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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No. 74048 of 2019
(Sumayyah Moses v. SHO & 3 others)

JUDGMENT

Date of hearing	**12.3.2020**
Petitioner by:	**Pir Abdul Wahid, Advocate**
Respondents by:	**The State:** **Mr. Zaman Khan Vardag, Additional Advocate General** **Respondent No.3:** **Mr. Zubair Afzal Rana, Advocate assisted by Mr. Tasawar Hussain Virk, Advocate**
Amicus curiae	**Mr. Muhammad Shahzad Shaukat, Advocate**

TARIQ SALEEM SHEIKH, J. – Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (the "Constitution"), the Petitioner seeks recovery of her two minor sons, Abdul Hannan Moses and Arshman Rizwan, from the alleged illegal custody of Respondent No.3, her husband, so that she may take them back to South Africa.

Facts

2. Brief facts of the case are that the Petitioner is a South African national and a Muslim by faith. She met Respondent No.3 who hailed from Samundari, District Faisalabad, and had gone to South Africa to earn livelihood. On 23.7.2010 they got married and out of the wedlock two boys, Abdul Hannan Moses and Arshman Rizwan, were born on 13.4.2011 and 17.6.2014 respectively. According to the Petitioner, they lived together in South Africa and in 2016 came to Pakistan along with the children to visit the family of

Respondent No.3. When their scheduled vacation ended Respondent No.3 sent her back but himself stayed behind with the children on the pretext that his father was ill. He promised to follow her as soon as he got better. The Petitioner returned to South Africa without suspecting that it was a clever ruse to snatch the children. She could not immediately travel to Pakistan again because of her job commitments and ailing mother. However, she kept urging Respondent No.3 to come back or at least return the children but he did not pay heed to her. In April 2019, she came to Pakistan but Respondent No.3 did not welcome her (although their marriage was and still is intact) and instead maltreated her. She had no option but to go back. Under her instructions her lawyer filed Writ Petition No.56094/2019 in this Court for recovery of the boys but that could not proceed because she had flown back. Accordingly, that petition was disposed of vide order dated 30.9.2019. The Petitioner has come to Pakistan again and filed this second petition for the same relief. On 1.8.2019 she instituted proceedings against Respondent No.3 in the Childrens' Court at Worcester, South Africa, for custody of the boys which are still pending. Meanwhile, on 13.5.2019 Respondent No.3 filed an application under Section 7 of the Guardian & Wards Act, 1890, in the Guardian Court at Samundari in which the Petitioner was proceeded ex-parte and he was appointed guardian of the person of the minors vide order dated 30.10.2019. In pursuance thereof Guardianship Certificate was issued to him on 17.12.2019.

Submissions of the learned counsel

3. The learned counsel for the Petitioner, Pir Abdul Wahid, Advocate, contended that Abdul Hannan and Arshman Rizwan were South African nationals and habitual residents of Worcester. Respondent No.3 deceitfully brought them to Pakistan and deprived the Petitioner of her parental rights. He maintained that the custody of the children with Respondent No.3 was illegal and improper. The learned counsel further contended that the children were of tender age and needed the support and care of the Petitioner. It was in their best

interest that they should be repatriated to South Africa. The Petitioner had instituted proceedings in the Childrens' Court at Worchester which were still pending. If Respondent No.3 wanted the custody of the boys he could go and contest them. As regards the Guardianship Certificate dated 17.12.2019, the learned counsel submitted that it was without jurisdiction. The Guardian Court at Samundari was not competent to appoint the guardian of Abdul Hannan and Arshman Rizwan as they were citizens of South Africa. Even otherwise, the said certificate had no legal sanctity as Respondent No.3 had procured it at the Petitioner's back. He dishonestly gave her wrong address to the Court and manoeuvred to keep her out of the proceedings.

4. Mr. Zaman Khan Vardag, Additional Advocate General, raised an objection that this constitutional petition was not maintainable as the Petitioner had an alternate and efficacious remedy before the Guardian Court.

