v. Khan*: One Small Step for Woman, One Moderate Leap for Womankind

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### I. OVERVIEW

After eighteen years of marriage, Nasreen Akhter decided she had had enough and filed for divorce.<sup>1</sup> On December 13, 1998, Akhter (the Wife) and Mohammed Shabaz Khan (the Husband) undertook an Islamic marriage ceremony, known as a Nikah, in Southall, a district near London.<sup>2</sup> The ceremony took place in public, was officiated by an Imam, and had witnesses.<sup>3</sup> After the Nikah and over the course of their union, the Wife continually asked the Husband to plan a civil ceremony, a requirement for all valid marriages under English law, but the Husband failed to ever plan such a ceremony.<sup>4</sup> The couple lived together for the course of their marriage, had four children together, and held themselves out to others as husband and wife.<sup>5</sup> In 2005, the family moved to Dubai, United Arab Emirates (UAE), where their marriage in accordance to Islamic (often referred to as Sharia) law was recognized as valid.<sup>6</sup> After years of marital and financial issues, physical and emotional distance, and allegations of assault, the Wife decided to end the marriage.<sup>7</sup>

The process of obtaining a divorce proved to be its own nightmare, as the Husband argued that a divorce was impossible because the two were never married under English law.<sup>8</sup> Because of the high level of public interest in the case and its outcome, Justice David Williams, the presiding

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1. See *Akhter v. Khan* [2018] EWHC (Fam) 54 [1] (Eng.).

2. *Id.* at [20].

3. *Id.*

4. See *id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at [1].

judge, invited the Attorney General to intervene in the case.<sup>9</sup> The court was tasked with classifying the couple's union as a valid marriage, a voidable marriage, or a "non-marriage," each carrying a different set of consequences.<sup>10</sup> If the marriage was to be treated as valid under the presumption of marriage, the court could grant a divorce and split the couple's assets.<sup>11</sup> If the marriage was voidable for failure to comply with necessary laws, the court could grant a decree of nullity and divide the couple's assets.<sup>12</sup> However, if the court determined that the couples entered into a non-marriage, neither party could ask the court for a division of assets.<sup>13</sup> The Family Division of the High Court of Justice *held* that the couple had entered into a void marriage within the scope of section 11 of the Marriage Act 1949 and granted a decree of nullity, enabling the parties to seek a division of assets. *Akhter v. Khan*, [2018] EWFC (Fam) 54 [97].

## II. BACKGROUND

### A. *Valid, Void, and Non-Marriages*

English jurisprudence has favored the presumption of marriage since at least 1849, when the House of Lords held in *Piers v. Piers* that the law strongly presumes the existence of a marriage, even when the couple did not meet all formal requirements of a marriage.<sup>14</sup> Two forms of the presumption of marriage exist: presumption from cohabitation and reputation, and presumption from ceremony followed by cohabitation.<sup>15</sup> The former applies when no positive evidence exists of a marriage having taken place and the parties have cohabitated for long enough to gain the reputation of being spouses.<sup>16</sup> The latter applies when evidence shows that the parties undertook some sort of marriage ceremony but have insufficient evidence to prove so.<sup>17</sup> Under either circumstance, a valid marriage is presumed to exist unless the other party puts forth evidence to

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9. *Id.* at [12].

10. *See id.* at [2], [7]-[8].

11. *Id.* at [7].

12. *Id.*

13. *Id.* at [8].

14. *See Piers v. Piers* (1849) 9 Eng. Rep. 1118; 11 H.L.C. [331], [331].

