

THE HIGH COURT

[2015 61 M]

IN THE MATTER OF THE PROTECTION OF CHILDREN (HAGUE CONVENTION) ACT 2000

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 AS AMENDED

AND IN THE MATTER OF THE THREE MINOR CHILDREN

A.M.Q.

APPLICANT

AND

K.J.

RESPONDENT

JUDGMENT of Ms. Justice O'Hanlon delivered on the 26th day of May, 2017

1. This is an application which was issued on 11th November, 2015 pursuant to the Protection of Children (Hague Convention) Act 2000 and the Guardianship of Infants Act 1964 as amended, in particular pursuant to ss. 31 and 32 as inserted by the Child and Family Relationships Act 2015. The applicant is seeking an order pursuant to Article 11 of the Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996 (the 1996 Convention) or pursuant to the inherent jurisdiction for the return of the children to the jurisdiction of Pakistan. The applicant is also seeking an order pursuant to the inherent jurisdiction and pursuant to the principle of the international comity of courts, recognizing and giving legal effect to orders made by the Guardian Court of Lahore, Pakistan dated 2nd May, 2015 and 19th October, 2015.

2. The applicant was married to the respondent on 27th April, 2001 in Pakistan. There are three children of the marriage; the eldest, their son was born on 16th March, 2002, the second child, a daughter was born on 16th March, 2005 and the youngest child, also a daughter was born on 27th February, 2008. The parties resided in Ireland from 2001. All the children were born in Ireland, they are Irish citizens with Irish passports and they also have Pakistani passports and identity cards. A similar status applies to both parents. The applicant travelled to the UK to work in various locum positions. In 2014, the family went to Pakistan. The circumstances of this move are the subject of some controversy. The applicant's position is that they agreed to move permanently to Pakistan, that this was an always intended, carefully planned move which took place at the end of the children's academic year in 2014 and they shipped all of their belongings to Lahore. It is accepted by all parties that difficulties arose in the marriage although there is considerable conflict around the specific facts. The Dublin District Court, by order of the 25th September, 2015, dispensed with the applicant's consent to the issuing of duplicate Irish passports for the children. The District Court in the area where the family lives in Ireland granted a protection order in favour of the wife on 3rd November, 2015. It is alleged that the respondent wrongfully removed the children from the jurisdiction of Pakistan on or about 3rd November, 2015 and travelled to Ireland in breach of an order of the Guardian Court of Lahore, Pakistan dated 4th May, 2015.

Evidence of the Applicant

3. The applicant gave evidence where he asserted a strong bond with his son, describing the second child as having more of a bond with her mother, and describing the third child as having an equal bond with both parents. The applicant acknowledges that he did not get to see the third child growing up as he worked in the United Kingdom during the week and travelled back to Ireland each weekend. The applicant's contention is that his son, now fifteen years of age wishes to live in Pakistan. The applicant describes a pattern where the parties went on holidays every year to Pakistan for a few weeks and that the children went to Kuwait, where their mother is from, on holiday with her while the father worked. The applicant's case is that the parties moved to Pakistan in 2014 where they remained for approximately eighteen months. He contends that they became habitually resident there, that the children were in a private school and that the children were treated like royalty by his extended family with whom they lived.

4. The applicant makes several allegations against the respondent including that she has made efforts to alienate the children from him and that there has been no true access since their arrival in Ireland. He asserts that the children can only have a meaningful relationship with both parents if they return to Pakistan. The applicant also contends that the respondent has made multiple suicide attempts in the presence of the children and he claims that this was proven by a Pakistani Police investigation. He also alleges that the mother regularly beats the children and he asserts that it is not in the best interest of the children to remain with their mother. The applicant argues in general terms that the respondent is unstable and has made contradictory statements in sworn affidavits and had contravened court orders. The applicant also asserts that the issue of the welfare of the children is best decided in their place of habitual residence which he argues is Pakistan.

5. Although the applicant had a legal team for a large portion of the hearing of this case, and while he had the expertise of a learned senior counsel to cross-examine the assessor, at a late stage in the case when he was representing himself and when the assessor's cross-examination had been concluded, he attempted to have the assessor removed from the case and complained to her employer, Barnardos, arguing that the reports went beyond the scope and purpose intended. The applicant contended that his concerns were not included in the assessor's reports and that various questions and issues were not pursued with the children in particular around violence and fear. The applicant argues that the reports were full of contradictions.

