

Case Name:

Javed v. Kaukab

Between

**Marriam Javed, Applicant, and
Nabeel Khayyam Kaukab, Respondent**

[2010] O.J. No. 5483

2010 ONCJ 606

Brampton Registry No. 369/09

Ontario Court of Justice

M. Pawagi J.

Heard: June 7, September 24, and October 1, 2010.

Judgment: November 30, 2010.

(34 paras.)

Family law -- Maintenance and support -- Spousal support -- Considerations -- Ability to pay -- Agreement -- Obligation to achieve financial independence -- Quantum -- Separated -- Duration of marriage -- Order -- Time-limited -- Amount of award -- Periodic (monthly) award -- Application by wife for spousal support allowed -- Parties married in Nikah ceremony in 2005 and separated three years later, shortly after wife immigrated -- Wife unemployed and planned to attend college -- As Immigration and Refugee Board found marriage was genuine, husband estopped from arguing wife was not his spouse -- Wife's educational plan reasonable and would lead to self-sufficiency -- Given wife's needs, measures she was taking to become self-sufficient, capacity of husband to provide support and obligation to do so pursuant to sponsorship agreement, husband to pay spousal support of \$500 monthly for two years.

Application by the wife for spousal support. The husband was a Canadian citizen and the wife was a Pakistani citizen, who lived in Ireland prior to the marriage. In 2005, the parties married in Pakistan, by a ceremony called a Nikah, in which the husband participated by telephone from his home in Canada. Thereafter, the husband sponsored the wife to come to Canada as his spouse. Her application was denied on the grounds that there was no genuine marriage given that the parties had not met after the ceremony and that the marriage had not been consummated. After the husband

filed an appeal of the immigration decision, he traveled to Ireland where the parties held a reception for friends and family, and they went on a one-week honeymoon, during which the marriage was consummated. At the hearing of the immigration appeal, the Immigration and Refugee Board concluded that the marriage was genuine and not entered into primarily to obtain immigration status, and the appeal was granted. After the wife arrived in Canada in 2007, the parties got along only briefly and soon began sleeping apart. They separated eight months later. The wife was 25 years of age, had never been employed and had not completed any post-secondary education. She was supported first by her parents and later by the husband. She currently lived with her aunt and received social assistance of \$671 per month, for which the husband was being billed because of his sponsorship agreement with the government. The wife intended to go to college and had received student loans for that purpose. She had not applied for any jobs and she had no intention to, given her academic plans. The husband was 36 years of age. He worked seasonally as a snowboard instructor and was supported by his common law spouse, who was an articling student, with whom he was expecting a child. However, from about 1997 until 2004, he held senior positions in recruiting firms earning a salary of \$90,000 to \$95,000. In 2004, he started his own recruiting firm, which operated in 2004 and 2005. He last filed an income tax return in 2004, reporting an income of about \$15,000. At trial, the husband argued, contrary to the position he had taken before the Immigration and Refugee Board and their decision, that Nikah was not a legal marriage, and consequently, the wife was not a spouse as defined by the Family Law Act and therefore not entitled to spousal support. Alternatively, he argued that he did not have the ability to pay spousal support.

HELD: Application allowed. As the Immigration and Refugee Board found that this was a genuine marriage and that the husband could sponsor the wife to come to Canada as his spouse, the husband was estopped from arguing that the wife was not his spouse. Although the husband was not currently working, it was clear from his work history that he was capable of providing support. The wife's educational plan was reasonable and would lead to her becoming self-sufficient. Given the wife's needs, the measures she was taking to become self-sufficient, the capacity of the husband to provide support and his obligation to do so pursuant to the sponsorship agreement, the husband was to pay spousal support of \$500 per month for a two-year period.

