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JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No.78185/2023

Syed Hassan Murtaza

Vs.

Mariya Bano Khan and others

JUDGMENT

Date of hearing:	**03.04.2024**
For the Petitioner:	Mr. Irfan Sadiq Tarar, Advocate.
For Respondents No. 1 & 2:	Ch. Akbar Ali Shad, Advocate.
For Respondents No.3 to 8:	Mr. Sittar Sahil, Assistant Advocate General, with Raza/SI.
Research Assistance:	Mr. Sher Hassan Pervez, Research Officer, LHCRC, and Mr. Muhammad Shahid, Librarian.

Tariq Saleem Sheikh, J. – Through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution"), the Petitioner seeks recovery of his minor children from the custody of their mother (Respondent No.1), who has allegedly abducted them from Canada and unlawfully brought them to Lahore, Pakistan.

The factual background

2. The Petitioner and Respondent No.1 (the "Parties") are Pakistani citizens. On 15.05.2005, they married in the United Arab Emirates (UAE), and had three children, all sons, namely Zoran Syed Hassan (aged 13), Zarayb Syed Hassan (aged 10), and Zaviyar Syed Hassan (aged 8). All of them were born and raised in the UAE. The family resided in the UAE until March 2020, when Respondent No.1 went on a trip to England and was stuck there for three months due to the pandemic restrictions preventing her from returning to the UAE. During these three months, the children were in the Petitioner's care in the UAE.

3. The Petitioner was permitted to immigrate to Canada with his family in 2019. They "landed" in Canada as Permanent Residents in May 2020 but had not yet determined a timeline for a move.

4. In June 2020, the Petitioner and the three children visited relatives in New Jersey for a month while Respondent No.1 went to England. They all returned to the UAE in June/July 2020 and lived together until November 2020. In the said month, the Petitioner moved to Canada alone, obtaining residence and employment in Toronto. Respondent No.1 and the children remained in the UAE.

5. In June 2021, the Parties discussed the children visiting the Petitioner in Canada. In a text exchange, Respondent No.1 insisted that the Petitioner purchase return tickets for the children. The Petitioner had suggested one-way tickets to circumvent the prohibition against non-essential travel, saying he would buy the children's tickets back to UAE after they arrived. The Petitioner ended up purchasing return tickets as Respondent No.1 had requested. Respondent No.1 sent the two older children to Canada (as unaccompanied minors) to visit the Petitioner on 23.07.2021. Their return flight was on 22.08.2021. The Petitioner did not return those boys. Instead, he enrolled them in a school (Jean Lumb Public School) to start in September 2021.

6. On 19.04.2021, Respondent No.1, through her Special Attorney, Muhammad Yaqoob son of Siraj Din (Respondent No.2), filed an application under section 7 of the Guardian and Wards Act, 1890 (GWA) in the Family Court at Lahore (Guardian Case No.2571/G.C./2021) for her appointment as the guardian of the children. She *inter alia* asserted that she resided in Lahore and all three children were in her custody. On 13.07.2021, the Petitioner was proceeded *ex parte*, and the case was scheduled for the evidence of Respondent No.1. On 02.10.2021, the Family Court directed Respondent No.1 to appear in person and also produce the children. On 19.11.2021, Respondent No.2, Muhammad Yaqoob, presented three boys in the Family Court, claiming they were Zoran, Zarayb, and Zaviyar. The court photographed these children and superimposed the pictures on the Order Sheet. However, the Petitioner contends that Zoran and Zarayb were with him in Canada during this time, and that the boys produced before the Family Court were not his sons.

7. Respondent No.1 appeared before the Family Court as AW-1 and recorded her statement during the above-mentioned proceedings. She *inter alia* deposed that she resided in Lahore and all three children were in

her custody. She submitted a copy of the decree as Mark-A to Mark-C and a Divorce Certificate dated 26.04.2021 as Mark-B. On 25.11.2021, Murtaza Ashraf Khan appeared before the Family Court as AW-2 and recorded a statement supporting Respondent No.1. The Family Court accepted the above-mentioned application of Respondent No.1 and issued her Guardian Certificate subject to the condition that she shall not take minors beyond its jurisdiction without prior permission except for occasional visits.

8. On 01.12.2021, Respondent No.1 submitted an application to the Family Court seeking permission to take the children abroad. On 06.12.2021, she produced three boys in court, asserting that they were the children she referred to in her application. The court documented this by capturing her image with the boys and pasting it on the Order Sheet. The Petitioner alleges that Zoran and Zarayab were misrepresented as they were in Canada during that time. In these proceedings, Respondent No.1 testified as AW-1 and provided her statement under oath supporting her application. Respondent No.2 (Muhammad Yaqoob) appeared as AW-2 and testified in favour of Respondent No.1. The Family Court accepted the application of Respondent No.1 through an order dated 24.12.2021, permitting her to take the minors abroad contingent upon the submission of surety bonds worth Rs.30,00,000/-. Additionally, she was obligated to produce the minors before the court whenever required.

9. On 31.01.2022, Respondent No.1 signed a permanent employment contract with Triple-M Professional Corp. in Toronto and made plans to reside with her cousin in Milton, Ontario. Shortly thereafter, she arrived in Canada with the youngest child, Zaviyar. On 05.02.2022, she went to the Petitioner’s residence while he was not home and took the two older children to reside with her and the youngest child in Milton. Subsequently, Respondent No.1 registered all three children for school in Milton. They started on 14.02.2022 in Grades 6, 3 and 1, respectively.

10. In 2022, the Petitioner and Respondent No.1 applied to the Ontario Court of Justice (the “Ontario Court”) for an order that the children primarily reside with them. They admitted that (a) they and the children had legal status as Permanent Residents in Canada, (b) they both had permanent employment in Toronto, and (c) the children’s habitual residence was in Ontario.

11. The Petitioner filed an urgent motion in the Ontario Court, which was heard on 18.02.2022. Both parties expressed their intention to remain in Ontario with their children. Respondent No.1 clarified that she was not seeking recognition of Pakistan's Family Court order at the moment. Given this context, the Ontario Court determined that it needed to address only the issues of primary residence and parenting time. It directed Respondent No.1 to return the two older children to the Petitioner's care and asked the latter to re-enroll them at Jean Lumb Public School immediately. It ordered that "on a temporary, without prejudice basis," the above two older children would primarily reside with the Petitioner (father) and that the youngest child would primarily reside with Respondent No.1 (mother). The court ordered that the children would spend the first weekend of each month with the Petitioner and that Respondent No.1 would have parenting time with the three children on all the other weekends. It further directed that neither party shall change the children's school or remove them from Ontario without its permission.

