



بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

حمد لله حمد الشاكرين، والصلاة والسلام على المبعوث رحمة للعالمين، وهادياً للناس أجمعين.
صلاةً وسلاماً دائمين إلى يوم الدين، وآله وصحبه ومن تبعهم بإحسان، وسلم تسليماً كثيراً، أما بعد:

مفتي محمد يوسف دنكا
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The Shari'ah Ruling of Obtaining Khula and Faskh Nikah the Civil Court

Khula (): When the wife makes an application to obtain separation from the husband.

Faskh Nikah (): When the court judge dispenses a decision of separation for the wife in the absence of any response or co-operation from the husband.

مه سبحانه وتعالى ، الجواب وبالله التوفيق-حامداً ومصلياً ومسلماً

﴿إذا كتب الطلاق بيده وجب عليه﴾ (مصنف ابن أبي شيبة ج:4 81)

According to the Islamic Shari'ah the validity of divorce depends on the husband either verbally or in writing giving divorce. If the relationship between the husband and wife emotionally deteriorates and it is not possible for them to live together in any manner. The teachings of Islam encourage the elders from both sides (the husband and the wives family) to seek a means of reconciliation.

Allah ﷻ has stated in the Holy Qur'an: 'If you fear a breach between them (husband and wife), appoint two arbitrators, one from his family and the other from hers; if they both wish for reconciliation, Allah will unite them in this. Indeed Allah is Ever All-Knowing, Well acquainted with all things.' (s4, v35)

It is clear from the above verse of the Noble Qur'an, that the responsibility of the parents or arbitrators is only to be a means of reconciliation. They do not have the freedom of enacting a divorce ruling if the reconciliation is not possible.

This is also proven from the statement of a Companion of the Prophet ﷺ: Hasan رضي الله عنه who related: 'The elders from both sides should seek to unite and resolve the difficulties between the spouses, they do not have the right to separate the couple.' (*Musanaf Abdur Razak, vol6, p389. no#11925 / Sunan Baihaqi, vol7, p498. no#14793*)

If in the process of seeking reconciliation, the couple do not agree the terms of an amicable reconciliation or even a separation, if the husband is unwilling to give his wife a divorce, then the wife can choose to obtain a divorce by the means afforded to her (by Khula).

It is not permissible for a woman to make a decision of divorce for herself due to her passionate stance. It is also not correct for her to believe and assume that, due to leaving the house of her husband, the Islamic Marriage (Nikah) she had with her husband is terminated, the teachings of Islam do not recommend this course of action and experience shows us that women who do so, cause harm to their relationships and any means of reconciliation, to safeguard women from this difficulty, the teachings of Islam have afforded woman legitimate rights when there is no scope of reconciliation and she desires separation from her husband.

In this situation, she will need to present her case to a Judge of the Islamic law, who also has to be a Muslim.

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: يا أيها الذين آمنوا أطيعوا الله أطيعوا الرسول وأولى الأمر منكم فإن تنزغتم ف

The Holy Qur'an states: 'O you who believe, Obey Allah and the Messenger and those of you who are in authority...' (s4, v59)

The Qur'an states: 'When there comes to them some matter involving public safety or fear, they make it known; if only they had referred it to the Messenger or those charged with authority amongst them...' (s4, v83)

Imam Zuhri رحمه الله a jurist of Islam, stated: 'When the Judge makes a ruling for separation, it is binding.' (*Musanaf Ibn Abi Shaybah, vol4, p110, #18310*)

In non-Muslim countries who should Make the Decision for Annulment of the Islamic Marriage?

Where there is no Islamic Judge present, the hearing for annulment should be heard in front of an Imarat Shari'ah (Shariah council of scholars) or, where even a Shariah council is not found, a group of the Muslims will suffice.

In the absence of an Islamic Judge, the decision of the Shariah council or group of Muslims will then be accepted as binding. (*Muktasar Khalil by Shaykh Khalil Bin Ishaq al Maliki, p163*)

The Muslim Judge, Shariah council or groups of Muslims also have the authority to annul the Islamic marriage in light of compliance with the Islamic conditions and rulings, even where the husband refuses to grant a divorce.

Obtaining Annulment of the Marriage or Divorce by means of a non Islamic Court and/or a non-Muslim Judge

The Muslims who live in non-Muslim countries are able to present their case for divorce/annulment in the non-Muslim courts, on the basis of three principles:

1. According to the Shari'ah, in matters pertaining to the religion of Islam, the ruling of a non-Muslim judge is not accepted as binding.

The Qur'an states: 'Then when they are about to attain their term appointed, either take them back in a good manner or part with them in a good manner, and take as witness two just persons from amongst you (Muslims)...' (s65, v2)

The Islamic Marriage (Nikah) is a religious matter, wherein the ruling a non-Muslim will not be binding upon the Muslims. (*Dure Mukhtar, Kitabal Qadah, vol8, p29*)

The Decision of Muslim Judge: If a non-Muslim court appoints a Muslim judge and that judge is mindful of the Shari'ah whilst making the divorce judgements, then the decision of the Muslim Judge will be valid in Shari'ah, if the Muslim Judge does not take into account the rulings of Shari'ah when making his decision then the decision will not constitute a valid divorce in Shari'ah. (*Kifayatul Mufti, vol, 2 Page 214*)