15. Rebecca Probert, *The Presumptions in Favour of Marriage*, 77 CAMBRIDGE L.J. 375, 375 (2018).

16. *See id.*

17. *See id.*

rebut the presumption.<sup>18</sup> This presumption may be rebutted only by clear and convincing evidence that disproves the existence of a marriage.<sup>19</sup>

However, when a known ceremony has actually taken place, if submitted evidence proves that the ceremony did not create a valid English marriage, the presumption may be rebutted.<sup>20</sup> In *Al-Saedy v. Musawi*, the Family Division held that the presumption of marriage arising from a Muslim couple's religious ceremony and subsequent reputation as husband and wife was rebutted because the couple's reputation as husband and wife arose from a ceremony that was shown to be invalid under English law.<sup>21</sup> The court reasoned that a presumption of marriage cannot make something valid that has already been proven to be invalid.<sup>22</sup> In such cases, where evidence of a ceremony noncompliant with English law rebuts the presumption of marriage, some courts have deemed the resulting relationship a "non-marriage."<sup>23</sup> In these situations, the resulting union is neither a valid marriage (allowing the parties to divorce) nor a void one (subject to a decree of nullity).<sup>24</sup>

England's Marriage Act 1949 and Matrimonial Causes Act 1973 both deal with void marriages.<sup>25</sup> Sections 11 and 49 of the Marriage Act 1949 both list characteristics of a void marriage, including the lack of a marriage license, failure to publish banns, failure to notify the superintendent registrar, and marriages not taking place in a church or other registered building.<sup>26</sup> The Matrimonial Causes Act 1973 states that a marriage that is not valid under Marriage Act 1949 for disregarding the legal requirements of marriage is void.<sup>27</sup> A void marriage is still a marriage, however, and is distinguishable from mere cohabitation or a so-called non-marriage.<sup>28</sup>

Several English cases have dealt with the interaction of the Marriage Act 1949 and the Matrimonial Causes Act 1973.<sup>29</sup> In *MA v. JA & the*

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18. *Id.* at 375-76.

19. *See* Chief Adjudication Officer v. Bath [1999] EWCA (Civ) 3008 [21] (Eng.).

20. *See* *Al-Saedy v. Musawi* [2010] EWHC (Fam) 3293 [72] (Eng.).

21. *Id.*

22. *See id.* at [71].

23. *See* *Hudson v. Leigh* [2009] EWHC (Fam) 1306 [69] (Eng.).

24. *See Al-Saedy* [2010] EWHC (Fam) 3293 at [67] (Eng.).

25. Marriage Act 1949, 12, 13 & 14 Geo. 6 c. 76, § 25, 49 (Eng. and Wales); Matrimonial Causes Act 1973, c. 18, § 11 (Eng. and Wales).

26. Marriage Act 1949, 12, 13 & 14 Geo. 6 c. 76, § 25, 49 (UK).

27. *See* Matrimonial Causes Act 1973, c. 18 § 11(a)(iii) (UK).

28. *Asaad v. Kurter* [2014] EWHC (Fam) 3852 [95] (Eng.).

29. *See, e.g., id.; El-Gamal v. Al-Maktoum* [2011] EWHC (Fam) 3763 [13]-[15] (Eng.); *Gandhi v. Patel* [2001] EWHC (Ch) 473 (Eng.).

*Attorney General*, the Family Division observed that the 1949 Act only lists the failures that will not void a marriage and those that will, but these two categories do not cover all possible situations.<sup>30</sup> In that case, Justice Andrew Moylan concluded that it would be impossible to formulate a test to determine whether a ceremony produces a non-marriage or a potentially valid (or voidable) one, but that policy leans in favor of preserving the validity marriages that do not wholly adhere to the legal requirements.<sup>31</sup> However, Justice Moylan did point out that the law requires something more than just some ceremony and the exchange of consent.<sup>32</sup>

England's Ecclesiastical Courts originally had jurisdiction over Christian marriage law and, therefore, over English marriage law.<sup>33</sup> The Matrimonial Causes Act 1857 gave the High Court matrimonial jurisdiction and prescribed that it was to apply the same rules and principles regarding marriage that the Ecclesiastical Courts had followed before.<sup>34</sup> The Senior Courts Act 1981, a successor to the Matrimonial Causes Act 1857, granted the High Court all jurisdiction over matrimonial matters that was previously vested in the Ecclesiastical Courts, including matters regarding divorce and nullity, but does not contain a provision that the court must follow the same rules and principles as the Ecclesiastical Courts.<sup>35</sup>