12. Respondent No.1 brought the three children to Pakistan on 16.11.2023. The Petitioner filed an urgent motion in the Ontario Court, which was heard on November 20 and 21, 2023. The court directed the following actions under sections 28(1), 36(4), and 36(5) of the Children's Law Reform Act (CLRA): Firstly, the mother (Respondent No.1) was ordered to immediately return the children to their habitual residence in Toronto, Ontario, at her own expense, with the father (the Petitioner) holding all the children's passports and government-issued documents until further notice. Secondly, upon their return to Ontario, on a temporary basis, the children were to reside solely with the father, while the mother shall have liberal access at his discretion. The father was granted sole decision-making responsibility regarding the children. Thirdly, the court mandated that, upon request and receipt of the court order, Ontario police forces were obligated to locate, apprehend, and deliver the children to the father. Fourthly, the International Police Organization (INTERPOL) was asked to enforce the court's orders and ensure the children's return to their habitual residence in Toronto.

13. The Petitioner has filed this constitutional petition for the implementation of the Convention on the Civil Aspects of International

Child Abduction 1980 (the "Hague Convention"). He seeks a writ of *habeas corpus* directing Respondent No.6 (Inspector General of Police, Punjab) to recover the children and their travel documents from the unlawful custody of Respondent No.1 and produce them before this Court. He has further prayed that the children may be handed over to him to be taken to Canada and submitted before the jurisdiction of their home court. Lastly, he has prayed that Respondent No.1 and her special attorney, Respondent No.2, be prosecuted for fraudulently obtaining custody orders despite the children being in Canada with him.

The submissions

14. The Petitioner's counsel, Mr. Irfan Sadiq Tarar, Advocate, contends that the children's *habitual residence* is in Canada. The Ontario Court had restrained the Parties from removing the children from its jurisdiction without prior permission. Respondent No.1 violated that order and unlawfully brought the children to Lahore. According to Mr. Tarar, it amounts to international parental child abduction under the Hague Convention. Pakistan is a signatory to that Convention, so the children are liable to be repatriated to Canada forthwith. The counsel argues that the children's custody with Respondent No.1 is illegal, or at least improper, and this Court is competent to issue a writ of *habeas corpus* under Article 199 of the Constitution to recover them and pass orders as the Petitioner has prayed for in the present petition.

15. Advocate Ch. Akbar Ali Shad, the counsel for Respondents No. 1 & 2, contends that the Hague Convention does not apply to the present case. Pakistan and Canada are signatories to the Hague Convention, but it is not in effect between the two countries because they have not accepted each other's ascension. The Parties are Pakistani nationals, so all matters relating to the custody of the children, parental time, and visitation arrangements have to be decided by the Family Court in accordance with the GWA, under which the welfare of the minors is the paramount consideration.

16. Mr. Shad has also objected to the maintainability of this petition. He argues that the High Court's constitutional jurisdiction for minors' recovery can be invoked in exceptional circumstances. There are none in the present case. Hence, the Family Court is the proper forum for resolving the dispute between the Parties. He further submits that

Respondent No.1 applied under section 7 of the GWA, and the Family Court appointed her the children's guardian vide order dated 25.11.2021 and issued her Guardian Certificate. The Petitioner has challenged that certificate under section 12(2) CPC. Respondent No.1 has filed a reply thereto and is contesting it. The Family Court has framed issues on that application and directed the Parties to produce evidence to substantiate their respective assertions. Mr. Shad argues that the Petitioner, having elected to seek a remedy before the Family Court, is excluded under the *doctrine of election of remedies* to file the present constitutional petition.

17. In rebuttal, Mr. Tarar has argued that the children had all along been with the Petitioner in Canada at all material times. Respondent No.1 got the Guardian Certificate dated 25.11.2021 through deceit and fraud. Upon knowledge, the Petitioner challenged the said Guardian Certificate by filing an application under section 12(2) CPC before the Family Court which suspended its operation vide order dated 23.04.2022. The counsel contends that Respondent No.1's conduct and the manner in which she has abused the legal process constitute extraordinary circumstances. Therefore, this constitutional petition should proceed.

18. Mr. Sittar Sahil, Assistant Advocate General, adversely commented on the conduct of Respondent No.1 while referring to different documents available on the file. He states that the question as to whether Respondent No.1 played foul with the Family Court in Pakistan must be thoroughly investigated and taken to its logical end. However, Mr. Sahil also opines that the Petitioner's remedy lies with the Family Court – where the matter is already pending – and that this petition is not maintainable.

The law

19. The U.N. Convention on the Rights of the Child (CRC) is the most comprehensive international instrument safeguarding children's rights across all facets of their lives. At its core lies Article 3, which asserts that the best interests of the child must be the paramount consideration in all matters concerning them. This provision obligates States to ensure the protection and well-being of children under all circumstances, serving as a fundamental principle guiding policy and practice globally. What is in the child's best

interests is a matter of fact that has to be determined in light of all the relevant circumstances.[1]

20. In General Comment No.14 (2013),[2] the Committee on the Rights of the Child[3] (the "CRC Committee") has stated that the concept of "best interests of the child" has three dimensions: (a) a substantive right, (b) a fundamental interpretative legal principle, and (c) a rule of procedure. The "substantive right" entitles the child to have their best interests assessed and prioritized whenever decisions affecting them are made. This right imposes an inherent obligation on States to ensure its implementation, which can be invoked directly before a court. As a "fundamental interpretative legal principle", the concept mandates that if a legal provision is open to more than one interpretation, the construction which most effectively serves the child's best interests should be chosen, guided by the rights enshrined in the Convention and its Optional Protocols. As a "rule of procedure", it requires that whenever a decision is to be made that will affect a specific child, an identified group of children, or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child requires procedural guarantees.

21. In custody disputes, the concept of the child's best interests prioritizes the child's welfare and well-being above the parents' interests. It requires a thorough assessment of various factors, including their physical, emotional, and psychological welfare and their cultural, social, and educational needs. It emphasizes that subject to their age and maturity, the child's opinions and preferences should be given due consideration when determining custody arrangements, ensuring their active participation in decision-making. Furthermore, decisions must not discriminate against the child based on factors such as gender, race, or disability. Instead, they should provide a safe, stable, and nurturing environment conducive to the child's growth and long-term happiness.

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[1] *J v. C (an infant),* [1970] AC 668, per Lord MacDermott at pp.710-711; *Re L (minors),* [1974] 1 All ER 913, per Bucklay LJ at pp.925-926.

