From: Accommodation in Pluri-Legal Europe [mailto:PLURI-LEGAL@JISCMAIL.AC.UK] **On Behalf Of** Prakash Shah
Sent: 11 January 2010 14:48
To: PLURI-LEGAL@JISCMAIL.AC.UK
Subject: Divorce case - from the Sharia council to the English Court of Appeal

Dear All,
This attached case (**[2009] EWCA Civ 1205**) seems very significant. Reactions to it would be welcome. Prakash.

A Commentary

In my view that the key issue in this case was the basis on which the *nikah* was brought to an end.

The bride would only have been entitled to retain the *mehr* if the marriage was terminated by *talaq*, i.e. by the groom. If, however, it was terminated by a *khul* obtained by the bride – the most usual reason why issues of divorce are taken to a *shari'ah* council – the *mehr* must normally be returned, since it is she who has backed out of the marriage. Moreover there is every reason to suppose that if the termination took the form of a consensual *mubaraat* the return of the *mehr* would have figured significantly in the course of the negotiations.

There can be little doubt that these matters would have been beyond the knowledge of the trial Judge, relied on the contents of a report prepared by an expert witness, a Mr. Saddiqui. In such a context what the SJE has to say is crucial, since the judge is virtually bound to rely on the accuracy of this advice. The trial Judge did so, as did Mummery LJ when the case came before the Court of Appeal - at which the appellant, most alarmingly, given the significance of the issues at stake, appeared in person, since his application for an adjournment to enable to appoint a legal representative was denied.

Hence the greater part of Mummery's judgement was a commentary on the evidence before him, in which he once again relied heavily on Mr. Saddiqui's expert advice and opinions:

5. Having heard that evidence, then having heard the evidence of Mr Saddiqui, which [the trial judge] summarised in his judgment, he came to a number of conclusions which Mr Uddin does not accept. The judge said that the gifts that were made were absolute and Mr Uddin could not get them back. They were not returnable if the marriage failed. They were not made conditional on the marriage. They were not part of the dowry or *mehr*. They were simply outright gifts. That is disputed by Mr Uddin.

7. The judge added there was no evidence as to existence or value or nature of the items beyond bold assertions to the effect by the first and second claimant. So he rejected that claim about the alleged taking of property. Next he decided that, as evidenced by the marriage certificate, there was a properly agreed dowry or *mehr*, and he found, on the basis of the evidence given by Mr Saddiqui, that that was a valid contract which, on the evidence he had heard, was enforceable by the court. There was no legal reason in the decided cases or in policy for refusing to enforce an agreement that the parties had made for the payment of the dowry. So he said that the counterclaim for the payment of that should succeed and there were no grounds for making deductions.

8. He also said at the end of his judgment, in relation to the disagreement about the reasons for the failure of the marriage, that (and I read a quote from paragraph 52):

"[The marriage] was not consummated [...] at the behest of the First Claimant [that is the groom] not as a result of any unwillingness or refusal [on the part of the bride], and therefore in Shari law [the bride] was entitled to the *mehr*..."

11. [The Appellant's] His second point was that the expert opinion given by Mr Saddiqui to the court has been ignored or misunderstood by the judge. He referred me to pages in Mr Saddiqui's opinion: pages 189, 192 and 194, in which he says the views expressed by Mr Saddiqui were not correctly understood and applied by the judge.

I am unable to accept that. The judge summarised in his judgment the essence of the expert's opinion. He was a single joint expert whose views were binding on both parties, and it seems clear to me that the judge correctly summarised and applied what was said by Mr Saddiqui in relation to matters of the Shari'a law of marriage and dowry.

Thirdly, Mr Uddin says that the marriage was invalid and that this affected the right to retain the gifts which had been made and the right to claim a dowry. On this point it seems to me that, on the basis of the evidence given by Mr Saddiqui and the findings of fact by the judge, it was a valid marriage under Shari'a law and that it was then validly dissolved by decree of the Islamic Shari'a council. This was not a matter of English law. There was no ceremony which was recognised by English law, but it was a valid ceremony so far as the parties were agreed and it was valid for the purposes of giving legal effect to the agreement which had been made about gifts and dowry.

12. Next, there was a dispute about the judge's findings on the taking of property from Mr Uddin's house by the bride and her family on 5 October 2003. In my view, there is no real prospect of success in challenging that finding. The judge made that on the basis of the evidence which he heard. Mr Uddin says that the items were taken. This was denied by the bride and her family....

Mr Uddin also made a number of other points in his written submissions, saying that it was the custom that the gifts which had been made in relation to the forthcoming marriage ought to be deducted from the dowry or *mehr*. He said that the bride was not entitled to claim the *mehr* or dowry in circumstances where she had, of her own free will, walked out of the marriage. He says that in those circumstances the dowry should not be payable.

13. I do not think there is a real prospect of those points succeeding on appeal in view of the findings of fact that the judge made about the absolute nature of the gifts. They were not conditional on the marriage. A gift is a gift and you cannot get it back simply because you have changed your mind or because circumstances have changed.

Looking to the evidence of Mr Saddiqui as summarised by the judge in his judgment, it is not correct to say, as Mr Uddin does, that those gifts should be deducted from the dowry or that there is no legal right to enforce the dowry in the circumstances in which this marriage was dissolved. As a matter of contract, arising out of the agreement which the parties had made, I think that the judge was entitled in law to say that this was an enforceable agreement, and therefore he was right to grant judgment on the counterclaim.