5. Mr. Zubair Afzal Rana, Advocate, who represented Respondent No.3, also opposed this petition. He contended that the Petitioner had distorted the facts and attempted to mislead this Court. He maintained that the family had their home in South Africa. In 2016 they decided to permanently shift to Pakistan and came here. After some time the Petitioner's mother got ill so she went back but did not return and instead filed this petition. The learned counsel insisted that it was not a case of child snatching. He further submitted that Abdul Hannan and Arshman Rizwan were Pakistani citizens by descent as provided by Section 5 of the Citizenship Act, 1951. The Guardian Court at Samundari was competent to entertain the application of Respondent No.3 and had rightly appointed him as guardian of their person. Guardianship Certificate dated 17.12.2019 held the field and the Petitioner had not challenged it todate. He denied the allegation that Respondent No.3 had used chicanery to procure it and added that till such time it was quashed/set aside through due process this Court could not intervene while exercising constitutional jurisdiction.

6. The learned *amicus curiae*, Mr. Muhammad Shahzad Shaukat, Advocate, submitted that in custody matters welfare of the child was of paramount consideration. His best interests were normally secured by having his future determined in the jurisdiction of his habitual residence. The instant case, however, had some peculiarities. Abdul Hannan and Arshman Rizwan came to Pakistan in 2016 and were here for more than 3½ years. The said period was long enough for them to develop roots. There was, *prima facie*, evidence that the Petitioner acquiesced in their settling in this country. Therefore, an elaborate inquiry was required to determine as to what would serve their best interests. The matter could not be decided in these habeas corpus proceedings which were summary in nature. The learned *amicus curiae* urged that the Petitioner should be directed to seek her remedies before the Guardian Court which was competent to decide all questions of law and fact. He further submitted that the Guardian Court at Samundari had appointed Respondent No.3 as the guardian of the children which was in the Petitioner's knowledge but she had not challenged that order. For that reason as well she should be asked to have recourse to that forum.

7. Arguments heard. Record perused.

8. In today's world an increasingly large number of people leave their homelands to look for opportunities abroad and some of them also get married there. In many cases incompatibility of temperament, diversity of backgrounds and inability to accept the new lifestyle lead to matrimonial discord that forces one or the other party to have legal recourse. Disputes also arise about the custody of the children born out of the union and they are also pulled into the battle. At times one of the parties may return to the country of his or her origin for family support, shelter or stability. Unresolved disputes in such situations lead to legal proceedings in the country of origin as well as in the adoptive country which give rise to conflict of laws and jurisdictions. The instant case happens to be one of those cases.

The law and jurisprudence

9. The law relating to international child abduction has mostly developed around litigation relating to enforcement of custody-related orders in foreign jurisdictions. However, there is significant divergence in judicial decisions because of differing personal laws[1] of parents and sometimes even the (domestic) statutory law. English courts focused on the welfare and happiness of the child and considered it to be of paramount importance in questions relating to his custody. In ***Re B's Settlement***, (1940) Ch 54, Morton J. said:

> "In my view, under s. 1 of the Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give the weight to any views formed by the courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the courts of any other country."

10. The above dictum was expressly approved by the Privy Council in ***McKee v. McKee***, (1951) AC 352. Lord Simonds held that in custody proceedings welfare of the minor is always the paramount consideration and the order of a foreign court is only one of the facts which should be considered in this regard. The court in whose jurisdiction the child is removed is bound to form an independent judgment on the merits of the case. He said:

> "It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody. To this paramount consideration all others yield. The order of a foreign court of competent jurisdiction is no exception…Comity demands, not its enforcement, but its grave consideration. This distinction, which has been recognized in the courts of England and Scotland…rests on the peculiar character of jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final."

11. In ***Re H*** (Infants), (1966) 1 All ER 886, which involved abduction of two American boys to England, the Court of Appeal held that unauthorized removal of children from one country to another

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1. The law applicable to matters relating to family such as divorce, maintenance, custody, guardianship, succession etc., sourced from a person's religious faith.

was against their welfare. As such, the courts in all countries are obligated to discourage it. Willmer L.J. approvingly quoted the following excerpt from the judgment of Cross, J., the trial judge:

> "The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing.…The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

12. In ***Re L*** (Minors) (Wardship: jurisdiction), 1974 (1) All ER 913 (CA), the Court of Appeal held that the principle that welfare of the child was the first and paramount consideration applied to kidnapping cases as well. Removal of the child from his country, society and culture impacts him so immediate steps should be taken to relieve his pain. To this end, his prompt return to the native country would serve his best interests. The court should take into account the conduct of the peccant parent while deciding the matter but it must not penalize the child for it. The Court of Appeal said:

> "To take a child from his native land, to remove him to another country where, may be, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors), which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge, may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spent in his country the period must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily

> resolved in the courts of that country may well be regarded as being in the best interests of the child."