[2] General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. CRC/C/GC/14
https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf

[3] A body of independent experts that monitors implementation of CRC by its States Parties.

22. Although the CRC touches upon various aspects of child abduction in several Articles, its treatment of this issue remains indirect and general. For example, Article 9(1) requires States Parties to ensure that children are not separated from their parents against their will, except when competent authorities, subject to judicial review, determine that such separation is necessary for their best interests. This determination may arise in cases of parental abuse or neglect or when parents live separately and decisions about the child's residence are necessary. Article 10(1) directs States Parties to handle applications for family reunification positively and promptly, without adverse consequences for the applicants or their families. Article 10(2) affirms the right of children with parents in different countries to maintain regular contact with both parents, except in exceptional circumstances. It also stresses that States Parties must respect the child and their parents' freedom to leave and enter any country, subject only to restrictions necessary for national security, public order, public health, morals, or the rights and freedoms of others, consistent with the CRC. Article 11 mandates that States Parties combat the illicit transfer and non-return of children abroad through bilateral or multilateral agreements or accession to the existing ones. Despite these provisions, the CRC lacks detailed procedural mechanisms to address child abduction comprehensively. Hence, there was a need for a supplementary international treaty. The Hague Convention, adopted on October 25, 1980, fills this void.

23. The Hague Convention seeks to prevent the unlawful removal or retention of children across international borders by their parents, thus shielding them from the harmful consequences of abduction. It aims to (a) secure the prompt return of children wrongfully removed to or retained in any Contracting State, and (b) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States. Additionally, the Convention aims to prevent forum shopping by establishing uniform procedures for resolving abduction cases and addressing human rights concerns related to the rights of children and parents.

24. Article 38 of the Hague Convention stipulates that any State may accede to the Convention. However, the accession will have effect only as regards the relations between the acceding State and those Contracting

States that have accepted the accession. Article 39 further provides that any State may, at the time of signature, ratification, acceptance, approval, or accession, declare the extension of the Convention to all territories for which it holds international responsibilities or select specific territories. In other words, when a country accedes to the Convention, it does not automatically form a partnership with all the countries that have ratified or acceded to it. Instead, countries must accept another country's accession to the Convention according to the conditions described in the Convention before a binding treaty comes into being.

25. The Hague Convention adopts a proactive and remedial approach. Its focus is not to adjudicate the merits of custody disputes but rather to address the breach of rights of custody established by law in the child's *habitual residence*. The underlying principle is that the most appropriate jurisdiction for custody disputes is typically the child's habitual residence before the abduction. This ensures that long-term decisions regarding their upbringing are made in the environment most familiar to them and by a court having access to the most relevant information. In ***Office of the Children's Lawyer v. Balev,*** 2018 SCC 16, [2018] 1 S.C.R. 398, McLachlin C.J. of the Supreme Court of Canada noted that swift return serves three purposes. Firstly, it shields against the detrimental consequences of wrongful removal or retention. Secondly, it discourages parents from taking the child away with the expectation of building ties in a new country that could potentially result in custody being awarded to them. Lastly, prompt return aims to expedite the assessment of the merits of a custody or access dispute in the child's habitual residence, thereby eliminating disputes over the appropriate jurisdiction for resolving them.

26. In ***re J (a child)*** (FC), [2005] UKHL 40, Baroness Hale of Richmond stated that the Hague Convention is motivated by the belief that resolving disputes about children's future is best done in their home countries. It aims to prevent one parent from relocating a child to gain an advantage in custody battles or to evade court orders. Rather than directly settling disputes, the Convention mandates returning the child to their home country or enforcing the original court order, with few exceptions. While this may occasionally not align with the individual child's best interests, the States that became parties to these treaties accepted this disadvantage to

some individual children for the sake of the greater advantage to children in general. This arrangement deters parents from moving their children across borders without consent. Additionally, it establishes a system of reciprocal obligations among participating States, whereby those adhering to the Convention can expect similar cooperation in return.

27. Pakistan ratified the CRC on November 12, 1990,[4] and acceded to the Hague Convention on December 22, 2016.[5] In view of Article 38 of the Hague Convention referred to above, the effectiveness of the Convention is contingent upon mutual acceptance of accession among the participating countries. Therefore, courts in Pakistan must differentiate between Convention and non-Convention cases when dealing with international child abduction cases.

Convention cases

28. The Hague Convention adopts a unique approach to the violation of custody rights, departing from traditional rules governing jurisdiction and the recognition of foreign judgments by introducing the principle of *status quo ante*.[6] According to Article 4, the Convention applies to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention ceases to apply when the child attains the age of 16 years.

29. Articles 12 and 13 of the Hague Convention deal with the conditions under which a child wrongfully removed or retained should be returned to their habitual residence. Article 12 stipulates that if a child is wrongfully removed or retained, as defined in Article 3, and legal proceedings for their return commence within one year of the occurrence, the authorities in the State where the child is situated must promptly return the child. If proceedings are initiated after one year has elapsed, the child's return can still be ordered unless it is shown that he has adjusted in his new environment. Where the judicial or administrative authority in the

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[4] Upon ratification, Pakistan initially entered reservations to two articles of the CRC. However, these reservations were later withdrawn on July 23, 1997.

[5] This was subject to certain reservations in relation to Articles 24 and 26 which still exist. The Hague Convention became effective for Pakistan on 01.03.2017.

[6] Linda Silberman, *Hague Convention on International Child Abduction: A brief Overview and Case Law Analysis*, 29 FAM. L.Q. 9, 11 (1994).

requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for their return.

30. Article 13 provides three additional grounds for the judicial or administrative authority not to order the child's return. These are: (a) the person, institution, or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that the child's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation; or (c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views. In considering the three grounds provided in Article 13, the interests of the child must be considered alongside the fundamental purpose of the Hague Convention, which aims to ensure that children wrongfully removed from their place of habitual residence are returned there as soon as possible.

31. The determination of habitual residence is crucial in cases involving international child abduction because, as discussed above, it has a direct link with the question of child's welfare. Hence, it has been the subject of extensive judicial interpretation. The Court of Justice of the European Union has also considered this concept in ***The proceedings brought by*** **A** (Case C-523/07)[2010] Fam 42. It held that it "must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular, the duration, regularity, conditions, and reasons for the stay on the territory of a member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge, and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the child's habitual residence, taking account of all the circumstances specific to each case." The European Court made similar observations in ***Mercredi v. Chaffe*** (Case C-497/10 PPU)[2012] Fam 22.