6. The applicant also alleges that all of the respondent's accusation against him have been proven false and that the respondent has accepted that she has done "the maximum wrong that anyone can do". He alleges that the respondent's decision not to go to Pakistan if the children are ordered to be returned is a type of blackmail. The applicant further contends that because there was a successful judicial review by him in relation to the issuing of passports to the respondent that the correction of this error should lie in the return of the children to Pakistan. The applicant gave evidence to this Court that for many years while his family were based in Ireland, he travelled to work in various parts of England as an ophthalmic surgeon. He outlined that this work pattern began because of the economic downturn in 2008. When he moved to Pakistan he had difficulty getting registered and therefore, did not work for the last two years except for some locum work. The applicant has a brother living in Ireland with children of similar ages to his own

children and he asserted that they visited regularly.

7. The applicant accepts that the respondent applied in Ireland for a protection order against him in 2014. He further accepts that when the protection order was due to expire he wrote the letter signed by her seeking to withdraw same. The applicant claims not to have put pressure on his wife to withdraw the protection order. It was put to the applicant that his wife withdrew same because he apologised to her and told her that he was going to change and that his son understood that his father was going to improve if they moved to Pakistan. This was denied by the applicant. He also denied screaming and shouting by him when he was home in Ireland at the weekends. Around Easter 2014 the respondent was on a visit to Kuwait for a holiday and she was admitted to hospital. The applicant claims that she had taken an overdose and he took time off work to care for his wife at that stage. The family then moved to Pakistan.

8. It is clear from the applicant's own evidence that there were many difficulties in the marriage. He spoke of there being some arguments. However, the applicant indicated that he would never do anything sexually without the respondent's consent, either in Ireland or in Pakistan, where he explained that sexual relations with a wife, consenting or not, would not be illegal. The applicant indicated that the respondent told him to get a second wife and that she said she felt like she had snakes on her body when he touched her. The applicant asserted that he did not take a second wife because that would not have given him a good reputation as a professional man.

9. In relation to an incident in April 2015 which occurred in Pakistan while this family were living with the husband's extended family, the applicant justified "manually handling" his wife by saying that he was trying to take a knife from her and alleges she was going to commit suicide. He admits that on that occasion he did slap his wife but denies kicking her. The applicant described this incident as one in which the children were shouting "mummy, don't do it", and alleges that his wife was running out into the street with the children running after her.

10. The applicant accepted that there would be a level of risk to the general security of the children in Pakistan. However, he denied that there would be a risk to the respondent if she were to return there and in furtherance of that, he asserted that his brothers are educated and sober so they would not attack his wife. He refused to accept that his children had been unhappy in Pakistan. He denied oppressing his wife or restricting her access to finances. He described the family unit in Pakistan as being different to Ireland and that there was no such thing as a separated father only a married father. His solution included that, upon their return to Pakistan, he would call the extended family together where they would sort everything out. If the children were returned without their mother to Pakistan his intention was that they would be placed living in an annex to his own mother's house. Both parties gave evidence of the applicant owning a large house in Lahore although they did not live there.

11. The applicant was very proud of the education he says he is able to provide the children with in a private school in Pakistan and that the children were doing well there. He denied ever hitting the children and he said he would never allow anyone to hit his children. His son, in the assessment, had indicated that his father would hold his wrists and give him bruises. The father's reaction was that he could not say he never did this but that it did not happen more than a couple of times. The applicant accepted that the air conditioning did not reach the back of the car on the journeys to school in Pakistan but stated that the weather would not have been hot at that time of year. The applicant gave evidence of orders received in the Lahore court by him which prevented the removal of the children from Pakistan.

12. The applicant indicated that he is hurt at the rejection he has suffered by the respondent but would still accept that the children should have contact with their mother. He stated that he was able to get the first set of passports sent to the respondent from the courier because he happened to be outside her uncle's house when these documents were in the course of being delivered. The applicant was also cross-examined in relation to an alleged incident in Pakistan in May 2015 which is alleged to have occurred in the respondent's uncle's house. It was put to the applicant that his wife was trying to make a complaint to the police but that her report could not be registered with Pakistani Police. The applicant denied this and said it would be impossible for him to beat his wife in front of other adults and that he never went into the respondent's uncle's house with his brothers. The applicant denied putting pressure on his wife to move to Pakistan.

Evidence of the Respondent

13. The respondent stated that the marriage was an arranged one after which she moved to Ireland. She was 18 years of age and her husband 32 years of age when they married. The respondent originally from Kuwait and is an Irish citizen. She confirmed in her evidence that all three children were born in Ireland and are Irish citizens. The respondent described herself as the main care giver in the sense that she and the children only saw the applicant at weekends as he was regularly working in England. She described this arranged marriage as having no friendship in it and that she saw the applicant as superior to her and never questioned what he told her to do, in the early years at least. She did not take her final school exams because of this betrothal.