13. The above-mentioned statement was reiterated in ***Re R*** (Minors) (Wardship: Jurisdiction) [(1981) 2 FLR 416 (CA)]. Ormrod LJ said:

> "It follows that the strength of an application for a summary order for the return of the child to the country from which it has been removed, must rest, not on the so-called "kidnapping" of the child, or an order of a foreign court, but on the assessment of the best interests of the child. Both, or either, are relevant considerations, but the weight to be given to either of them must be measured in terms of the interests of the child, not in terms of penalizing the 'kidnapper', or of comity, or any other abstraction. 'Kidnapping', like other kinds of unilateral action in relation to children, is to be strongly discouraged, but the discouragement must take the form of a swift, realistic and unsentimental assessment of the best interests of the child, leading, in proper cases, to the prompt return of the child to his or her own country, but not the sacrifice of the child's welfare to some other principle of law."

14. ***Re R*** (Minors) (Wardship: Jurisdiction), (1981) 2 FLR 416 (CA), *supra*, also authoritatively held that the concept of *forum conveniens* has no place in wardship jurisdiction.

15. The Indian courts have applied the Guardian and Wards Act, 1890 (India), and the Hindu Minority and Guardianship Act, 1956, to disputes involving custody and guardianship of minors born or residing abroad. "However, the conceptual rationale explaining the judicial opinion – best interests of the child, return to the habitual residence, and welfare of the child – has focused on factual determination rather than on development of any theoretical constructs. While there have been references to foreign court opinions in a few cases and stray allusions to conceptual strands of private international law, it does not follow that such references indicate that Indian courts borrowed any theoretical constructs to develop a pattern in handling these disputes, nor has there been an attempt to develop an indigenous one."[2] In ***Smt. Surindar Kaur Sandhu v. Harbax Singh Sandhu & Another*** (AIR 1984 SC 1224) soon after their marriage in

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2. Sai Ramani Garimella, *International Parental Child Abduction and the Fragmented Law in India – Time to Accede to the Hague Convention*? 17 Macquarie L.J. 38 (2017)

India the couple left for England where a boy was born to them. Their relationship came under a strain and the husband negotiated with a hitman to have the wife run over by a car. He was arrested and convicted by an English court and sentenced to three years' imprisonment. The wife obtained an order for probation but he abused the favour and fled to India with the boy as soon as his probation completed. On a motion by the wife the High Court of Justice (Family Division) in England directed the husband to deliver the minor's custody to the lady. The wife came to India and instituted a habeas corpus petition in the High Court for his recovery which was dismissed. The Supreme Court of India set aside that order holding that "the modern theory of conflict of laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Ordinarily, jurisdiction must follow the functional lines. In matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of the marriage." The Supreme Court ruled that since the parties had their matrimonial house in England, it established sufficient ties with that country and it was just and proper that the matter should be left to the courts there.

16. In ***Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and another*** (AIR 1987 SC 3 = 1989 MLD 2009) an Indian father and American mother divorced. A competent court in the United States entrusted the custody of their minor son, Dustan, to the mother and gave week-end visitation rights to the father who took advantage thereof and abducted him to India. On the habeas corpus petition of the mother the Supreme Court of India held that the court should decide the question of custody "not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor." The Supreme Court noticed that Dustan had not developed roots in India and was still "accustomed and acclimatized to the conditions and environment

obtaining in the place of his origin, the United States." Therefore, his welfare required that he should be handed over to his mother. It added that the boy was in India as a result of abduction and the father who had committed that illegal act could not claim any advantage. It endorsed the dictum laid in ***Re H*** (Infants), (1966) 1 All ER 886, *supra*, that it was the duty of the courts in countries all over the world to see that a person doing wrong by removing a child from his country does not gain any advantage of his wrongdoing.

17. In ***Dhanwanti Joshi v. Madhav Unde*** [1998 (1) SCC 112] the couple lived with the respondent in USA for 10 months after their marriage and had a male child. Due to certain compelling circumstances the appellant (mother) left the respondent (father) when the child was only 35 days old and also took him with her. Thereafter they remained involved in civil and criminal litigation in both USA and India for 14 years. The respondent filed for divorce in USA and also sought custody of the child. In the meanwhile, the appellant and the child came to India and the U.S. Court passed an *ex-parte* order granting permanent custody of the child to the respondent. One of the questions that fell for consideration before the Supreme Court of India was whether the bringing of the child to India by the appellant contrary to the order of the U.S. Court would have bearing on the decision of the courts in India in deciding the question of custody of the child and what would be the effect of his 12-year- long residence in the country. The Supreme Court observed that in Elizabeth Dinshaw's case the child was sent back to USA to the mother not only on the principle of comity but also because on facts such an order was in his interest. It also distinguished that case on the ground that the mother moved the application in India for custody within six months of his removal by the father. The Supreme Court held that in certain circumstances the courts of the country to which the minor is taken may be required to conduct an elaborate inquiry to determine the question of his welfare. It added that "summary jurisdiction is exercised only if the court to which the child had been removed is