*Hyde v. Hyde & Woodmansee* and *Risk v. Risk* (otherwise *Yerburgh*) are both examples of the High Court conforming strictly to the rules of the Ecclesiastical Court by refusing to grant relief to non-Christian marriages.<sup>36</sup> However, *Corbett v. Corbett* (otherwise *Ashley*) demonstrates that the Ecclesiastical Courts, in some cases, did grant declaratory sentences to non-marriages or "meretricious marriages."<sup>37</sup> Because of that fact, the High Court granted a decree of nullity to a same-sex couple seeking a divorce at a time before same-sex marriage was

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30. MA v. JA & the Attorney-General [2012] EWHC (Fam) 2219 [92] (Eng.).

31. See *id.* at [85], [89].

32. *Id.* at [93].

33. See Matrimonial Causes Act 1857, 20 & 21 Vict., c. 85, § XXII (UK).

34. *Id.*

35. Senior Courts Act 1981, c. 54, § 26 (UK); Matrimonial Causes Act 1857, 20 & 21 Vict., c. 85, § XXII (UK).

36. *Hyde v. Hyde & Woodmansee* [1866] 1 L.R.P. & D. 130 (Eng.); *Risk v. Risk* (otherwise *Yerburgh*) [1951] P 51 (Eng.).

37. *Corbett v. Corbett* [1971] P 83 (Eng.) (citing *Elliott & Sugden v. Gurr*, (1812) 2 Phil. Ecc. 16) (Eng.).

lawful in the United Kingdom, stating that it had “no discretion to withhold a decree of nullity” in such cases.<sup>38</sup>

*B. Human Rights Considerations*

The Human Rights Act 1998 provides that, to the greatest extent possible, legislation must be read and interpreted in ways compatible with rights set forth by the European Convention on Human Rights.<sup>39</sup> The Act further states that public authorities may not act in ways incompatible with Convention rights.<sup>40</sup> Among the rights protected by the Convention are the right to a fair trial; the right to respect for private and family life; the right to marry; the right to peaceful enjoyment of one’s possessions; and the prohibition of discrimination based on, among other things, religion.<sup>41</sup> The Vienna Convention on the Law of Treaties 1969, which took effect in the United Kingdom in 1980, prescribes that nations must implement international treaties in good faith and, when in conflict with domestic laws, gives precedence to the treaty.<sup>42</sup>

The United Nations Convention on the Rights of the Child 1990, which took effect in the United Kingdom in 1992, provides that, in any action involving a child, the child’s best interests shall be a primary concern.<sup>43</sup> In *ZH (Tanzania) v. Secretary of State for the Home Department*, the United Kingdom Supreme Court clarified that the child’s interests, though a *primary* concern, are not the *sole* concern, and that other factors may outweigh the primary concern of the child’s welfare when deciding an issue.<sup>44</sup> In addition, the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979), ratified by the United Kingdom in 1986, provides that courts must take all appropriate measures to eradicate discrimination against women relating

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38. *Id.* at P 83. In this case, the court held that the respondent, a transgender woman separating from a man, was a man in the eyes of the law. Accordingly, the court treated the union as between two men although the respondent presented and identified as a woman. *Id.*

39. Human Rights Act 1998, c. 42, § 3 (UK).

40. *Id.* § 6.

41. Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, ETS 9 (entered into force May 18, 1954); European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6, 8, 12, 14, *opened for signature* Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

42. Vienna Convention on the Law of Treaties 1969 arts. 26-27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

43. United Nations Convention on the Rights of the Child 1990 art. 3, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

44. *ZH (Tanzania) v. Sec’y of State for the Home Dep’t* [2011] UKSC 4 [26], [2011] 2 AC 166 [26].

to marriage and family life.<sup>45</sup> This protection applies equally to the dissolution of marriage and ensures equal rights to both spouses in the ownership of property.<sup>46</sup>