Statutes, Regulations and Rules Cited:

Family Law Act, R.S.O. 1990, c. F.3, s. 1(1), s. 29, s. 30, s. 33(8), s. 33(9), s. 33(9)(d), s. 33(9)(m)

Court Summary:

Evidence -- *Res judicata* -- Estoppel -- Issue estoppel -- About 3 1/2 years ago, respondent had argued before Immigration Appeal Board that Muslim ceremony of "Nikah" was genuine marriage that would allow him to sponsor applicant into Canada as his "spouse" -- Appeal board agreed -- When applicant recently filed support claim against him, he tried to argue that "Nikah" was not in fact true marriage -- Court ruled that, in light of Immigration Appeal Board finding, respondent was estopped from now arguing that applicant was somehow not his spouse.

Support Orders -- Assessment of quantum -- Dependant's assets, means and needs -- Any other legal right of dependant to support (except out of public money) -- Support commitment in sponsorship agreement with immigration authorities -- Court noted that clause 33(9)(m) of *Family Law Act* specifically directed court to consider "any other legal right" of dependant to support in its

assessment of quantum -- Thus, fact that government agency was attempting to recover welfare payments made to wife because of husband's default of sponsorship agreement was no bar making of support order -- Indeed, existence of sponsorship agreement actually strengthened obligation to support.

Support Orders -- Assessment of quantum -- Payor's assets and means -- Attribution of income -- Evidence -- Inference from ability to work -- Clause 33(9)(d) of *Family Law Act* directs court to consider respondent's "capacity" to provide support and not what he chooses to do with his productive time -- Evidence in this case indicated that respondent had been "high roller" in corporate circles but was now content to be merely "house-husband" -- Court concluded that respondent was capable of providing support in monthly amount of \$500 for next 2 years (by which time applicant would be self-sufficient).

Cases cited:

M.(O.) v. M.(N.E.), 2003 BCPC 99, 27 Imm. L.R. (3d) 73, 40 R.F.L. (5th) 189, [2003] B.C.J. No. 774, 2003 CarswellBC 795 (B.C. Prov. Ct.).

Segal v. Qu, 2001 CanLII 28201, 17 R.F.L. (5th) 152, [2001] O.J. No. 2646, [2001] O.T.C. 500, 2001 CarswellOnt 2304 (Ont. S.C.).

Statutes and Regulations cited:

Family Law Act, R.S.O. 1990, c. F-3 [as amended], subsection 1(1), section 29, section 30, subsection 33(8), subsection 33(9), clause 33(9)(d) and clause 33(9)(m).

Authors and Works cited:

McLeod, James G.: "Annotation" to *Poelen v. Poelen* (2000), 7 R.F.L. (5th) at 421.

Rogerson, Carol J. and D.A. Rollie Thompson: *Spousal Support Advisory Guidelines*, (Ottawa: Minister of Justice and Attorney General of Canada, July 2008).

Counsel:

Lance Carey Talbot, counsel for the applicant.

Nabeel Khayyam Kaukab, on his own behalf.

Reasons for Judgment

M. PAWAGI J.:--

1: NATURE OF THE CASE

1 This is Ms. Javed's Application for spousal support. Mr. Kaukab disputes every aspect of Ms. Javed's Application, including that she is his spouse. His position is that the Muslim religious ceremony that they underwent in 2005 (a "Nikah") is not a legal marriage and consequently he does not have any obligation to pay spousal support, despite the fact that he successfully sponsored her to

Canada from Ireland in 2007 as his spouse. His alternative position is that he does not have the ability to pay spousal support as he is not working and is being supported by his current common-law spouse with whom he is expecting a child in December.

2: FACTS

2 Mr. Kaukab is 36 years old. He was born in Canada on 22 July 1974. Ms. Javed is 25 years old. She was born in Pakistan on 12 July 1985. They are first cousins (their mothers are sisters). At the time that the two families entered into marriage discussions, Ms. Javed was living in Ireland with her parents. Ms. Javed was able to live in Ireland on a temporary visa that was renewable yearly. Mr. Kaukab came to Ireland to meet both Ms. Javed and her twin sister and decided in favour of Ms. Javed. The families chose to hold the ceremony in Pakistan instead of Ireland because it would be a shorter wait time for a date, many family members lived in Pakistan, and the ceremony could be done by proxy so Mr. Kaukab would not have to travel.

