

**Family**

## Decision revisits intersection between a religious marriage and requirements under Family Law Act

By **John Schofield**

(April 14, 2021, 9:05 AM EDT) -- A recent Superior Court decision in Ontario sheds light on a potential legal predicament that could affect couples who rely entirely on religious rites for marriage and divorce, says a lawyer involved with the case.

In a March 31 decision in *Iqbal v. Shah* 2021 ONSC 2407, Brampton, Ont., Superior Court Justice Michael G. Emery found that Lubna Umbreen Shah could not claim spousal rights to the matrimonial home under the *Family Law Act* through her religious marriage to Mohammad Raza Iqbal because they had not finalized civil divorces to previous spouses, rendering their April 2019 Islamic marriage, or *nikah*, invalid.

The legal action was prompted by an application by Iqbal seeking a court order requiring the respondent, Shah, to vacate his Mississauga property under the *Trespass to Property Act*. Shah had continued to live there with her son following the breakdown of their relationship in late June 2019.

Iqbal was under a court order not to return to the property after allegedly assaulting Shah in June 2019. In addition to an order that Shah vacate the property, Iqbal requested an order that Shah clean and restore the property and, under a claim for unjust enrichment, reimbursement for his expenses to carry the property and \$3,000 in rent.

Shah opposed the application, arguing that she and Iqbal were legally married through the *nikah* and that, as Iqbal's spouse, she had a right to possess the matrimonial home under s. 19(1) of the *Family Law Act*. In a three-day trial heard in February, May and September 2020, she testified that both partners entered the *nikah* with the intention of complying with the *Ontario Marriage Act* (Ontario).

"The primary issue in this case is whether the parties are spouses under the definition of 'spouse' in s. 1 of the *Family Law Act*," Justice Emery wrote in his decision. "This singular issue turns on the question of whether the *nikah* ceremony held on April 6, 2019, resulted in a valid marriage between the parties under the law of Ontario."

The trial included expert evidence on how an Islamic marriage is received under Ontario law and, in particular, the *Marriage Act* (Ontario). But Justice Emery found that, on balance, the evidence presented during the trial undermined the legitimacy of the marriage.

While the couple sought the *nikah* to conform to their Islamic faith and Shah felt it was equivalent under Islamic or Sharia law to a marriage certification, evidence at trial revealed that Imam Nafis Bhayat from their Mississauga mosque had only verbally blessed the marriage during the small ceremony in front of family members and did not present the couple with a document of any kind. He instructed them to bring formal documents to him when their respective divorces were finalized and he would finish the paperwork at that time. The parties signed no Islamic marriage contract or other agreement.

Although Shah had received a *talaq*, or Islamic divorce, from her previous husband through the Islamic Sharia Council in Britain, it was not recognized as a civil divorce in Canada.

Bhayat testified that to officiate at a marriage, he requires a marriage licence, but he agreed to proceed with the *nikah* on the understanding that it would only be the religious ceremony, without any paperwork because a marriage licence was not available.

In expert testimony, Imam Abdalla Idris Ali confirmed that the religious requirements for an Islamic marriage had been met, but stated that he does not officiate at a nikah without a marriage licence between the parties.

Professor Mohamed Faisal Ahmedkutty, a law professor and Islamic law expert referred to in the decision as professor Kutty, acknowledged that Shah was technically subject to a legal disqualification because she was not divorced. However, he disagreed with the position that the deeming provisions under s. 31 of the *Marriage Act* did not apply, because he considered that all other requirements of an Islamic marriage had been met.

He argued that, as a matter of public policy, if marriages between parties who participate in good faith in a nikah and intend to be married are not recognized under the law, members of religious communities could be exposed to abuse and serious social issues upon the breakdown of a relationship.

Natasha Bakht, a law professor from the University of Ottawa and an expert in the field of religious contracts, confirmed that religious officials may perform marriages and that the couple had apparently entered into a valid Islamic marriage, but that both were under a legal disqualification from entering a new marriage because their civil divorces from their previous partners had not been obtained.

As a result, ruled Justice Emery, Shah could not be considered a spouse under Ontario law, even though Ontario courts have recognized religious divorces and the nikah as legitimate on their own. "It was not possible," he concluded, "for the parties to obtain a marriage licence because a court had not yet granted a Divorce Order to either Mr. Iqbal or to Ms. Shah as of the day of the nikah."

"Having found that Ms. Shah is not a spouse," he added further in the decision, "I conclude that she has no right to possession of the property under the *Family Law Act*."

But while ordering Shah to vacate the premises and to repay Iqbal for his expenses, the court did not order her to pay rent.



Muhammad Alam, Alam Law

Muhammad Alam, the founder and managing barrister for Mississauga-based Alam Law, who served as counsel for Iqbal, said there remains a misconception among some members of religious communities that religious divorces are legal in Ontario.

"This (decision) was so critical because if it would have gone the other way, then that would be a bigger problem for hundreds of marriages," he told *The Lawyer's Daily*.

"Any religious marriage is accepted," he added. "You can have a spousal right. But only the marriage is accepted. As for anything else in contravention of any Canadian law, then you don't have that advantage. You still have to comply with the legal requirements."

Aisha Amjad, a Toronto family lawyer, said the decision was not entirely surprising because even

looking at the nikah as a marriage contract, there were no terms or even documents on which to base the marriage. At under three years, the marriage was also too short for Shah to claim common law status.

"There was really nothing that she could have done in this situation because her marriage wasn't legal," she told *The Lawyer's Daily*. "And I agree with professor Kutty that it does give rise to a public policy concern for people who are in these circumstances. And I think that's why every case has to be scrutinized on the facts. And it just depends on the case before you."



Julie MacFarlane, University of Windsor law professor

University of Windsor law professor Julie MacFarlane, author of 2012 book *Islamic Divorce in North America: A Shari'a Path in a Secular Society*, agreed that the decision does point to a potential danger for vulnerable women in some religious communities.

"There are certainly people who would say that until the nikah is recognized as an enforceable contract, when it has all the contract elements ... there is some potential harm to women who are particularly vulnerable," she told *The Lawyer's Daily*. "I saw a number of cases in my research where there was a nikah only there would then be an effort by the man to avoid having to pay any support under the Canadian system. So it is something that potentially can be used to take advantage as long as the Canadian courts don't recognize it as either an enforceable contract or a legal marriage."

Muhammad Zafar with Mississauga-based Zafar Law, who served as counsel for Shah, did not respond to a request for comment.

*If you have any information, story ideas or news tips for The Lawyer's Daily please contact John Schofield at [john.schofield@lexisnexis.ca](mailto:john.schofield@lexisnexis.ca) or call 905-415-5891.*