In the landmark case *White v. White*, the House of Lords further protected women's financial rights in divorce proceedings by ruling that the court's prior practice of assessing non-income-earning wives' "reasonable requirements" when dividing assets unfairly discriminated against women by undervaluing their contributions to the family when compared to the (typically male) breadwinner.<sup>47</sup> The court clarified that this did not entitle divorcees to an equal share of assets, but rather that courts should consider all contributions to the family, financial or otherwise, when distributing assets.<sup>48</sup>

### III. THE COURT'S DECISION

In the noted case, the Family Division of the High Court of Justice followed the trend, demonstrated in cases like *White*, of accounting for human rights and opting for a more liberal interpretation of family and divorce law.<sup>49</sup> The court first deduced that the facts did not support a presumption of marriage because the only ceremony alleged by the parties did not conform or even purport to conform to the requirements set forth by English law.<sup>50</sup> The court then moved on to approach the issue of whether the couple's union was a void marriage or a non-marriage.<sup>51</sup> Accounting for the fundamental rights of spouses and children, the court decided that whether a ceremony falls within the scope of the Marriage Act 1949, and therefore within the scope of section 11 of the Matrimonial Causes Act 1973, is an issue that must be analyzed holistically and on a case-by-case basis.<sup>52</sup> Following that approach, the court determined that the couple's ceremony fell within the scope of section 11 and was void for disregarding some of the requirements of a marriage.<sup>53</sup> Therefore, the Wife was entitled to a decree of nullity and subsequent division of assets.<sup>54</sup>

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45. United Nations Convention on the Elimination of All Forms of Discrimination Against Women art. 16, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

46. *Id.*

47. *White v. White* [2001] 1 AC 596 (Eng.).

48. *Id.*

49. *See Akhter v. Khan* [2018] EWHC (Fam) 54 [96] (Eng.); *White* [2001] 1 AC 596.

50. *Akhter* [2018] EWHC (Fam) at [40]-[41].

51. *Id.* at [42].

52. *Id.* at [93]-[94].

53. *Id.* at [95]-[97].

54. *See id.* at [97].

The court began its analysis by discussing the presumption of marriage.<sup>55</sup> Looking at other cases involving the presumption of marriage, Justice Williams determined that the presumption cannot operate based on a ceremony that is known to not conform to English law.<sup>56</sup> The Wife's counsel argued that the court should presume that the couple entered a "marriage by proxy" while living in Dubai because the UAE had recognized their Nikah and the couple were considered validly married while living there.<sup>57</sup> The court rejected this argument, however, because the couple's proxy marriage and their reputation as married was entirely based on a ceremony that was shown to be invalid under English law.<sup>58</sup> Therefore, the court concluded that any presumption, whether based on the ceremony and cohabitation or by cohabitation and reputation, was rebutted by the evidence showing that the couple's ceremony did not even purport to comply with English law.<sup>59</sup>

After establishing that the presumption of marriage was inapplicable in the noted case, Justice Williams moved on to determine what the resulting union was if a valid marriage could not be proven or presumed.<sup>60</sup> He began by examining the interplay between the Matrimonial Causes Act 1973 and the Marriage Act 1949 to surmise whether non-marriages exist and, if so, whether relief should be granted for them.<sup>61</sup> The Wife's counsel argued that the court should follow the jurisprudence of the Ecclesiastical Court, which granted decrees of nullity to unions that were not truly recognized as marriages.<sup>62</sup> Her counsel pointed to *Corbett v. Corbett (otherwise Ashley)*, where the Court of Appeal of England and Wales rejected the argument that a same-sex couple's marriage was a non-marriage and thus not subject to a decree of nullity, citing to an Ecclesiastical Court case that granted a decree of nullity to a "meretricious marriage."<sup>63</sup> The Attorney General argued that the Family Division was no longer obligated to follow Ecclesiastical Court jurisprudence, pointing out that the court in *Corbett* was operating under the Matrimonial Causes Act 1857, which contained a provision requiring the court to rule in the

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55. *Id.* at [31].