3 The ceremony, called a "Nikah", was held on 14 May 2005 in Pakistan. Ms. Javed and the Iman conducting the ceremony were present in Pakistan and Mr. Kaukab was present by telephone from his home in Mississauga. Ms. Javed registered the "Nikah" in Pakistan, the next day, 15 May 2005.

4 Mr. Kaukab sponsored Ms. Javed in her application to come to Canada as his spouse. On 23 January 2006, her application was rejected on the grounds that there was no genuine marriage. The immigration officer's concerns included the fact that they had not met after the proxy ceremony and the marriage had not been consummated, despite Mr. Kaukab having the ability and the means to travel to Ireland to visit Ms. Javed.

5 Mr. Kaukab filed a notice of appeal on 6 February 2006. Later in 2006, he travelled to Ireland where the parties held a reception for friends and family (what the appeal decision describes as "extensive celebrations of the marriage over three days") and they went on a one-week honeymoon in Ireland during which time their relationship was consummated. The appeal was heard over three days by the Immigration and Refugee Board (Immigration Appeal Division). Both parties gave oral evidence: Ms. Javed over the telephone from Ireland and Mr. Kaukab in person. The board granted the appeal in a decision released on 19 February 2007, [2007] I.A.D.D. No. 2614, stating at paragraph 22, "Therefore, having regard to the evidence presented, the panel concludes that the marriage is genuine and was not entered into primarily to obtain immigration status in Canada."

6 Ms. Javed arrived in Canada on 17 October 2007 as a permanent resident. It appears that they got along only briefly. Mr. Kaukab testified that he began sleeping apart after a few months and that they were clearly "mismatched." He said that he paid for everything, clothes, day trips and that she refused to apply for jobs and she only got her driver's licence after he insisted. She testified that they got along at first and then he became controlling and abusive. He refused to let her speak freely to her parents and, in one instance, he struck her on the face and head. He denies ever hitting her. He says that it was her decision to separate. The parties separated, eight months later, on 17 June 2008. The separation occurred the day they arrived in Pakistan for what Ms. Javed thought was a two-week trip. However, Mr. Kaukab left her in Pakistan. She did not yet have her permanent resident card and it took her about six months before she was able to return to Canada on 9 December 2008. Soon after her return to Canada, Ms. Javed commenced her application for spousal support.

7 Ms. Javed's financial situation is as follows: She was 19 years old on the date of the "Nikah" ceremony. She has never worked and she has completed no post-secondary education. She studied some English at school in Pakistan and took some English courses while living in Ireland. She was

supported first by her parents and then by Mr. Kaukab. When they separated and she was in Pakistan, she had rental income from Mr. Kaukab's mother's property in Pakistan of about 6,000 rupees per month, which was enough to cover her expenses in Pakistan, but she does not currently have this income as the property became vacant.

8 She began receiving social assistance of \$571 per month, plus \$100 per month for transportation, when she returned to Canada in January 2009. She lives with her aunt in Mississauga and pays her \$350 per month in rent. From January 2009 to April 2010, she attended a language institute to study English as a second language. She has completed 6 levels. She is studying advanced English for academic purposes. She intends to go to Sheridan College to complete a two-year course in business accounting. She has received an OSAP loan of \$4,480 and a grant of \$872 for the first semester. She has not applied for any jobs and does not intend to, as she thinks that it would be too difficult to work and to attend school full-time. She did some volunteer work at a community centre day care while taking her English courses.

3: ANALYSIS

3.1: Is Ms. Javed a Spouse?

9 Pursuant to section 30 of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended (the "Act"), "every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so."

10 The term "spouse" is defined in section 29 and subsection 1(1). Since the parties have not lived together for three years or have a child together, to qualify for spousal support, Ms. Javed must be found to be a spouse pursuant to subsection 1(1) which defines "spouse" as "either of two persons who (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right."

11 On the third day of trial, Mr. Kaukab attempted to make the argument that the Ontario Court of Justice had no jurisdiction to hear this application because it lacked the jurisdiction to make a "declaratory order"; that a "declaration of validity" of the marriage must be made before any claim for spousal support can be made; and that only a Superior Court of Justice could make such a declaratory order. His argument was rejected. I am not required to make a declaratory order in this instance, I am merely required to make a finding of fact whether Ms. Javed is a spouse or not.