The Decision of a Non Muslim Judge: If a non-Muslim Judge gives a decision on divorce, then that decision will not constitute divorce according to Shari'ah, as a result of his/her decision the wife's marriage to her husband does not terminate and divorce is not issued. (*Fataawa Shami, vol 5, Page 428/ Badaa'i-us-Sana'i vol 7, page 3/ Idaahul Nawaadir vol 2 Page 152/ Qawa'adul Fiqh, page 421*)

لم ينفذ حكم الكافر على المسلم وينفذ للمسلم على الذمي ... (ردالمختار لعلامة عابدين الشامي، جلد5 428)
الصّلاحية للقضاء لها شرائط منها العقل ومنها البلوغ ومنها الإسلام ... (قواعد الفقه ص421 5 3)

2. If the husband grants a non-Muslim judge authority to dissolve the marriage or issue a divorce on his behalf, then the decision of the judge will be binding and the Nikah (Islamic Marriage) will be terminated, it is not necessary for the judge to be a Muslim for this authority/consent to be issued by the husband to him/her.

The Prophet ﷺ gave responsibility of the harvest of Khaybar (location) to the Jews in that area. (*Saheeh Muslim #1551*)

3. If the husband signs his approval on the divorce ruling of a non-Muslim judge, by way of accepting its ruling, then the Nikah (Islamic Marriage) will be terminated and the divorce will be issued.

As previously stated, the husbands verbal or written statement is required for a divorce to be issued. In this situation, it is not the ruling of the judge which is the cause of the divorce but, the acceptance and signing thereon of the husband.

عن إبراهيم إذا كتب الطلاق بيده وجب عليه. (مصنف ابن أبي شيبة ج:4 81)

Ibrahim Nakai and Ata bin Abi Riba رحمه stated: 'When the husband writes a divorce with his hand, the Islamic divorce will be issued.' (*Musanaf Ibn Abi Shaybah, vol4, p81*)

The refusal of the husband to sign his approval to the ruling of the judge will render the ruling null and void. His signature is required to make the ruling binding.

The means for Muslims Obtaining a Separation in the UK courts and rulings Pertaining to this

1. If the husband submits a divorce petition in the court by way of submission of papers and grants authority to the court to carry this out.
In reality, the authority of issuing divorce is with the husband in Islam. Having submitted the papers, the husbands authority would be passed to the judge presiding on the case, whether the judge was Muslim or non-Muslim. The decision of the judge will be binding. There would be no need to involve the Shariah council if the civil courts had already heard the case.
2. When the wife submits a divorce petition to the court to dissolve her Nikah (Islamic Marriage) and obtain a divorce. If the husband, upon receiving notification of the divorce proceedings, accepts the judge as his guardian (decision maker) in this matter, the husbands acceptance of the judge presiding over the case would make any decision that the judge makes binding. There is no condition of the judge being a Muslim or non-Muslim, there would be no need to involve the Shari'ah council if the civil courts had already heard the case.
3. If the wife submits a divorce petition to the court to dissolve her Nikah (Islamic Marriage) and obtain a divorce. Upon completion of all the hearings, assume a ruling of Decree Absolute is granted and sent to the husband for his information and acceptance. If the husband was to sign his acceptance of this ruling 'Decree Absolute'. Then divorce will occur due to the husbands approval in writing. There would be no need to involve the Shariah council if the civil courts had already heard the case.
4. If the wife submits a divorce petition to the non- Muslim court to dissolve her Nikah (Islamic Marriage) and obtain a divorce, after all of the hearings, assume a ruling of Decree Absolute is granted and sent to the husband, however, if the contents of the ruling of the court are not accepted by husband, the claims made against him are refuted and the ruling of the court for separation is also refuted (not accepted) by him, in this condition, the husband has not granted the non-Muslim judge the authority to dissolve his Nikah (Islamic Marriage). Nor would he have signed the Decree Absolute ruling from the court. In this matter, the Islamic Marriage contract of Nikah will not be broken, they will remain husband and wife according to Shari'ah.

In this circumstance, in order to obtain a divorce it is necessary for the wife to obtain Khula according to Shari'ah from the Shariah Council.

5. In the UK courts, after researching and hearing both sides of the case, the Judge issues a Decree Nisi. It is explained below that; for the husband, there can be two meanings for the Decree Nisi: (A) This is an notification that in the near future your marriage will be terminated by means of a Decree Absolute, if on the basis of the ruling of Decree Nisi the husband signs his acceptance, his Talaq (divorce according to Shari'ah) will not take place, because, this the Decree Nisi is taken only as a notification of a future ruling to be issued in respect of divorce, it is not the final decision itself. (B) The husband accepts the Decree Nisi as a notification of divorce, albeit a small one, he then accepts that he will get issued a Decree Absolute in the near future, if the husband then signs the Decree Nisi believing it to be a notification of divorce, a full Islamic divorce (Talaq) will take place.

If the 2nd understanding is found to be true, the woman will have to commence her Shari' waiting period from the date the Decree Nisi is signed by the husband, she will not have to wait for the Decree Absolute to be issued, she will have been issued a full Islamic divorce (Talaq) upon the signing of the Decree Nisi by the husband, with his believing it to be a notification of divorce. (*Islami Qanoon Nikah wa Talaq, p152-164*)

والله سبحانه وتعالى أعلم وهو الموفق

والله وحده هو المسؤول والمستعان وهو الهادي إلى سبيل الخير والسلام .
مفتي محمد يوسف دنكا (عفا الله عنه)

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