56. *Id.* at [38]-[40].

57. *Id.* at [39].

58. *Id.* at [39]-[40].

59. *Id.* at [40]-[41].

60. *Id.* at [42].

61. *See id.* at [43]-[46].

62. *See id.* at [48]-[51].

63. *See id.* at [48]; *see Corbett v. Corbett* [1971] P 83 (Eng.) (citing *Elliott & Sugden v. Gurr*, (1812) 2 Phil. Ecc. 16 (Eng.)).

same manner as the Ecclesiastical Court, while the Senior Courts Act 1981, which succeeded that Matrimonial Causes Act and governed the noted case, contains no such provision.<sup>64</sup> The court agreed with the Attorney General's argument and added that following the Ecclesiastical Court's jurisprudence would likely constitute religious discrimination in 2018, as the Ecclesiastical Court did not recognize marriages outside the Christian tradition.<sup>65</sup> Therefore, the court determined that a "filling in" was necessary, rather than following the Ecclesiastical Court exactly.<sup>66</sup>

The court next turned to a discussion of *MA v. JA*, in which Justice Moylan analyzed several other cases dealing with presumptions of marriage, void marriages, and invalid marriages.<sup>67</sup> After going through Justice Moylan's analysis, which discusses ceremonies outside the Christian faith and those that do not comply with English law, the court concluded that the proper question was whether the parties attempted to comply with the requisite formalities, and that a case-by-case analysis was necessary to evaluate the extent of a couple's attempt at compliance.<sup>68</sup>

Next, the court considered the human rights implications of its decision, first by quoting provisions of the Human Rights Act 1998, which require that legislation be interpreted in ways compatible with rights enumerated by the European Convention on Human Rights and forbid public authorities from acting in ways incompatible with Convention rights.<sup>69</sup> The Wife's counsel argued that the following Convention rights were relevant to the case: the right to a fair trial, the right to respect for private and family life, the right to marry, the right to peaceful enjoyment of one's possessions, and the prohibition of discrimination.<sup>70</sup> The Wife's counsel argued that the right to respect for private and family life includes the right to respect for a couple's status as married, and that describing the union as a non-marriage would violate that right, as family status is independent of marriage.<sup>71</sup> The court responded that no real difference exists between a couple who chooses to cohabit without marrying and

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64. See *Akhter* [2018] EWHC (Fam) at [51].

65. *Id.* at [51].

66. *Id.*

67. *Id.* at [53]; *MA v. JA & the Attorney-General* [2012] EWHC (Fam) 2219 [71]-[81] (Eng.).

68. *Akhter* [2018] EWHC (Fam) at [53]-[55]; *MA* [2012] EWHC (Fam) 2219 at [71]-[81].

69. Human Rights Act 1998, c. 40, §§ 3, 6 (UK); *Akhter* [2018] EWHC (Fam) at [58].

70. *Akhter* [2018] EWHC (Fam) at [66]; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 41, arts. 6, 8, 12, 14; Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 41, art. 1.

71. *Akhter* [2018] EWHC (Fam) at [78].



one who chooses to undergo a religious ceremony and not a civil one, but that the law supports a looser interpretation in cases where a couple tried or intended to create a valid marriage.<sup>72</sup> Regarding the right to marry, both parties agreed that legislators may impose legal formalities concerning marriage.<sup>73</sup> The court held that the Husband, not the law, had infringed upon the Wife's right to marry because his refusal to plan a civil ceremony prevented her from creating the valid marriage that the couple (or at least the Wife) had intended.<sup>74</sup> The Wife's counsel argued that the Wife had contributed to the family assets and that the determination of a non-marriage would infringe on her right to property by not allowing her to seek a division of assets, but the court accepted the Attorney General's argument that cohabitantes do not acquire any property rights by simply cohabitating, regardless of whether they presented as a married couple or had children together.<sup>75</sup>