12 The onus is on Ms. Javed to establish that she is a "spouse" under the Act. Mr. Kaukab submits that she has not met that onus as she has not provided any expert evidence on a point of foreign law; namely, whether a "Nikah" ceremony qualifies as a legal marriage ceremony. He further submits that no weight should be given to the "Nikah" registration certificates entered as exhibits in this proceeding, as they have not been certified by Pakistan's Department of Foreign Affairs or the Canadian Consulate in Pakistan. He testified that he did not give Ms. Javed his permission to register the "Nikah" and that, even if the registration was proper, he disputes the English translation of the original Urdu certificate that Ms. Javed obtained. His position is that "Nikah Nama" does not translate as "Marriage certificate." He testified that the "Nikah" is not a marriage ceremony. Mr. Kaukab defined "Nikah" as "a religious ceremony that allows a man and a woman to live together without breaking any Islamic taboos."

13 Mr. Kaukab further submitted that Ms. Javed in her testimony admitted that they were not legally married. It was regarding an argument that she had had with Mr. Kaukab, and she testified,

through the Urdu interpreter, that she had asked Mr. Kaukab, "Why are you not treating me like a wife?" Mr. Kaukab objected and said the correct translation of what she had said would actually be "Why are you not *making* me into a wife" thus proving his point that they were both fully aware that she was not his legal wife *yet*. Mr. Kaukab did not explain what steps, according to him, would be required to make her into a legal wife. Mr. Kaukab raised many objections regarding the interpreter; for instance, when the interpreter translated "Nikah" as "marriage." This objection was sustained and the interpreter was directed to use the term "Nikah" without translating it into English as its meaning was disputed.

14 However, I find that I do not need to determine the definition of "Nikah" or the validity of the "Nikah" registration based on the contradictory testimony of the parties, as I find that the ruling of the Immigration Appeal Division is dispositive of this issue. The appeal decision found that there was a "genuine marriage" in this case and consequently that Mr. Kaukab could sponsor Ms. Javed to Canada as his "spouse." The decision was based in large part on the *viva voce* testimony of Mr. Kaukab himself. After having successfully obtained a ruling that Ms. Javed is his legal spouse in order to sponsor her to Canada, Mr. Kaukab cannot now turn around and argue that she is not his legal spouse in order to avoid paying her spousal support.

15 Mr. Kaukab actually asserts that his testimony at the immigration appeal does not contradict his testimony at this trial, pointing to paragraph 17 of the appeal decision, which I have reproduced in full as follows:

The appellant [Mr. Kaukab] testified that he attempted to have the legal wedding ceremony in Ireland. The applicant [Ms. Javed] tried to arrange a date with various officiants but was told a date would be several months in the future due to high demand. In addition, most of the couple's maternal relatives are in Pakistan. The applicant could obtain a date there very quickly. All of the appellant's immediate family could be present in Canada for a telephone/Web camera wedding, as well as a lot of the family in Pakistan could be present in person there with the applicant. This would save the expense of the appellant's immediate family travelling to Ireland for a Nikkah Nama there. Therefore, a Nikkah Nama was conducted in Pakistan.

Mr. Kaukab's argument was that he was clear in his testimony at the immigration appeal that while a "legal wedding ceremony in Ireland" was contemplated, what actually took place was a "Nikah Nama" in Pakistan, and the above paragraph reflects this distinction. I find this argument disingenuous, to say the least. In any event, even if I accept his highly implausible contention that he successfully sponsored her as his spouse while at the same time making clear in his testimony at the appeal that she was not his legal spouse and they were not legally married, this was not what the appeal division found. In the paragraph just before the one Mr. Kaukab cites, the appeal division finds as follows: "The couple were married in a Nikah Nama (a Muslim marriage) by telephone on 15 May 2005." And, as stated above, the decision concludes at paragraph 22 as follows: "Therefore, having regard to the evidence presented, the panel concludes that the marriage is genuine and was not entered into primarily to obtain immigration status in Canada."