I can well understand the great dissatisfaction that Mr Uddin feels about this whole matter. He explained to me, obviously with feeling, that this is a situation in which he thought that the bride had consented to this arranged marriage. He thought in those circumstances that he should invest a lot of money in the marriage of his son to the bride. It now turns out, he thinks, that the bride did not really intend to remain married to his son, but had someone else

in mind, and that it was relevant to look at these reasons for the failure of the marriage in the context of the money that he had invested in it.

14. He has made gifts. He has agreed to pay a substantial sum of money for a marriage that seemed to dissolve almost as soon as it had been undertaken. I can fully understand the feelings of a father in those circumstances. Mr Uddin is obviously very dissatisfied with the outcome of this case.

I have to say, however, having considered the judgment very carefully and these arguments which are critical of it, that I really do not think that this appeal has got a real chance of succeeding. The main reasons for the judge's judgment are twofold. First, his view about the truthfulness of the witnesses -- and he made it clear that he regarded the bride and her family as giving truthful evidence; and the second is about the effect of the expert evidence from Mr Saddiqui on Shari'a law and that, as a matter of Shari'a law in the circumstances of this marriage and its dissolution, the gifts were absolute, not returnable, not deductible from the dowry, and the dowry was payable notwithstanding the failure of the marriage.

I know Mr Uddin will be upset to hear all of this, but I have, for those reasons, come to the conclusion that I should refuse his application for permission to appeal.

But just what are the implications of all this? The case may well provide 'an indication how far we have moved in Britain in recognising aspects of Muslim mediation and family law' as Prakash puts it. But in which direction? Just what were the facts of this case? And was the expert a sufficiently expert expert?

Much remains mysterious about the facts of this case. On just what basis (given the caveats set out in the opening paragraph in this note) did 'The Islamic Shari Council' dissolve the marriage. Unfortunately Mummery J provides no information as to the precise basis on which this occurred. Nor does there appear to have been any agreement between the parties as to why 'the marriage seemed to dissolve before it had even begun': both parties appear to have argued with equal vigour that the other had refused to consummate the marriage.

In the midst of all this factual uncertainty, Mr Saddiqui's evidence played a key role, no less the Mummery LJ as it did for the trial judge: hence he concludes:

it is not correct to say, as Mr Uddin does, that those gifts should be deducted from the dowry or that there is no legal right to enforce the dowry in the circumstances in which this marriage was dissolved. As a matter of contract, arising out of the agreement which the parties had made, I think that the judge was entitled in law to say that this was an enforceable agreement, and therefore he was right to grant judgment on the counterclaim.

But just what was the agreement in question? Once again there is great confusion. Was the jewellery which appears to be at the core of the dispute specified in the *nikah namah*? Or was it given as a supplement to the provisions set out in that contract – as some of the evidence appears to suggest? And when that contract was dissolved by 'The Muslim Shari Council' (whether by *khul* or *mubaraat*) what provisions, if any were made with respect to the *mehr,* or indeed to the jewellery, if it was considered in this case to be outwith the *mehr*

the effect of the expert evidence from Mr Saddiqui on Shari'a law and that, as a matter of Shari'a law in the circumstances of this marriage and its dissolution, the gifts were absolute,

not returnable, not deductible from the dowry, and the dowry was payable notwithstanding the failure of the marriage.

But was Mr. Saddiqui's expert guidance on this point correct? As Peal and Menski point out on Page 80 of Muslim Family law

7-18 The wife may lose the whole dower in two situations: First, if the marriage is dissolved by the husband before consummation, in various situations akin to annulment (see Nasir (1990b), p. 54).20 Secondly, if the marriage is dissolved by an action of the wife before consummation, the most common example being probably her exercise of the 'option of puberty', she is not entitled to any dower (see Nasir (1990b), pp. 54-55).

A simple point, of which any real expert in Islamic Law should have been aware. However in this case the misleading guidance provided by Mr. Saddiqui has had disastrous consequences.

That both the trial judge and a Lord Justice of Appeal should be have been prepared to recognise the enforceability of a *nikah namah* contract in English Law can only be regarded as welcome: one step forward. But as a result of being presented with unreliable evidence, the learned Judge has introduced a new precedent into English Law: namely that Muslim brides are entitled to retain their *mehr* and/or their dowries, regardless of the circumstances in which the marriage breaks down.

That certainly makes a nasty pitfall for those who assume that English law is beginning to accept the legitimacy of the principles of Shari'ah when agreements have explicitly been arrived at in those terms. So far as I can see Lord Mummery has fallen into the same pitfall as his colleague Lady Arden in her celebrated ruling in *Khan v Khan : [2007] EWCA Civ 399*. Although both learned Judges have sought to apply pluralistic principles in their judgements, they both failed adequately to apply those principles in the judgements which they went on to articulate.

Unfortunately the consequences of Mummery's judgement appear to be by far the most egregious. Whilst Lady Arden merely overlooked the corporate character of South Asian extended families, and consequently the crucial role of the family meeting as a method of quasi-judicial dispute settlement as between members of the corporation, her colleague now appears to have constructed a new manifestation of *angrezi shari'at*, which may well require a further application to the Court of Appeal before the consequent contradictions can be overturned.

Two steps back!

Roger Ballard
Consultant Anthropologist

12th January 2010