moved promptly and quickly, for in that event, the Judge may well be persuaded to hold that it would be better for the child that the merits of the case are investigated in a court in his native country, on the expectation that an early decision there would be in the interest of the child before he develops roots in the country to which he had been removed. So also the conduct of an elaborate inquiry may depend upon the time that had elapsed between the removal of the child and the institution of the proceedings for custody. This would mean that longer the time gap, the lesser the inclination of the court to go for a summary inquiry." The court rejected the prayer for returning the child to the USA.

18. In ***Surya Vadanan v. State of Tamilnadu & others*** (AIR 2015 SC 2243) the mother brought the child to India in violation of the order passed by a U.S. Court. She did not return the child to the jurisdiction of that court so it issued bailable warrants for her arrest. Meanwhile, the father initiated proceedings in the Andhra Pradesh High Court for a writ of habeas corpus seeking production and custody of child to enable him to take the child to USA. The High Court passed quite a few material orders on that petition which were assailed before the Supreme Court of India. The apex Court ruled that there was no cavil that the best interests and welfare of the child were of paramount consideration but that was the final goal – it was not the beginning of the exercise but the end. It held that the "doctrines of 'most intimate contact' and 'closest concern' must be given due deference. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court." The Supreme Court further held that the principle of "comity

of courts" is essentially a principle of self-restraint and is applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or *vice versa*), unless there are very good reasons not to do so. The Supreme Court outlined the following principles for deciding international abduction cases:

> "(1) The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement. *Dhanwanti Joshi v. Madhav Unde* (1998) 1 SCC 112.
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> (2) One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry. *Dhanwanti Joshi v. Madhav Unde* (1998) 1 SCC 112.
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> (3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child. *Sarita Sharma v. Sushil Sharma* AIR 2000 SC 1019.
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> (4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed. *V. Ravi Chandran and Aviral Mittal* AIR 2010 SC (Supp.) 257.
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> (5) Since the interest and welfare of the child is paramount, a domestic court is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication."

19. In the above-mentioned case the Supreme Court of India further ruled that if an order of a foreign court is in the field the domestic court would be guided by the following principles while deciding whether an elaborated inquiry should be conducted or not:

> "(a) The nature and effect of the interim or interlocutory order passed by the foreign court.
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> (b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.
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> (c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. Arathi Bandi. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.
>
> (d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

20. The courts in Pakistan also consider that welfare of the minors is supreme. In some of the early cases religion was considered to be one of the important determinants thereof. For example, in ***Mrs. Mosselle Gubbay (formerly Mrs. Moselle Said) v. Khawaja Ahmad Said and others*** (PLD 1957 (W.P.) Kar 50), an Indian Jewess girl married an Indian Muslim. In 1952 their marriage was dissolved by the High Court in Calcutta and the custody of two minors was given to the mother. However, the father managed to bring the children to Pakistan in violation of the order of the Calcutta High Court. The mother filed a habeas corpus petition in the Pakistan. A Division Bench of the Karachi High Court dismissed it holding that it was improper to hand over the children to a Jewess mother who was an Indian national and residing in India.

21. Similarly, in ***Christine Brass v. Dr. Javed Iqbal*** (PLD 1981 Peshawar 110) Ms. Christine Brass, a Canadian Christian, and Dr. Javed Iqbal, a Pakistan Muslim, married in Canada in 1968. The couple had four offsprings and in 1978 they shifted to

Washington where the lady instituted proceedings for divorce and custody of children. Her plea was granted. The father had access to the children and taking its advantage removed them to Pakistan. A Division Bench of the Peshawar High Court refused to give them to the mother holding as under:

> "The Court will consider a foreign order as to custody, but only subject to the paramount consideration of the welfare of the child. The welfare of the child, the comfort, the health and the moral intellectual and spiritual welfare of the infant are the matters for consideration. The father has the right to determine in what religion his infant child should be brought up and this right of the father continues after his death, even if the mother is of different religion. In that view of the matter it can be held without any difficulty that the minors in this case are Pakistanis and it is their welfare which is of paramount importance. The respondent (father) being a Muslim has a legal right both under the domestic law as well as International Law to see that his children are brought up in the Muslim faith. In this way the order/decree (Annexure 'A') should not stand in the way."