3.2: Does Mr. Kaukab Have an Obligation to Pay Spousal Support?

16 As cited above, pursuant to section 30 of the *Family Law Act*, every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.

17 The purposes of an order for support of a spouse are set out in subsection 33(8):

- (8) *Purposes of order for support of spouse.* -- An order for the support of a spouse should,
- (a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
 - (b) share the economic burden of child support equitably;
 - (c) make fair provision to assist the spouse to become able to contribute to his or her own support; and
 - (d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

18 Factors to consider in determining the amount are set out in subsection 33(9):

- (9) *Determination of amount for support of spouses, parents.* -- In determining the amount and duration, if any, of support for a spouse or parent in relation to need, the court shall consider all the circumstances of the parties, including,
- (a) the dependant's and respondent's current assets and means;
 - (b) the assets and means that the dependant and respondent are likely to have in the future;
 - (c) the dependant's capacity to contribute to his or her own support;
 - (d) the respondent's capacity to provide support;
 - (e) the dependant's and respondent's age and physical and mental health;
 - (f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;
 - (g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
 - (h) any legal obligation of the respondent or dependant to provide support for another person;
 - (i) the desirability of the dependant or respondent remaining at home to care for a child;
 - (j) a contribution by the dependant to the realization of the respondent's career potential;
 - (k) [REPEALED: S.O. 1997, c. 20, s. 3(3).]
 - (l) if the dependant is a spouse,
 - (i) the length of time the dependant and respondent cohabited,

- (ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,
 - (iii) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,
 - (iv) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,
 - (v) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support,
 - (v.1) [REPEALED: S.O. 2005, c. 5, s. 27(12).]
 - (vi) the effect on the spouse's earnings and career development of the responsibility of caring for a child; and
- (m) any other legal right of the dependant to support, other than out of public money.

19 Mr. Kaukab submits that, even if Ms. Javed is found to be his spouse, he should not be obligated to pay spousal support for the following reasons:

3.2(a): Ms. Javed Entered into the Marriage Solely to Immigrate to Canada

20 He cites in support of this contention her failed attempt to obtain a temporary resident permit a year prior to the "Nikah", submitting that this shows her primary motivation was to enter Canada and, when she could not do it one way, she tried another way. This was one of the concerns of the immigration officer who originally rejected the sponsorship. However, the appeal decision considered this issue and accepted the evidence that Ms. Javed and her mother attempted to enter Canada prior to the "Nikah" in order to see what Ms. Javed's circumstances would be like if she married Mr. Kaukab. Thus, this issue has been dealt with. Mr. Kaukab raises no other evidence in support of his contention that Ms. Javed entered into the marriage solely for immigration purposes. Furthermore, in the case that he himself cites, *O.M. v. N.E.M.*, 2003 BCPC 99, 27 Imm. L.R. (3d) 73, 40 R.F.L. (5th) 189, [2003] B.C.J. No. 774, 2003 CarswellBC 795 (B.C. Prov. Ct.), despite the parties only living together for four months and despite the court finding "credible evidence that the Applicant deliberately entered into a 'marriage of convenience' unknowingly to her husband, to facilitate access into Canada" (paragraph [27]), the court still ordered the husband to pay \$400 per month towards the applicant's rent for nine months in part because "it is incumbent on Mr. M. to accept some responsibility for bringing his wife into Canada and ensure to some extent that she is not placed on the Welfare rolls" (paragraph [33]).

3.2(b): Mr. Kaukab is Already Being Billed by the Government for Her Support

21 Mr. Kaukab signed a sponsorship agreement with the Government of Canada to support her for three years. The agreement expires in October 2010. The Ministry of Community and Social Services has billed him about \$4,600 to date (as a result of Ms. Javed's having had to turn to social

assistance). He has not paid any of the money sought as of yet as he is awaiting the outcome of this decision. He argues that it would be double dipping if he has to pay this bill to the Ministry and pay spousal support to Ms. Javed.