Additionally, the court examined the United Nations Convention on the Rights of the Child 1990, which prescribes that courts deciding actions involving children must take the children's consideration as a primary consideration.<sup>76</sup> Examining a case from the United Kingdom Supreme Court, the court concluded that a child's interest is of primary concern but may be outweighed by other factors and that the present case "concern[ed] children" because the couple had four children together who would be directly affected by the ruling.<sup>77</sup>

Lastly, the Wife's counsel asserted that the court should consider the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979), which states that the court shall eliminate discrimination against women in matrimonial and family matters, particularly ensuring, *inter alia*, equal rights in the dissolution of a marriage and equal rights to spouses in property ownership.<sup>78</sup> The Wife's counsel argued that the existence of a non-marriage and the resulting unavailability of financial relief was indirectly discriminatory to women, and particularly Muslim women.<sup>79</sup> He claimed that these classes

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72. *Id.* at [80].

73. *Id.* at [83].

74. *See id.*

75. *See id.* at [84]-[88].

76. United Nations Convention on the Rights of the Child 1990, *supra* note 43, art. 3; *Akhter* [2018] EWHC (Fam) at [69].

77. *ZH (Tanzania) v. Sec'y of State for the Home Dep't* [2011] UKSC 4 [26], [2011] 2 AC 166 [26].

78. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 45, art. 16; *Akhter* [2018] EWHC (Fam) at [73].

79. *Akhter* [2018] EWHC (Fam) at [75].

were disproportionately affected due to the likelihood that men usually hold most of a family's financial assets, and that Muslim women were more likely to be affected because they are more likely to be held in a non-marriage, since many Muslim couples undertake religious ceremonies but not civil ones.<sup>80</sup> The court ultimately agreed with the Attorney General's position that any discrimination that the right to be classified as married was a procedural one, and that there would be no direct or indirect discrimination because nothing would prevent a Muslim woman who had obtained a decree of nullity from obtaining financial remedy.<sup>81</sup> Therefore, the court held that the Wife did not have a claim for gender discrimination.<sup>82</sup>

Finally, after considering the law, the court's degree of discretion, and important human rights considerations, Justice Williams was able to analyze the facts and classify the couple's union.<sup>83</sup> He began by asking whether the state's interest in the certainty of marriage, which would call for a stricter interpretation of section 11 of the Matrimonial Causes Act 1973, outweighed the State's interest in the institution of marriage and the interests of the parties, which would call for a broader reading.<sup>84</sup> He then pointed out that there is clearly a difference between void marriages and non-marriages in terms of legal status, as a void marriage would enable the parties to seek financial remedies but a non-marriage would not.<sup>85</sup> He decided that issues involving fundamental rights called for a broader reading, and that he did not consider that to be inconsistent with the wording of the law.<sup>86</sup> The interests of the children should be of primary consideration, and the court should also consider whether the parties had a joint understanding that they were entering a process that would result in a legally valid marriage.<sup>87</sup> Justice Williams also pointed out that one party's interests may be in favor of finding a void marriage, while the other's may be in favor of finding a non-marriage.<sup>88</sup> Incorporating these considerations, Justice Williams arrived at the correct approach to take.<sup>89</sup> Only marriages within the scope of the Marriage Act 1949 fall within

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80. *Id.*

81. *Id.* at [76]-[77].

82. *Id.* at [77].

83. *Id.* at [90].

84. *Id.*

85. *See id.*

86. *Id.* at [91].

87. *Id.* at [93].

88. *Id.*

89. *Id.* at [94].

section 11, and a case-by-case, holistic approach is appropriate to classify a marriage, particularly one that produces children.<sup>90</sup> When determining whether a marriage is in the scope of the 1949 Act, the court should consider, among other things:

- (a) whether the ceremony or event set out or purported to be a lawful marriage including whether the parties had agreed that the necessary legal formalities would be undertaken; (b) whether it bore all or enough of the hallmarks of marriage including whether it was in public, whether it was witnessed whether promises were made; (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage[; and] (d) whether the failure to complete all the legal formalities was a joint decision or due to the failure of one party to complete them.<sup>91</sup>