22. In ***Sara Palmer v. Muhammad Aslam*** (1992 MLD 520) the petitioner lady was a British citizen of Kenyan origin who converted to Islam and married the respondent, a Pakistani, in England and settled there. The respondent (father) brought the children to Pakistan in violation of the order of a British court and filed a petition in the Guardian Court for being appointed as their guardian. The mother moved a habeas corpus petition in the Lahore High Court. A learned Single Judge held that in the peculiar circumstances of the case an elaborate inquiry was required to determine what was in the interest of the minors and the Guardian Court was the proper forum therefor. Nevertheless, he allowed the mother to have their custody till the decision of that court.

23. The case ***Abu Saeed A. Islahi v. Mrs. Talat Mir and 2 others*** (1994 MLD 1370) arose from proceedings under the Guardian & Wards Act, 1890. The High Court was called upon to determine whether the decree of the Harris County Texas, USA, operated as *res judicata*. The learned Single Judge held that it did not bar filing of an application for the custody of the minors especially when the circumstances in which it was passed had changed. The foreign

court's order was one of the factors to be considered by the Guardian Judge but it was not conclusive of the controversy.

24. The case ***Peggy Collin v. Muhammad Ishfaque Malik and 6 others*** (PLD 2010 Lah. 48) related to a French lady and a Pakistani who met in London, got married and settled in France. They were blessed with a son but they could not live together and separated. The respondent (father) surreptitiously brought the son to Pakistan but subsequently executed an agreement with the petitioner (mother) and in pursuance thereof took him back to France. The agreement was produced before a French court which passed judgment dated 5.2.2003 in terms thereof. In terms of that agreement the child was to ordinarily live with the mother while the father was to have visitation rights but he could not remove him beyond the jurisdiction of the court. The father disregarded the agreement (and the court's judgment) and brought the child to Lahore (Pakistan). In a habeas corpus petition by the mother he contended that the boy could not be handed over to her because she was a Christian and under the law he had a right to raise him in his own religion which was Islam. The High Court rejected the argument holding as under:

> "I have felt distressed over some of the arguments addressed by the learned counsel for respondent No.1...When it came to falling in love with a Christian girl religion did not matter to respondent No.1. When it came to marriage and setting down French nationality of the petitioner and France as an abode did not bother respondent No.1. When it came to producing a child and bringing him up in France religious inclinations of his spouse and western culture did not make any difference to respondent No.1. For respondent No.1 religion, nationality and culture did not have much significance as long as it suited him .but when the marital relations between respondent No.1 and the petitioner hit turbulence and ultimately came to a dead end in the war of sorts that ensued over custody of the child respondent No.1 has now found it to be advantageous and convenient to take shelter behind faith, nationality and culture. To respondent No.1 it may appear to be a fair ruse or stratagem in the war over custody of the child but I have found such volte-face on the part of respondent No.1 to be offensive to justice, equity and good conscience."

25. The case reported as ***Mirjam Aberras Lehdeaho v. SHO, Police Station Chung, Lahore and others*** (2018 SCMR 427), which arose from an order of the Lahore High Court dismissing the mother's

habeas corpus petition, also requires a mention. In this case the petitioner, a national of Finland, married a Pakistani who was a police officer. The couple had three children who were born in Lahore, Pakistan. In 2009, the family applied for Canadian Immigration (except the father who got permanent resident status which allowed him to enter and exit Canada at his convenience) and shifted abroad. They stayed there for about seven years and settled. The father then changed his mind and brought two of his children, who were still minors, to Pakistan ostensibly on a short vacation. He also approached the Guardian Court and at the back of the mother got himself appointed their guardian under Section 7 of the Guardian & Wards Act, 1890. The Hon'ble Supreme Court of Pakistan held that since the children were old enough to form an intelligent preference the High Court erred in law in failing to determine their wish. It was obligated to make a balanced and dispassionate assessment of the situation to protect their physical safety, emotional well-being and welfare. The Supreme Court set aside the ex-parte Guardianship Certificate and directed the Guardian Court to decide the matter afresh after hearing the parties. As an interim measure, it handed over the custody of the minors to the mother.