32. In ***re A (Children) (AP)*** [2013] UKSC 60, Baroness Hale ruled that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that a child automatically takes the

domicile of his parents. The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends on numerous factors influencing the family's stay in the country. Baroness Hale held that the test adopted by the European Court should be preferred, being focused on the child's situation, with the parents' purposes and intentions being merely one of the relevant factors. An infant or young child's social and family environment is shared with those (whether parents or others) upon whom he is dependent. Hence, it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

33. In ***Office of the Children's Lawyer v. Balev***, 2018 SCC 16, [2018] 1 S.C.R. 398, McLachlin C.J. of the Supreme Court of Canada emphasized that determining habitual residence goes beyond merely identifying the child's last residence and duration there. While crucial, other factors, such as assessing all relevant links and circumstances, also matter. This involves examining the child's nationality, movements between countries, ties to each country, duration, regularity, conditions, and reasons for the child's stay in a particular place. No single factor dominates the analysis, and the judge should consider all circumstances. The child's age is relevant; for infants, their environment is mainly determined by their caregivers. Parents' intentions, particularly for infants or young children, may be significant, although not conclusive.

34. The presumption favouring habitual residence jurisdiction must yield to the necessity of safeguarding a child in cases of serious harm. The burden of proof is on the person alleging it. Furthermore, serious harm is established only when the harm itself is substantial. Thus, simply showing potential adverse effects on the child upon return is not enough. Instead, the assessment focuses on the likelihood and severity of such harm.

35. Pakistan is a federation whose Constitution vests the subject of family and children in the provinces. To implement the Hague Convention effectively, they have included it in the Schedule of the West Pakistan

Family Courts Act 1964 as Entry 6A.[7] Consequently, Family Courts dealing with cases under section 25 of the GWA now have jurisdiction over international child abduction disputes, encompassing custody issues, orders from foreign courts, and judgments from countries that are parties to the Hague Convention.[8]

36. Neither the Family Courts Act nor GWA provides specific guidelines for adjudicating Convention cases. Perhaps it was deemed unnecessary. Since the aforementioned amendment has incorporated the Hague Convention into the Family Courts Act, courts may benefit from the jurisprudence discussed above unless it is inconsistent with our judicial decisions.

Non-Convention cases

37. The case ***McKee v McKee,*** [1951] AC 352, has had a lasting impact on the development of family law, especially in international disputes involving child custody. In this case, the core issue was a custody dispute that crossed international borders. It originated from a familial conflict between Mr. and Mrs. McKee, who were residents of Ontario, Canada. After their marriage in 1942 and the birth of their son in 1943, Mrs. McKee left for England with the child in 1946 without her husband's consent. In England, she secured a custody order in 1948. Meanwhile, Mr. McKee successfully challenged this in Ontario, obtaining a custody order in his favour in 1949, which the Ontario Court of Appeal confirmed. The case reached the Privy Council, which upheld the Ontario court's decision, emphasizing that the child's welfare was paramount and should be assessed by his domicile of origin, Ontario. This case underscored the importance of jurisdiction based on domicile in international child custody disputes and reinforced the principle that child welfare supersedes all other considerations, including recognizing foreign custody orders. The Privy Council ruled that the order of a foreign court would yield to the welfare and happiness of the child. The comity of the courts demanded not its enforcement but its grave consideration. It further stated:

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[7] The Punjab Government has amended Part-I of the Schedule to the Family Courts Act through Notification No. SO(Judl-III)4-19/2019 dated 21.08.2019 (published in the Punjab Gazette on August 22, 2019).

[8] Azad Kashmir and Gilgit Baltistan have also taken similar measures. The Central Authority under the Convention lies in the Ministry of Law and Justice.

> "It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. It is, however, the negation of the proposition … that the infant's welfare is the paramount consideration, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case."

38. When a child is taken to a country where the Hague Convention does not apply, the law of that country governs custody determinations. The court will often consider the child's best interest when determining custody, but each country has a different definition of this term.[9] Some countries, such as Canada,[10] have a complete code for cases not covered by the Hague Convention. On the other hand, several nations have regard for its guiding principles even when they lack direct applicability.

39. In ***re Barrios and Sanchez*** [(1989) FLC 77,602], a father abducted the two children of his marriage from Chile, which at the time was not a party to the Hague Convention, to Australia which was a party to it. The Court of First Instance ordered the father to return the child to the mother's custody in Chile. On appeal against that order, the Full Family Court of Australia said:

> "Although His Honour was correct in saying that the Convention had no direct application to this case in the strict sense, we think that it is nevertheless open to a court, and appropriate in this case, to pay regard to the policy of the Convention, particularly having regard to the fact that Australia is a party to it."

40. In ***Lehartel v Lehartel,*** [1993] 1 NZLR 578, the child was the subject of a joint custody order between the father and mother made by a Court in Tahiti where the child and his parents were residing. The mother then took the child from Tahiti, which was a non-Convention country, to New Zealand, a Convention country, and failed to return the child to Tahiti. The father went to New Zealand and sought a court order to return the child to Tahiti. The New Zealand Guardianship Amendment Act 1991, which

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[9] *Sumayyah Moses v. Station House Officer, Faisalabad, and others* (PLD 2020 Lahore 716).

[10] In Canada, for cases not covered by the Hague Convention, the CLRA provides a complete code.

implements the Hague Convention in New Zealand, did not apply. Tompkins J. in the High Court of New Zealand held that the child should be returned by the mother to Tahiti and stated on p. 583:

> "Although the Amendment Act and the Convention do not directly apply to this case, I consider that the court can properly have regard to principles of the Convention as a factor to take into account in deciding how the court should exercise its discretion on the application before it. This approach accords with that of the Full Court of the Family Court of Australia *In the marriage of Barrios and Sanchez* [(1989) FLC 77,602]. That was an appeal against an order requiring the father to return two children of the marriage to the custody of the mother in Chile. The Convention did not apply because Chile was not a signatory. The Full Court considered that although the Convention had no direct application, it was open to the court and appropriate, in that case, to pay regard to the policy of the Convention, particularly having regard to the fact that Australia was a party to it."

41. In the U.K., the Chancery judges developed the principle that the individual child's welfare might outweigh any other considerations in exercising their inherent jurisdiction over children. The Guardianship of Infants Act 1925 casts a statutory duty on the courts to regard the child's welfare as their paramount consideration.[11] Despite this overarching principle, there are instances where the application of the welfare principle may be specifically excluded by statute. For example, the Child Abduction and Custody Act 1985 sometimes excludes the welfare principle, aligning with international treaties like the Hague Convention on the Civil Aspects of International Child Abduction and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children.