22 Mr. Kaukab attaches the collection letter from the Ministry to his Financial Statement sworn on 30 September 2010 (exhibit "O"). I have reproduced an excerpt from the first page of the letter as follows:

I am writing about the legal undertaking you signed with the Government of Canada to sponsor Marriam Javed into the country.

Sponsoring an immigrant to Canada is a serious commitment. When sponsors sign a sponsorship undertaking, they promise to support their sponsored relative so that he or she will not need to apply for social assistance. This agreement remains in effect regardless of changes in the sponsor's circumstances.

When a sponsor does not fulfill the terms of this agreement and the sponsored person receives social assistance in Ontario, the sponsor must repay the amount of social assistance that the sponsored person received during the period of the undertaking. Social assistance is an income of last resort and we must make sure that it goes to those who need it most.

The ministry has determined that you are in default of your sponsorship undertaking because the person(s) you sponsored has/have collected social assistance. You currently owe the Government of Ontario over \$4,600.00.

Please note that if the person(s) you sponsored continue(s) to collect social assistance, your debt will increase until you fully resume your sponsorship support obligation and her/she/they no longer receive(s) social assistance in Ontario.

23 There are not many cases where courts have considered the intersection of sponsorship agreements and spousal support obligations. In *Segal v. Qu*, 2001 CanLII 28201, 17 R.F.L. (5th) 152, [2001] O.J. No. 2646, [2001] O.T.C. 500, 2001 CarswellOnt 2304 (Ont. S.C.), Justice Susan G. Himel cited (at paragraph [78]) James G. McLeod in his "Annotation" to one of those rare decisions, *Poelen v. Poelen* (2000), 7 R.F.L. (5th) 420 at 421:

There is surprisingly little authority on the effect of immigration sponsorship on a spouse's support rights. Most cases refer to the undertaking in passing, point out that it is relevant and move on to decide support without further regard to the sponsorship. The two cases referred to by Lee J. in *Poelen* are perfect examples of this attitude. In *Lee v. Lee* (1986), 3 R.F.L. (3d) 172 (Alta. Q.B.) and *Thind v. Thind* (1988), 14 R.F.L. (3d) 165 (B.C.S.C.), the courts did no more than mention the undertaking in passing. In both cases, the wives were unable to support themselves and the husbands had the ability to pay. Both were also short-duration marriages -- in *Lee* approximately two years and in *Thind* six years. In *Lee*, the husband was ordered to pay support for two years, after which time

support could be reviewed. In *Thind*, the wife was awarded a small lump sum. In neither case did the amount or duration of support appear to reflect the spirit or language of the undertaking.

More recently, the Ontario Court of Appeal noted in passing that such an undertaking was relevant to a judge's decision to award lump sum support following the breakdown of a short marriage: *Nahatchewitz v. Nahatchewitz* (1999), 1 R.F.L. (5th) 395 (Ont. C.A.), again without any indication of how or why.

Justice Himel went on to describe the different approaches:

[79] The decisions that mention a sponsorship agreement in determining spousal support appear to reach slightly different conclusions about the agreement's effect. Some decisions, as noted by Professor McLeod, simply state that the sponsorship agreement is relevant: *Thind, supra*; *Lee, supra*; *Sarai v. Sarai*, [1999] B.C.J. No. 2786 (B.C.S.C.). Others indicate that the sponsorship agreement creates additional responsibility on the part of the sponsoring spouse: *Szczur v. Szczur*, [1999] A.J. No. 1523 (Alta. Q.B.); *Camilleri v. Camilleri*, [2000] O.J. No. 4136 (Ont. S.C.); *Achari v. Samy* (2000), 9 R.F.L. (5th) 247 (B.C.S.C.); *Poelen, supra*. Two authorities state that it would be unreasonable for the spouse in need to have to rely on public assistance when the other spouse has signed a sponsorship undertaking: *Ferron v. Ferron* (1997), 31 R.F.L. (4th) 26 (Ont. Prov. Div.); *Anilevska v. Meheriuk*, [2001] A.J. No. 584 (Alta. Q.B.).