26. It may be pertinent to add that Pakistan also recognizes the principle of comity of courts. Reliance is placed on ***Muhammad Ramzan (deceased) through L.Rs. and others v. Nasreen Firdous and others*** (PLD 2016 SC 174)[3] wherein the Hon'ble Supreme Court held:

> "It is clear that foreign judgments are conclusive as to any matter thereby adjudicated upon and Pakistani courts must recognize and enforce the same. However, before enforcing any foreign judgment, a Pakistani court will have to ensure that it does not fall within any of the exceptions contained in Section 13 CPC."

27. Custody-related disputes are growing with increasing globalization. The international community has responded to this challenge by drawing the Hague Convention on the Civil Aspects of

3. This appeal arose from a suit for administration with regard to a property situated outside Pakistan. It was not a case under the family law.

International Child Abduction, 1980 (the "Hague Convention"). As of July 2019, 101 States are party to the Convention. Pakistan acceded to it on 22.12.2016 with certain reservations in relation to Articles 24 & 26.

28. The Hague Convention aims to protect the children internationally from the harmful effects of their wrongful removal or retention by a parent. For this purpose it establishes procedures to ensure their prompt return to the State of their habitual residence and to protect the rights of access. The Convention ceases to apply when the child attains the age of 16 years.

Article 3 defines wrongful removal and retention as under:

> The removal or the retention of a child is to be considered wrongful where –
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 5 elucidates:

> For the purposes of this Convention –
>
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

29. Article 12 of the Hague Convention stipulates that where there is international parental child abduction and, at the date of commencement of the proceedings before the judicial or

administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. However, if the proceedings are initiated more than one year after the happening, the judicial or administrative authority may refuse to make such an order if it is demonstrated that the child has settled in his new environment. Article 13 stipulates that the child's return may also be declined if: (a) there is a grave risk that his return would expose him to physical or psychological harm or otherwise place him in an intolerable situation; or (b) the child objects to being returned and has attained the age and degree of maturity at which the Court can take his views into account; or (c) the party seeking return consented to subsequently acquiesced to the child's removal or retention; or (d) the return would violate the fundamental principles of human rights and fundamental freedom in the country where the child is being held; and (e) the party seeking return was not actually exercising rights of custody at the time of the wrongful removal or retention.

30. The Hague Convention is not an extradition treaty. It focuses on procedure and jurisdiction rather than on the merits of any underlying custody issue.[4] According to Linda Silberman, the approach of the Convention is remedial as well as preventive. It adopts a unique approach to the violation of custody rights. It departs from the rules relating to jurisdiction and recognition of foreign judgments and establishes *status quo ante*. She adds:[5]

> "The objective is to protect children from wrongful international removals or retentions from their lawful custodians by requiring that children be returned to their country of habitual residence for resolution of any custody dispute. The Convention remedy is simple: the child is ordered returned, and any dispute over custody is litigated at the place of habitual residence. The Convention does not offer uniform international standards for determining custody

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4. Lara Cardin, *The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One* (1997) 20 Hous.
5. Linda Silberman, *Hague Convention on International Child Abduction: A brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 11 (1994).

> rights, nor does it provide for enforcement of custody decrees rendered by another foreign State."

31. Another commentator says:[6]

> "Noting the fact that enforcement of foreign custody orders could result in protracted and delayed litigation, the Convention enjoins Contracting States to use the most expeditious procedures available. Return, however, is discretionary if more than one year has passed and the child is settled in the new environment…The Convention's Explanatory Report observed that re-establishing 'the status quo [in the child's habitual residence] disturbed by the actions of the abductor was necessary, since to do otherwise would assist the abductor to gain an unfair advantage – and a return order prevents forum shopping. The appropriateness of habitual residence as the sole connecting factor in the Convention cases has been explained by two main reasons. Firstly, parents who abduct their children do so with the intention of 'creating jurisdictional links which were more or less artificial. The purpose is to alter the existing custody status quo, and prompt summary return was seen as remedying this problem. It could, therefore, be said that the Convention's purpose is more of a forum decider, a result of ss 16 and 19: that courts upon receiving the application for return shall not decide upon the merits of the custody dispute, and that decisions under the Convention shall only be concerning the return of the child and not on any custody issue. Secondly, a child's habitual residence immediately preceding their abduction was viewed as providing the most appropriate moral and cultural framework in which to construct the best interests of the child legal standard."