42. In the era following the Hague Convention, English courts have examined the principles governing applications for returning children abducted from non-Convention countries in a series of legal cases. In ***re M (Abduction: Non-Convention Country)*** [1995] 1 FLR 89, the Court of Appeal outlined key principles guiding English courts in non-Convention cases. It ruled that the best interests of children should be prioritized, adding that they are usually best secured by having their future determined in the jurisdiction of their habitual residence and sparing them the distress and disruption they are liable to suffer if one parent abducts them from the home jurisdiction to secure a tactical or a supposed juridical advantage in a competing jurisdiction. Nevertheless, the court should consider all relevant

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[11] The statutory duty was first laid down by section 1 of the Guardianship of Infants Act 1925 and later consolidated in section 1 of the Guardianship of Minors Act 1971.

factors delineated in Article 13 of the Hague Convention. The Court of Appeal also emphasized the urgency in granting a peremptory return order, indicating that detailed considerations should not delay the process. In ***re JA (Child Abduction: Non-Convention Country)*** [1998] 1 FLR 231, the Court of Appeal endorsed the following observations of Singer J.:

> "In the ordinary case, it is in the child's best interests for his or her welfare to be determined by the court of the country where the child habitually resides. The reasons for that have been so often stated that it would be superfluous for me to repeat them. It is an important component of the principle that the court should not assist or encourage transnational abductions, whether or not the Hague Convention applies, but as has most recently been pointed out by Ward LJ in his leading judgment in the case of *Re E (A Minor) (Child Abduction: Non-Convention Country)* [1997] 2 WLR 223, that and every other general principle in cases concerning children's welfare must give way to the overriding consideration of the child's welfare. That case made it clear that it is wrong slavishly, as it were, to follow by analogy the principles of Hague Convention cases and apply them to non-Convention cases such as this, nor is it appropriate to force into that format of a non-Convention case the terminology that is appropriate to Hague cases."

43. In ***re J (a child)*** (FC), [2005] UKHL 40, Baroness Hale of Richmond stated that there is no warrant, either in statute or authority, for the principles of the Hague Convention to be extended to countries which are not parties to it. This is so even in a case where a friendly State has made orders about the child's future. Hence, in all non-Convention cases, the courts must act in accordance with the welfare of the individual child. If they decide to return the child, it is in his best interests, not because some other consideration has superseded the welfare principle. The child's welfare is paramount and the special rules and concepts of the Hague Convention are not to be applied by analogy in a non-Convention case. Baroness Hale further stated:

> "How then is the trial judge to set about making that choice? His focus has to be on the individual child in the particular circumstances of the case. The policy considerations which have led this country to enter into international treaties for the good of children in general are irrelevant. *A fortiori,* the hope that countries which have not yet become parties to such treaties might be encouraged to do so in future is irrelevant. There may be good reasons why those countries are unable to join the club. They may well believe that it would be contrary to the fundamental principles of their laws to accept the reciprocity entailed ..."

She went on to say:

> "… The most one can say, in my view, is that the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case.

> What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed, in this or any other case, that allowing a child to remain here while his future is decided here inevitably means that he will remain here forever."

44. India is currently not a party to the Hague Convention. In ***Nithya Anand Raghavan v. State (Nct of Delhi) and another*** (2017) 8 SCC 454, the Indian Supreme Court outlined the following principles for child custody cases involving foreign countries:

(i) When a parent abducts their child from abroad and brings them to India, courts should prioritize the child's welfare. They may conduct a summary or elaborate inquiry to decide the custody issue.

(ii) In exercising summary jurisdiction, the court must be satisfied that the proceeding instituted before it was in "close proximity" and filed promptly after the child was removed from their native State and brought within its territorial jurisdiction. The child should not have gained roots here, and it will be in the child's welfare to return to their native State because of differences in the language spoken, social customs, or other tangible reasons. In such cases, the court need not resort to an elaborate inquiry into the merits of the child's welfare but leave that inquiry to the foreign court by directing the child's return. The court can still refuse to issue a direction to return the child to the native State if their return may expose them to a grave risk of harm.

(iii) In an elaborate inquiry, the court is obliged to examine the merits regarding where the paramount interests and welfare of the child lie and reckon the fact of a pre-existing foreign court order for the return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. This has to be done independently, bearing in mind the totality of facts and circumstances of each case.

(iv) The principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or the return of the child to the native State. Essentially, the principle of the comity of courts is a principle of self-restraint, 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 the 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 principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.

(v) Invoking the first strike principle as a decisive factor would undermine the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration.

45. As adumbrated, Pakistan acceded to the Hague Convention on December 22, 2016, with certain reservations regarding Articles 24 and 26. When the Convention is not applicable, the court must evaluate each case individually, focusing on the child's welfare. The child's habitual residence is initially considered a significant factor, but it is not the sole determinant. This approach aims to mitigate the trauma and instability caused by parental abductions, which are often intended to secure a legal advantage in another jurisdiction. Even if a foreign court has issued an order regulating the child's custody, the domestic court must still weigh it in light of the welfare principle, treating it as just one aspect among others rather than the sole consideration. Thus, Pakistani courts retain the discretion to refuse the return of an abducted child if they determine that such a return would not be in the child's best interests. This could be the case if the child has settled into their new environment, or if returning would expose them to physical or psychological harm, or if the child is sufficiently mature and objects to the return.

46. Even before Pakistan acceded to the Hague Convention, the country's courts consistently held that the decisions of foreign courts did not, by their own force, bar the filing of the application for the custody of minors, particularly when circumstances changed. A foreign court's order was one of the factors to be considered by the Family Court, but it was not conclusive of the controversy. In this regard, reference may be usefully made to ***Abu Saeed A. Islahi v. Talat Mir and others*** (1994 MLD 1370).

High Court's jurisdiction under Article 199 of the Constitution

47. Before July 1954, the *habeas corpus* jurisdiction vested in the High Courts under section 491 of the Code of Criminal Procedure 1898 ("Cr.P.C."). After that, the Government of India (Amendment) Act, 1954 also conferred constitutional power on the High Courts to issue such writ by inserting section 223-A in the Government of India Act, 1935. Article 170 of the 1956 Constitution, Article 98 of the 1962 Constitution, and now Article 199 of the 1973 Constitution have maintained this jurisdiction. In ***Muhammad Ajmal Khan v. Lt.-Col. Muhammad Shafaat and others*** (PLD 1976 Lahore 396), A.R. Sheikh, J. held that the High Court's jurisdiction under Article 199(1)(b)(i) of the Constitution of 1973 is much wider than section 491 Cr.P.C.