Applying the approach above to the noted facts, the court concluded that the Husband and Wife both understood that they were beginning a process that was meant to include a civil ceremony in which the marriage would be registered; that the Wife believed the Husband intended to complete the process; that the failure to complete the process was completely due to the Husband's refusal to plan the civil ceremony after the Nikah had been completed; that the Wife tried to persuade the Husband to undertake a civil ceremony; that the Nikah was held in public, witnessed, officiated by an Imam, and involved an exchange of promises, so it bore all the hallmarks of a marriage; that the Husband and Wife lived as a married couple; and that the couple were considered validly married while living in the United Arab Emirates.<sup>92</sup> Therefore, applying the broader interpretation of section 11, the court held that the couple's marriage was within section 11.<sup>93</sup> Because of the couple's failure to regard some of the requirements under English law, the marriage was void and the wife was entitled to a decree of nullity.<sup>94</sup>

#### IV. ANALYSIS

Some media outlets have misrepresented the decision in the noted case as the United Kingdom's recognition of Sharia law marriages,

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90. *Id.*

91. *Id.*

92. *Id.* at [95].

93. *Id.* at [96].

94. *Id.* at [96]-[97].

although the court found that the marriage was void.<sup>95</sup> Justice Williams was careful to point out that the case was not about whether a Nikah creates a valid marriage under English law but rather a question almost the opposite: whether a Nikah creates an invalid or void marriage.<sup>96</sup> The court could not expand the definition of marriage to include Islamic ceremonies unaccompanied by civil ceremonies, as that would cross the line between interpreting the law and amending it.<sup>97</sup> However, though the holding did not validate Nikah ceremonies, it did provide an avenue of financial relief for the Wife by categorizing the couple's union as a void marriage rather than a non-marriage.<sup>98</sup>

Though Justice Williams took an expansive view of the Marriage Act 1949 and Matrimonial Causes Act 1973, his holding was well within the boundary of the law.<sup>99</sup> The court's holding, incorporating fundamental human rights considerations, protected the Wife's financial interests while not going so far as to validate Islamic marriage ceremonies.<sup>100</sup> One could look at this as a reflection of the gradual worldwide equalization of women and men.<sup>101</sup> Advancements are being made, but women have yet to experience worldwide equality with men.<sup>102</sup> The court's decision in the noted case is a step in the right direction, but one of many steps necessary to achieve true equality, both between sexes and between religions.

Sharia law imposes many restrictions on Muslim women, particularly in the realm of marriage.<sup>103</sup> For example, a Muslim man may divorce his wife simply by repeating the word *talaq* (meaning "I divorce you") three times.<sup>104</sup> Islamic women do not have that right.<sup>105</sup> Instead, they must go to either a judge in a Muslim country or a Sharia council in

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95. See, e.g., *E&W: Nikah Rite Created Valid Marriage Despite Absence of Civil Ceremony*, STEP (Aug. 2, 2018), <https://www.step.org/news/ew-nikah-rite-created-valid-marriage-despite-absence-civil-ceremony>.

96. *Akhter* [2018] EWHC (Fam) at [5].

97. *Re K & H* [2015] EWCA (Civ) 543 [29]-[30] (Eng.).

98. See *Akhter* [2018] EWHC (Fam) at [77].

99. See *id.* at [91].

100. See *id.* at [93].

101. See Mark Molloy, *How Far Have Women's Rights Advanced in a Century?*, TELEGRAPH (Feb. 6, 2018), <https://www.telegraph.co.uk/women/life/far-have-womens-rights-advanced-century/>.

102. See *id.*

103. See Sufiya Ahmed, *No One Talks About the Fact that in Sharia Courts, British Muslim Women Have Fewer Rights than Women in Islamic Countries*, INDEPENDENT (Nov. 20, 2017), <https://www.independent.co.uk/voices/sharia-law-uk-courts-muslim-women-rights-few-compared-islamic-countries-religious-rulings-quran-a8064796.html>.