32. When a child is taken to a country in which the Hague Convention does not apply, the law of that country governs custody determinations. The Court will often consider the child's best interest in determining custody but, as already discussed, each country has a different definition of this term. In ***Re M*** (Abduction: Non-Convention Country), [1995] 1 FLR 89, the Court of Appeal held that the English courts act upon the following principles in non-Convention cases:

> "First, the underlying assumptions which the court applies *prima facie* to every case are those which underlie the Hague Convention itself, namely that the best interests of children are normally best secured by having their future determined in the jurisdiction of their habitual residence and sparing them the distress and disruption which they are liable to suffer if one parent abducts them from the home jurisdiction in order to secure a tactical, or a supposed juridical, advantage in a competing jurisdiction: see Re S (Minors) (Abduction) [1993] 1 FCR 789 and D v D (Child Abduction: Non-Convention Country) [1994] 1 FLR 137."

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6. Sai Ramani Garimella, *supra*, note 2

> "Secondly, in acting by analogy with the Convention the court takes account of those matters which it would be relevant to consider under Art 13."
>
> "Thirdly, it is of the essence of the jurisdiction to grant a peremptory return order that the judge should act urgently. That means that the court has no time to go into matters of detail. The case has to be viewed from the perspective of a quick appraisal of its essential features…"
>
> "Fourthly, … the principle of comity applies. It is assumed, particularly in the case of States which are fellow members of the European Union, that such facilities as rights of representation…will be secured as well within one State's jurisdiction as within another."

Opinion

33. Having discussed the law on the subject I take up the case before me.

34. Article 38 of the Hague Convention declares that the accession will have effect only as regards the relations between the acceding State and such contracting States will have declared their acceptance of the occasion. Therefore, when a country accedes to the Convention, it is not automatically partners with all the other countries who have ratified or acceded to it. Countries must accept another country's accession to the Convention under the terms described in the Convention before a treaty is created. South Africa acceded to the Convention on 1.10.1997 while Pakistan on 22.12.2016 (with reservation in respect of certain Articles). However, South Africa has not accepted Pakistan's accession so far. Consequently, the Convention is not in force between them.

35. I have carefully gone through the principles stated by the Court of Appeal in ***Re M*** (Abduction: Non-Convention Country), [1995] 1 FLR 89, *supra*, and have found that they are consistent with our jurisprudence discussed in the earlier part of this judgment. Therefore, there is no reason why we should not adopt them. ***S. v. S.*** (Abduction: Non-Convention Country), [1994] 2 FLR 681, involved South Africa which had not then acceded to the Hague Convention. The father was a British national and a South African citizen while the

mother was British. The child was three years old when the family moved from the Isle of Man to South Africa but shortly after that the father and mother separated. A South African court granted interim custody to the mother who moved the child to England. The father thereupon initiated wardship proceedings for his return to South Africa. The British High Court of Justice (Family Division) gave effect to the underlying principles of the Hague Contention and ruled that the child had strong connections with Isle of Man as he did with South Africa but his parents had chosen South Africa to be his home for the foreseeable future. Holding that his interests would be best served there it repatriated him to South Africa.

36. In private international law the term "abduction" carries a meaning somewhat different from criminal law. There it connotes removal or retention of a child in breach of another's rights of custody. The phrase "rights of custody" may have varying meanings. However, keeping in view the fact that 101 countries are party to the Hague Convention one should prefer the definition given in Article 5 thereof which says that these rights "include rights relating to care of the person of the child and, in particular, the right to determine the child's place of residence." The facts pleaded by the Petitioner in her petition before this Court, *prima facie*, show that she has a case against Respondent No.3 for wrongful removal and retention of Abdul Hannan and Arshman Rizwan. The rights of a married couple as to the custody of their children are joint. A unilateral action by one party in taking them to another country or preventing their return constitutes a breach of custody rights. The mere fact that the Petitioner does not have a formal custody order from a court of South Africa does not preclude her from asserting her rights in Pakistan. Lara Cardin rightly points out that "a formal custody decree from the State of habitual residence need not exist in order to obligate a court to return the child.

Nor is the absence of a formal custody decree reason to decline return."[7]

37. The Petitioner alleges that in 2016 Respondent No.3 brought her and the children to Pakistan ostensibly for a vacation and then deceitfully sent her back to South Africa and thereafter denied all access to the boys. The Petitioner has produced return tickets of the family to substantiate her contention that there was a plan to go back. On the other hand, Respondent No.3 contends that the family had their home in South Africa but they permanently shifted to Pakistan in 2016. Shortly after that the Petitioner's mother got ill so she went back but did not return and instead filed this petition. He denies that he has snatched the children by subterfuge and has referred to various WhatsApp messages of the Petitioner to support his contention.