48. Specifically, Article 199(1)(b)(i) states that subject to the Constitution, if the High Court is satisfied that no other adequate remedy is provided by law, upon the application of any person, it may issue an order directing a person in custody within its territorial jurisdiction to be brought before it to ensure that he has not been unlawfully detained. *Habeas corpus* is available against anyone suspected of unlawfully detaining another person, not just jailors, police officers, or other public officials whose duties normally include arrest and detention. It may also be filed in respect of minors. In ***Qurat-ul-Ain v. Station House Officer, Police Station Saddar Jalalpur Jattan, District Gujrat, and others*** (2024 SCMR 486), the Supreme Court of Pakistan observed that when a writ of *habeas corpus* is sought for the production of a child, it is not for the liberation of a detenue or a prisoner. The issue concerns his nurture, control, and education in such cases.[12]

49. The Supreme Court of Pakistan has consistently maintained that the High Court's jurisdiction under Article 199(1)(b)(i) of the Constitution (and section 491 Cr.P.C.) should be sparingly invoked for the custody of minor children and only under specific circumstances. In ***Nadia Perveen v. Almas Noreen and others*** (PLD 2012 SC 758), the Supreme Court ruled that the High Court may entertain matters related to the custody of minor children while exercising its *habeas corpus* jurisdiction if the following conditions are met. Firstly, the children involved must be of very tender age. Secondly, they should have quite recently been snatched away from lawful custody. Lastly, there must be a real urgency in the matter. The Supreme Court further stated that even if these conditions are fulfilled, the High Court may only regulate interim custody of the children, leaving the matter of final custody to be determined by the Family Court. It highlighted that the Family Court has ample powers to recover minor children and regulate their interim custody.[13]

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[12] In this context, the Supreme Court cited the following excerpt from *R v. Barnardo* (1891) 1 QB 194:

> " … to determine whether the person who has the actual custody of them (infants) as children shall continue to have the custody of them as children. In such cases, it is not a question of liberty, but of nurture, control and education."

[13] Also see: *Muhammad Javed Umrao v. Uzma Vahid* (1988 SCMR 1891), *Nisar Muhammad and another v. Sultan Zari* (PLD 1997 SC 852), *Naziha Ghazali v. The State and another* (2001 SCMR 1782); *Khalida Perveen v. Muhammad Sultan Mehmood and another* (PLD 2004 SC 1); and *Qurat-ul-Ain v. Station House Officer, Police Station Saddar Jalalpur Jattan, District Gujrat, and others* (2024 SCMR 486).

50. In *Qurat-ul-Ain*, the Supreme Court held that the High Court's jurisdiction under Article 199(1)(b)(i) of the Constitution is subject to the satisfaction that no other adequate remedy is provided by law. A writ of *habeas corpus* is not to be issued as a matter of course, particularly when it is sought against a parent for the custody of a child. There must be clear and compelling reasons for issuing such a writ. The Supreme Court criticized the tendency of High Courts to unhesitatingly involve law enforcement agencies in family matters, particularly when there is no criminal element involved and the child is under the lawful custody of a parent. The Supreme Court noted that such actions could cause unnecessary trauma and harassment to the affected parent, especially if the parent is the biological mother. Therefore, the High Court should proceed with great care, caution, and restraint. It may exercise its constitutional jurisdiction only in exceptional circumstances, where all other measures have failed, and criminal actions such as forced removal, kidnapping, or abduction of the child are apparent. The following excerpt is relevant:

> "A perusal of the [impugned] order reveals that at no stage had the High Court (a) satisfied itself that no alternative or efficacious remedy was available to Respondent No.3; (b) shown why it had deemed the production of the child appropriate when she was admittedly with her mother; or (c) on what basis the continued custody of the minor with her real mother was even *prima facie* 'without lawful authority or in an unlawful manner', which necessitated the production of the minor before the court ... Issuance of a writ of *habeas corpus* in a custody matter should be an exception, and not the rule, as the GW Act provide the [Family] Court with all requisite powers to pass and enforce its orders in matters of custody of the child(ren). It is, in our opinion, inappropriate for a constitutional court to encroach upon and arrogate itself the powers of a [Family] Court, which is the court of competent jurisdiction under the law, to decide all matters relating to custody of child(ren)."

51. The High Court's jurisdiction under Article 199(1)(b)(i) of the Constitution (and section 491 Cr.P.C.) and the jurisdiction of the Family Court under the GWA are fundamentally distinct and serve different purposes. In ***Muhammad Javed Umrao v. Uzma Vahid*** (1988 SCMR 1891), the Supreme Court explained:

> "The Guardian and Wards Act, as the title itself suggests, deals with the Guardians, Wards, and the problems and questions relating to them. Section 7 relates to the appointment of a guardian by the court, and section 12 authorizes the court to make interlocutory orders for the protection of minors and interim protection of their person and property. The two matters, one dealt with by section 491 Cr.P.C. and the other under the Guardians and Wards Act, are entirely different, and there is no question of one excluding the other, the one overlapping the other, or the one destroying the other. The law, as it stands, shows no such repugnancy. It is true that the facts of individual cases may be such where the cover of

> proceedings of one sort is taken for advancing the cause of another. In such cases, it has to be ascertained as to what is the substance of the proceedings, and thereafter, the proceedings are to be diverted to the appropriate channel, be it of section 491 Code of Criminal Procedure or one under the Guardian and Wards Act."[14]

52. Given the above, the High Court's jurisdiction to issue a writ of *habeas corpus* is not affected by the pendency of the guardianship matter before a Family Court.[15] Nonetheless, it is reiterated that it cannot be used for declaring a guardian or determining the question of custody of the minor for all times to come.[16]

53. Mr. Shad has argued that in *Qurat-ul-Ain*, the Supreme Court whittled down the principle established earlier in *Muhammad Javed Umrao*. It has held that the GWA offers an alternative and effective remedy and that a petition for a writ of *habeas corpus* is incompetent to recover children from a parent. This argument is flawed. Firstly, *Qurat-ul-Ain* had peculiar facts. In that case, the grandmother filed a constitutional petition to recover her granddaughter from her own mother, alleging that her custody was improper because she had contracted a second marriage with a man who was a *ghair mahram* for the child. The High Court directed the SHO to recover and produce the child, subsequently ordering that her custody be handed over to the grandmother as an interim arrangement and that the concerned Family Court shall decide the issue of permanent custody of the child in accordance with the law. The mother, dissatisfied with the High Court's decision, appealed to the Supreme Court, which ruled that the grandmother should seek a remedy from the Family Court. Secondly, *Qurat-ul-Ain* does not impose an absolute prohibition on issuing a writ of *habeas corpus* in respect of minors. The Supreme Court clearly stated that in exceptional and extraordinary circumstances – where all other methods fail and there is an element of criminality, forced removal, kidnapping, or abduction of the child – the High Court may exercise its constitutional jurisdiction. Thus, *Qurat-ul-Ain* reaffirms the principles laid down in *Muhammad Javed Umrao* rather than deviating from them.