104. *Id.*

105. *Id.*

a non-Muslim one and plead specific grounds for divorce, such as abuse, infidelity, or failure of the husband to provide for the family.<sup>106</sup> Women obtaining divorces are entitled to receive a *mehr*, a compulsory financial gift from her husband; however, if a woman obtains a groundless divorce, she waives her right to this compensation.<sup>107</sup> Therefore, prior to the decision in the noted case, an English Muslim woman who did not undergo a civil marriage ceremony could only receive financial compensation if she had specified narrowly defined legal grounds for divorce.<sup>108</sup>

The role of Sharia law in the United Kingdom has been hotly debated recently, as evidenced by then-Home Secretary Theresa May commissioning an “Independent Review into the application of Sharia Law in England and Wales” in 2016.<sup>109</sup> The review criticized Sharia councils as discriminatory against women, which is especially alarming as over ninety percent of petitioners to Sharia councils are women seeking Islamic divorces.<sup>110</sup> Among the bad practices observed in Sharia councils by the review panel were inappropriate questioning, inconsistencies in procedure and decisions, a lack of women on review panels, and inconsistent interpretations of Islamic law.<sup>111</sup> In order to ensure the fairer treatment of women by moving more Islamic divorce proceedings from Sharia councils to English courts, the review recommended a legislation change to the Marriage Act 1949 and Matrimonial Causes Act 1973 to require that civil ceremonies be conducted before or simultaneously with religious ones.<sup>112</sup> Additionally, the report recommended raising awareness of marriage laws in the Muslim community and introducing regulations to be placed upon Sharia courts.<sup>113</sup> All of this underlines the necessity for change in the legal system to protect a group that is highly vulnerable to oppression in the realm of marriage.<sup>114</sup>

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106. *Id.*; *Valid Reasons for Divorce in Islam*, ABOUTISLAM (Apr. 10, 2018), <http://aboutislam.net/counseling/ask-the-scholar/family/valid-reasons-for-divorce-in-islam/>.

107. Ahmed, *supra* note 103.

108. *See id.*

109. *See* Akhter v. Khan [2018] EWHC (Fam) 54 [4] (Eng.).

110. *See* SEC’Y OF STATE FOR THE HOME DEP’T, THE INDEPENDENT REVIEW INTO THE APPLICATION OF SHARIA LAW IN ENGLAND AND WALES, 2018, Cm 9560, at 12, 15-16 (UK).

111. *Id.* at 16.

112. *Id.* at 5.

113. *Id.* at 18-20.

114. *See* Hayley Gleeson & Julia Baird, *I’m Not His Property: Abused Muslim Women Denied Right to Divorce*, ABC NEWS AUSTRALIA (Apr. 18, 2018), <https://www.abc.net.au/news/2018-04-18/abused-muslim-women-denied-right-to-divorce/9632772>.

## V. CONCLUSION

Justice Williams's decision in the noted case provides a glimmer of hope to Islamic women in similar situations as the Wife, who are seeking divorces from marriages that are not recognized under English law. The court's decision did not go as far as some may have hoped or as some media outlets reported,<sup>115</sup> but it is a tentatively progressive move. Further, it was about as far as the court could go without overstepping its boundary into the realm of legislation.<sup>116</sup> So, although the court did not change the law, its interpretation provided the Wife with an avenue of relief and reflects the larger societal movement toward more equitable legislation.

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115. See, e.g., *E&W: Nikah Rite Created Valid Marriage Despite Absence of Civil Ceremony*, *supra* note 95; *Estranged Couple's Islamic Marriage Ruled Valid by Judge*, BBC (Aug. 1, 2018), <https://www.bbc.com/news/uk-england-london-45032472>.

116. *Re K & H* [2015] EWCA (Civ) 543 [29]-[30] (Eng.).

\* © 2019 Austin Pratt. J.D. candidate 2020, Tulane University Law School; B.S.M. 2017, Tulane University, A.B. Freeman School of Business. The author would like to thank his parents, professors, and fellow *Journal* members.