38. Admittedly, Abdul Hannan and Arshman Rizwan are in Pakistan since 2016. The Petitioner filed this petition about 3½ years after the alleged cause of action arose. In view of the pleadings of the parties three questions arise for determination: (i) whether the family came to Pakistan in 2016 with intent to permanently settle here; (ii) if there was no such intention at the inception, whether the Petitioner subsequently acquiesced in relocating the children to Pakistan; and (iii) whether the boys have developed roots in this country during the 3½ years they have been here and there is a grave risk that their return would expose them to psychological harm or otherwise place them in an intolerable situation. These questions cannot be decided without recording evidence.

39. There is no cavil that this Court is competent to entertain a habeas corpus petition under Article 199 of the Constitution or Section 491 Cr.P.C. and direct that a person in custody within its territorial jurisdiction be brought before it and satisfy itself that he is not being held in improper or illegal custody. More particularly, where the petitioner is a mother who *bona fide* believes that the

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7. Lara Cardin, *supra*, note 4.

children have been removed from her custody by use of chicanery and thereafter forced to stay in Pakistan against her will, she cannot be precluded from approaching this Court. Reliance is placed on ***Mirjam Aberras Lehdeaho'***s case (*supra*). However, the proceedings in the habeas corpus jurisdiction are summary in nature and this Court cannot conduct detailed inquiry which is required in this case. For that the Petitioner must have recourse to the Guardian Court which is the proper forum.

40. There is another important issue in this case. Respondent No.3 approached the Guardian Court at Samundari and got himself appointed as the guardian of Abdul Hannan and Arshman Rizwan under Section 7 of the Guardian & Wards Act, 1890. The Petitioner alleges that Respondent No.3 has procured that appointment through fraud and misrepresentation. She maintains that he deliberately gave her wrong address to the Court and manoeuvred to keep her out of the proceedings. Whatever may be the merit of this allegation, the fact is that Guardianship Certificate dated 17.12.2019 issued in favour of Respondent No.3 still holds the field which confers various rights on him under the aforesaid Act, including the right to the custody of the wards. In the circumstances, the Petitioner requires an order from the Guardian Court before she can take the children out of Pakistan.

41. The learned counsel for the Petitioner contends that since Abdul Hannan and Arshman Rizwan are nationals of South Africa the Guardian Court in Pakistan had no jurisdiction to appoint their guardian and that Guardianship Certificate dated 17.12.2019 issued in favour of Respondent No.3 is *ab-initio* void. This contention deserves a short shrift. Admittedly, Respondent No.3 is the father of the minors. According to Section 5 of the Citizenship Act, 1951, all children, wherever born of a Pakistani father, are deemed to be citizens of Pakistan by descent. This question was considered by this Court in ***Muhammad Younas v. Shahzad Qamar and 3 others*** (PLD 1981 Lah. 280) and it was ruled that although respondents No.1 & 2 in that case were born in U.K. they were citizens of Pakistan by

descent in terms of Section 5, *ibid*, and as such the Family Court at Sialkot had jurisdiction to decide the matter. In ***Rochomal Daryanomal v. The Province of West Pakistan*** (PLD 1960 (WP) Kar. 150), it was held that the nationality of the minor is determined by that of his father and onus to prove is on the person alleging to the contrary. Similarly, in ***Abu Saeed A. Islahi v. Mrs. Talat Mir and 2 others*** (1994 MLD 1370) it was held that in law the minors are deemed to hold the citizenship of their father. The question of their renunciation of citizenship cannot arise till they attain the age of majority.

Order of the Court

42. This petition is disposed of with a direction to the Petitioner to approach the Guardian Court which shall decide the matter expeditiously in accordance with the law discussed in this judgment. As an interim measure, Respondent No.3 shall allow the Petitioner free access to Abdul Hannan and Arshman Rizwan. If the Petitioner manages a separate accommodation, she may also take the children with her on Sundays. However, she shall not take them out of Pakistan without the permission of the Guardian Court.

(TARIQ SALEEM SHEIKH)
JUDGE

ANNOUNCED IN OPEN COURT ON 21.4.2020

JUDGE

Approved for reporting

Judge

M.Khalid