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[14] This view was reiterated in *Mirjam Aberras Lehdeaho v. SHO, Police Station Chung, Lahore, and others* (2018 SCMR 427).

[15] *Muhammad Javed Umrao v. Uzma Vahid* (1988 SCMR 1891); *Ahmed Sami and others v. Saadia Ahmed and another* (1996 SCMR 268); *Ghulam Fatima v. The State and others* (1998 SCMR 289); *Mirjam Aberras Lehdeaho v. SHO, Police Station Chung, Lahore, and others* (2018 SCMR 427); *Jahan Ara v. Province of Sindh, and others* (2019 MLD 1722).

[16] *Muhammad Javed Umrao v. Uzma Vahid* (1988 SCMR 1891); *Nadia Perveen v. Almas Noreen and others* (PLD 2012 SC 758).

54. In various international child abduction cases, courts have intervened on a *habeas corpus* petition to safeguard the best interests of the child and provide relief to the affected parent. In ***Louise Anne Fairley v. Sajjad Ahmed Rana*** (PLD 2007 Lahore 300), the mother, a British national, and the father, a Pakistani citizen who migrated and settled in the U.K., were involved in a custody dispute over their minor child. The father allegedly abducted the child from the mother's care in Scotland and brought him to Pakistan, bypassing law enforcement authorities and violating a Scottish court order favouring the mother. The latter filed a petition under Article 199(1)(b)(i) of the Constitution in the Lahore High Court. The father argued that the case did not fall under the said Article 199 because the child's custody with him could not be deemed "without lawful authority" under Pakistani laws. Even section 491 Cr.P.C. did not apply as the custody could not be considered "illegal" or "improper". The High Court rejected this contention, holding as follows:

> "According to Article 199 (1)(b)(i) of the Constitution of the Islamic Republic of Pakistan, 1973, this Court has the power and the jurisdiction to satisfy itself that the custody of a person is not being held by another "without lawful authority" or "in an unlawful manner". The above are the expressions of art, and in spirit, it means that such a custody should not be against or unauthorized by law; in defiance of law, in disregard or disobedience of law, impermissible under the law, without excuse and justification of law. According to section 491 of the Criminal Procedure Code, a *habeas corpus* order can be issued by this Court, if the custody of a person held by another is "illegal" or "improper". Thus, the proposition which comes for direct consideration is whether respondent No.1 is holding the custody of the minor under the sanction of law or otherwise. The case of the petitioner is that there are interdict and residence orders passed by the Scottish Court and also an undertaking has been given by the respondent No.1 not to remove the minor from the care and control of the petitioner and also the jurisdiction of that court, therefore, bringing the child over to Pakistan and retaining its custody in breach of the above, is thus "without lawful authority", "illegal" and "improper".

55. In ***Mirjam Aberras Lehdeaho v. SHO, Police Station Chung, Lahore, and others*** (2018 SCMR 427), Mirjam (the mother), a Finnish national, married a Pakistani police officer and had three children in Lahore, Pakistan. In 2009, the family applied for Canadian immigration (except for the father who got permanent resident status which allowed him to enter and exit Canada at his convenience) and shifted abroad. After about seven years, the father brought two of the minor children to Pakistan, ostensibly for a short vacation, and obtained guardianship of them through the Family Court without the mother's knowledge. When the mother learnt about the Family Court's *ex parte* order, she travelled to Pakistan and attempted to see her

children, but the father denied her access. Consequent thereupon, she filed a *habeas corpus* petition in the Lahore High Court to recover the children, which was dismissed as not maintainable. The Supreme Court set aside the High Court's order. It held that since Mirjam genuinely believed that the children had been removed from her custody through deception and trickery and subsequently forced to stay in Pakistan against their will, she could rightfully approach the High Court for redress. The High Court was competent under sections 491 and 561-A Cr.P.C. to provide her relief. The Supreme Court nixed the contention that the remedy under section 491 Cr.P.C. was barred due to the availability of an alternative remedy through the Family Court. It further stated that the Supreme Court and the High Court also have parental jurisdiction. They must consider the welfare of minors and ensure that no harm or damage occurs to them physically or emotionally due to a breakdown in the family ties between parents. The Supreme Court went on to say that since the children were old enough to form an intelligent preference, the High Court erred in law by 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 struck down the *ex parte* Guardian Certificate and directed the Family 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.[17]

56. To sum up, under Article 199(1)(b)(i) of the Constitution (and under section 491 Cr.P.C.), the High Court possesses the authority to issue a writ of *habeas corpus* to ensure that a person is not being unlawfully detained within its territorial jurisdiction. Although legally speaking, it can issue the aforesaid writ in respect of minors, it must only exercise this jurisdiction in exceptional circumstances, particularly when no other adequate legal remedies are available, the children involved are very young, have been recently taken from lawful custody, and there exists an urgent need for intervention. In such cases, the High Court's role is strictly limited to determining interim custody, leaving final custody decisions to the Family Court, which has the specialized function under the GWA to handle such

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[17] Also see: *Iza Nowak v. Federal Investigation Agency and others* (W.P. No. 3181/2022 decided by the Islamabad High Court by order dated 28.12.2022); *Muhammad Faraaz Shaikh v. Javeria Shahani and others* (C.P. No. S-678/2022 decided by the Sindh High Court by order dated 25.01.2024).

matters comprehensively. The emphasis is on exercising this jurisdiction sparingly to avoid undue trauma or harassment, especially to biological mothers, and to avoid encroaching upon the domains reserved for Family Courts. In situations of international child abduction (whether falling under the Hague Convention or not), the High Court is competent to intervene, particularly when the removal of the child breaches existing legal custodial arrangements because it renders the custody "without lawful authority", "illegal", and "improper". This legal framework underscores a cautious and balanced approach to safeguarding children's physical safety, emotional well-being, and overall welfare while respecting legal jurisdictions and custodial rights.

The case in hand

57. Pakistan and Canada are both signatories to the Hague Convention. However, they have yet to reciprocally acknowledge each other's accession. Consequently, the Convention is not enforceable between them.