[80] *Achari v. Samy, supra*, is the most thorough examination of the issue to date. The husband had signed an undertaking to Citizenship and Immigration Canada to support the wife for a period of ten years. The agreement specifically provided that separation or divorce does not cancel the sponsorship obligations. Oppal J. held at p. 255 that the agreement is "very much relevant in determining entitlement" to support. He found that the husband had agreed to provide for the wife's essential needs and the wife relied on that agreement when she left Fiji to immigrate to Canada. In addressing the impact of the agreement, Oppal J. stated at p. 255 that the undertaking cannot be ignored since to do so "would render it meaningless" and "it would be contrary to public policy to permit a person who has given an undertaking to provide support for a spouse to simply ignore the legal obligation to do so."

24 The case law is clear that any agreement can be considered. It does not matter whether the agreement is between the sponsor and the immigrant, or whether, as in this case, it is between the sponsor and the government. It is also noted that the precise wordings of the agreements may vary, although in most cases, as in this case, the text of the sponsorship agreement was not provided. Clause 33(9)(m) of the *Family Law Act* (reproduced in full above) specifically directs the court to consider "any other legal right of the dependant to support" in determining the amount and duration of support. Thus, far from negating his obligation to pay spousal support, the existence of a sponsorship agreement actually strengthens the obligation.

3.2(c): Mr. Kaukab Has No Income

25 Mr. Kaukab testified that he works seasonally as a snowboard instructor and is being supported by his common-law spouse who is an articling student. In his financial statement, sworn on 30 September 2010 (exhibit "O"), he gives his yearly income as zero. He gave his employment history as follows: at the age of 15 he helped run part of his family business (hockey and baseball card memorabilia). He held a senior position at a recruiting firm, Saber, for 6 or 7 years leaving in 2004. At Saber in 1999, he made about \$90,000 or \$95,000. He also worked for other firms, including Bosworth Field Associates and Interim Personnel. He started his own recruiting firm called Talent Lounge which operated in 2004 and 2005. He last filed an income tax return in 2004, reporting an income of about \$15,000.

26 Ms. Javed testified that Mr. Kaukab never told her what business he did before she came to Canada. After she arrived, he told her that he was a "head hunter-recruiter" downtown. Mr. Kaukab and Ms. Javed lived with his parents and younger brother. She describes that, when they were living together, he and his younger brother would get up and go to work every day, that he told her he earns \$100,000 per year. She described that they had a very good lifestyle living with his parents and that he drove a Corvette. She did not know what year. She described that he was very busy working, with meetings late at night, that his parents did not work and that it was the two brothers who paid the household expenses.

27 Ms. Javed's mother testified that Mr. Kaukab told her in 2004 in Ireland, when the families met to discuss marriage, that his income was \$200,000 per year. She testified that "He always used to say he had a lot of work, so no time to talk, because he was such a busy person you have to book an appointment to speak to him."

28 Mr. Kaukab testified that he had never told Ms. Javed's mother that he made \$200,000 per year, but that, when she asked "Do I make enough money to support her daughter, I said yes. She said how much, I said enough." When asked whether he did believe at that time that he earned enough to support Ms. Javed, he said, no. When asked then why he said yes to Ms. Javed's mother, he explained that "It was a question I didn't anticipate getting, question I was uncomfortable with, so that is the answer that I gave." However, I find it was completely reasonable and completely unsurprising that Ms. Javed would inquire about his income, given that there were in marriage negotiations and her daughter was 19-years-old, uneducated, and had never supported herself. The immigration appeal decision at paragraph [14] also referred to Mr. Kaukab's testimony that he will be the breadwinner: "It also became apparent that the appellant [Mr. Kaukab] is the half of the couple more responsible for dealing with matters that are more official and involve dealing with authorities. This fits the appellant's [Mr. Kaukab's] description of the marriage as one where he is expected to be the breadwinner and the applicant [Ms. Javed] will likely play a larger role in running their household."