58. The facts narrated above reflect that on 18.02.2022, Respondent No.1 appeared before the Ontario Court and tried to get an order for temporary custody of Zoran, Zarayb, and Zaviyar, representing that she intended to remain in Ontario with them. The court, focusing on primary residence and parenting time, directed Respondent No.1 to return the two older children to the Petitioner's care and asked the latter to re-enroll them at Jean Lumb Public School immediately. It ruled that the two older children would primarily reside with the father and the youngest with the mother, with specified visitation schedules. It prohibited changing the schools or relocating the children without the court's approval. It appears that Respondent No.1 was not satisfied with these arrangements and unlawfully removed the children to Pakistan. Moreover, the allegations of fraudulent conduct in obtaining orders from the Family Court in Lahore are deeply concerning. Therefore, this petition under Article 199 of the Constitution is maintainable on the touchstone of the law enunciated by the Supreme Court in the legal precedents discussed above.

59. Mr. Shad has also contested this petition on the basis of the *doctrine of election of remedies*. This principle suggests that when a party has the right to choose one of two or more appropriate but inconsistent

remedies and, with full knowledge of all the facts and his rights, makes a deliberate choice of one of them, he is bound by his election and estopped from subsequently electing and resorting to the other remedy.[18] Mr. Shad argues that the Petitioner, having elected to seek a remedy before the Family Court, cannot simultaneously invoke the constitutional jurisdiction of this Court. However, in my view, the election of remedies doctrine does not apply to the present case. As discussed earlier, in *Muhammad Javed Umrao,* the Supreme Court determined that the *habeas corpus* petition and the proceedings under the GWA are distinct. Neither one excludes the other, overlaps with the other, or destroys the other.

60. The legal concept of "maintainability of *lis*" is distinguishable from "entitlement to relief". Maintainability of *lis* refers to a party's legal standing or right to bring an action before the court. It includes meeting preliminary requirements for the court to accept the case, such as proper jurisdiction, the legal capacity of the parties to sue or be sued, the existence of a justiciable controversy, and adherence to procedural rules like correct pleadings and timeliness. If a case is deemed not maintainable, the court will not proceed to examine its merits. On the other hand, "entitlement to relief" involves a claimant's substantive right to the remedy or relief sought in the lawsuit. This determination is based on the merits of the case, requiring the court to evaluate the evidence and apply relevant laws to decide if the claimant has a valid claim. Entitlement to relief is considered only after the court has determined that the case is maintainable. To put it differently, when a petition is described as "maintainable," it means that it fulfils the procedural requirements for court consideration and adjudication. Essentially, the court thereby affirms that the lawsuit is correctly filed and falls within its jurisdiction. However, this determination does not affect the final outcome or decision on the case's merits. It merely allows the legal process to proceed, enabling the court to hear arguments from both sides, review evidence, and apply relevant laws to reach a final decision.[19]

61. Having held that the petition is maintainable, let's delve into the merits of the case. The Petitioner has produced two orders from the Ontario

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[18] *Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others* (PLD 2018 SC 828).

[19] See: *Muhammad Nasim Siddiqui v. Ali Akbar* (PLD 2018 Sindh 703); and *Capt. Tariq Mehmood Malik v. PALPA Pilots Occupational Disability Fund Trust* (2022 CLC 862).

Court, dated 18.02.2022 and 22.11.2023. When the Ontario Court passed the first order, it was concerned with the issue of the children's primary residence and parenting time. Consequently, it made certain arrangements on a "temporary, without prejudice basis". The second order contains directives for ensuring the children's return to Canada. Thus, the case before the Ontario Court was still at its preliminary stage, and it did not make any final determination regarding the best interests of the children when Respondent No.1 relocated them to Pakistan.

62. As adumbrated, the overarching principle in cases involving the question of custody is the determination of the welfare of the child, as enshrined in section 17 of the GWA. This provision explicitly directs courts to prioritize the child's well-being in accordance with relevant laws. Section 17(3) allows courts to consider the preferences of mature minors. In ***J v. C (an infant)*** [1970] AC 668, the House of Lords emphasized that ensuring the child's best interests involves a "process, whereby all the relevant facts, relationship, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to follow will be that which is best in the interest of the child." Similarly, in ***Shaista Habib v. Muhammad Arif Habib and others*** (Civil Petition No. 3801 of 2022 decided on 06.03.2023),[20] the Supreme Court of Pakistan ruled that the issue of custody entails taking into account aspects pertinent to the upbringing, nurturing, and fostering of the child, which encompasses their emotional, personal, and physical welfare. The primary aim is to safeguard the child's overall growth and development.

63. In this petition, the Petitioner has exclusively focused on the violation of the Ontario Court's orders. He has not clarified how granting him custody would promote the children's well-being. Similarly, Respondent No.1 has not elaborated in her pleadings on how their interests would be served if custody were awarded to her. As a result, there is no material before this Court to adequately assess the pivotal issue of the children's welfare, which lies at the heart of these proceedings.

64. On 19.04.2021, Respondent No.1, through her Special Attorney, Muhammad Yaqoob (Respondent No.2), applied to the Family

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[20] https://www.supremecourt.gov.pk/downloads_judgements/c.p._3801_2022.pdf

Court in Lahore under section 7 of the GWA for appointment as the children's guardian. The Family Court accepted her application by an order dated 25.11.2021. The Petitioner alleges fraud and misrepresentation by Respondent No.1 and has challenged that order under section 12(2) CPC. The Family Court suspended its order to inquire into these allegations, and the matter is still pending. Evidence needs to be recorded to resolve this controversy between the Parties.

65. In view of the above, this Court must not intervene in the matter while exercising its constitutional jurisdiction and direct the Petitioner to seek redress in the Family Court.

Disposition

66. This petition is disposed of in the following terms:

(i) The Petitioner may pursue remedy before the Family Court, Lahore.

(ii) The allegations of fraud and deceit against Respondent No.1 are serious. The Family Court is directed to prepare a separate file and initiate proceedings under section 476 Cr.P.C. against Respondents No.1 & 2 and those complicit with them.

(iii) The Family Court shall conduct proceedings in all other matters between the Parties (including those under section 476 Cr.P.C.) on a day-to-day basis and ensure they are concluded within the next two months.

(iii) The children are with Respondent No.1 at present. The Family Court shall also draw a timetable so that the Petitioner can access them and have reasonable parenting time until it decides the litigation between the Parties.

(iv) Neither party shall take the children out of the jurisdiction of the Family Court without its prior permission.

(Tariq Saleem Sheikh)
Judge

Naeem

Announced in open court on _____

Judge

Approved for reporting

Judge