29 Mr. Kaukab testified that he was able to support Ms. Javed and himself even though he was not working because his younger brother, Anjum Kaukab, lent him \$118,150. His younger brother runs his own recruiting firm called Shikari Group. When counsel for Ms. Javed asked Mr. Kaukab why he could not work with his brother since they were in the same business of recruiting, he answered that the fields were entirely different: one was the IT field and the other was the financial services field. Then, on 14 January 2008, his brother lent him more money, \$70,526, but this loan he returned almost immediately, keeping just \$526. As counsel for Ms. Javed succinctly put it, "For someone who has no income, he comes into contact with a lot of money." Counsel for Ms. Javed entered as exhibit "T" a write up about Mr. Kaukab in a snowboarding newsletter, dated April 2010,

about a Canadian Association of Snowboard Instructors Board of Directors election for which Mr. Kaukab was running:

Nabeel Kaukab

A serial entrepreneur, Nabeel Kaukab started his first business at the age of 16. Following his passion for business and sports, Nabeel founded one of Canada's most successful businesses, specializing in retail and wholesale of collectors' memorabilia. Nabeel held senior positions with several Canadian companies in Toronto. During his tenure in the executive search business, Nabeel helped hundreds of companies source and secure top executives to build and manage these businesses. His ability to work with, and advise, senior management of these companies has been vital to the success of these corporations.

Nabeel holds a Bachelor's degree and is an avid traveler, snowboarder, camper, motorcyclist and martial artist. Nabeel currently serves as an advisor/director to several private organizations and corporations in industries including real estate, executive search, executive coaching, chartered accounting, technology and consulting.

Nabeel instructs at Craigeleigh Ski Club in Collingwood, Ontario. With his passion for sport, combined with his background in business, Nabeel could make a valuable contribution to CASI.

30 Mr. Kaukab explained the write-up as being for an election he did not expect to win, that he answered questions for the interviewer but never saw the write-up. He testified that he never intended to be a house husband but that is what he has ended up being. His common-law spouse is working as an articling student and is supporting them both. They are expecting a baby in December. She, along with his brother, were assisting him at counsel table throughout the trial, taking notes and passing him documents, but he only introduced her at the outset as his "friend." It was only under cross-examination that he revealed she was his common-law spouse.

31 Clause 33(9)(d) of the *Family Law Act* is clear that it is the "capacity" of Mr. Kaukab to provide support that the court is to consider, not what he chooses to do. It is clear from his work history that he is capable of providing support.

32 Counsel for the mother provided a range of support calculations based on the *Spousal Support Advisory Guidelines*, (Ottawa: Minister of Justice and Attorney General of Canada, July 2008) "without child support" formula, based on incomes for Mr. Kaukab ranging from \$60,000 to \$100,000 and incomes for Ms. Javed ranging from 0 to \$10,000. The various combinations yield spousal support figures ranging from a low of \$188 per month to a high of \$500 per month. Counsel for the mother submitted that the award should actually be as much as \$1,000 per month, given the sponsorship obligation and the fact that Ms. Javed has moved to another country and has to learn another language and attain educational qualifications before she can support herself.

33 Mr. Kaukab disputes the necessity of her continuing to take English classes as she could get a minimum wage job now. Ms. Javed did appear to be fairly fluent in English. She did not use the interpreter's services while listening to the testimony of others or the submissions of counsel, but

only for her own testimony. And even then, she once responded to a question in English which the interpreter then instinctively translated into Urdu for the court. However, her plan of taking "academic" level English classes and then enrolling in a two-year business course at Sheridan College is a reasonable one that will lead to her becoming self-sufficient. She has received assistance from OSAP (both loan and grant) and her accommodation expenses are modest. Thus a spousal support award of \$500 per month for two years, commencing on 1 December 2010, is reasonable having regard to Ms. Javed's needs and the measures that she is taking to become self-sufficient, the capacity of Mr. Kaukab to provide support, and his obligation to do so pursuant to the sponsorship agreement.

4: ORDER

34 The respondent Nabeel Khayyam Kaukab shall pay the applicant Marriam Javed spousal support of \$500 per month, commencing on 1 December 2010, for a period of two years.

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---- End of Request ----

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