14. The respondent sought a protection order and was granted same in 2014 as a result of which she says that the applicant repented and indicated his intention to change his behaviour. Her husband wrote a letter to the District Court which she signed and agreed to hand in withdrawing the protection order. She agreed somewhat reluctantly to go to Pakistan at that stage and saw it as a two or three year arrangement but that the children would be returning to Ireland for third level education in any event. She described the applicant as being very anxious that the children would live in an Islamic culture for a period of time. The respondent's evidence was to the effect that there had never been a set date during conversations about plans to go to Pakistan until after the protection order and then that the applicant threatened to leave her and to stop giving her money if she refused to go. She describes the actual move as quite sudden and not a joint decision. She felt that her compliance was a method of survival and she would never have agreed to go if she had been aware of the social welfare assistance available in Ireland. The respondent described a stark change on her arrival in Pakistan. Although they had a new house there they did not move into it, rather she lived with her mother-in-law and extended family which she had not expected to happen. The respondent gave evidence that she was threatened by the applicant saying that he could get another wife who would give him what he wanted.

15. She described a pattern of arguments arising and escalating in Pakistan because she refused to tolerate the oppression and refused to have sexual intercourse. The respondent alleges that in October 2014 the applicant slapped her causing bruising and damage to one of her teeth after she refused to sign a document giving him power of attorney in relation to selling their family home in Ireland. The respondent described a situation where his brother arrived and they locked her in the room. Her uncle arrived at that house and took her to his own home but she was distraught without her children whom she describes as being totally dependent on her. There was a meeting arranged between her uncle and the applicant which facilitated her return to live in her mother-in-law's house and promptly thereafter the applicant went to the U.K. to do locum work. She described life as very hard and she described the children as having moments of happiness but being generally unhappy. There was a garden and toys at the new house where they were supposed to be living.

16. During an incident in or around April, 2015, the respondent describes demanding the children's passports. As a result she says the applicant and his brothers slapped and kicked her until she passed out. The respondent describes the children as witnessing this attack and indeed that they cleaned blood from her face. The respondent denied having a knife in her hand as alleged by her husband and says that she never attempted to commit suicide because she would not want to leave her children behind. The outcome of this incident was that two of her uncles arrived at the mother-in-law's house and the applicant told them to take her away. At that point her parents decided to help her get back to Ireland. An uncle who acted as her lawyer sought and obtained orders in Pakistan restraining the removal of her children from her sole care. She explained her problem to the Pakistani Police but they could not get the passports for her. She said she did not know and was not informed about any Pakistani order restraining her from removing the children from Pakistan.

17. In or about May, 2015 the respondent sought passports for her children from the Irish Embassy in Turkey. Her belief is that the applicant used bribes to track the passports and intercepted the package. She was devastated at that point as she believed that she would be trapped in Pakistan despite being an Irish citizen with three Irish children. By way of background, the applicant was successful in a judicial review of the Irish District Court decision which allowed for passports to be granted without the consent of the father on the basis that the particular District Court in question lacked territorial jurisdiction and on the basis that her husband ought to have been put on notice of the application. Emergency travel documents were obtained by the respondent through the Irish Consulate in Karachi and the respondent and the three children departed to Pakistan immediately thereafter.

18. The respondent describes herself as being in fear of her husband and that when they returned to their house in Ireland which is a property in their joint names, she promptly changed the locks on the house. The respondent's case is that her children never settled in Pakistan and that they missed Ireland. She describes them as well behaved and conscientious students and noted that her youngest child is the best in her class at Irish lessons. The respondent gave evidence that the children were very unhappy and were being bullied in their school in Pakistan and that they are much happier back in Ireland where they have settled into their old routine. The respondent agreed that both parties wished their son to have some counselling sessions.

19. The respondent describes her links with the Islamic community in Ireland and her integration both with close friends and neighbours and her having undertaken a VTOS course in order to obtain education and employment. She feels that culturally, educationally and in terms of their religion, their needs are being well catered for in Ireland and described how she ensures their study of the Quran through Skype lessons. In terms of language, English is their primary language although they do speak Urdu. Fundamentally, she describes them as Irish children that have lived most of their lives in Ireland. The respondent described the fear that the children will be returned to Pakistan and taken away from her. She is very afraid of going to Pakistan and she fears the consequences of her own actions in fighting this case and believes that she would be helpless there. The respondent places reliance on the fact that although she explained her problem to Police in Pakistan they would not register her complaint against her husband and she believes she could not rely on the police there to help her. The respondent made the distinction between Pakistani culture and Islamic culture. She believes that sexual abuse is a regular occurrence in Pakistan although it is forbidden in Islam. The respondent went on to say how she was subjected to sexual abuse when she herself was between ten and twelve years of age and living in Pakistan when her own family had moved there from Kuwait due to a war. The respondent alleges that her husband sexually abused her at that stage, as she alleges did a friend of his and she contends that she has nightmares about this and fears that it could happen to her children. The applicant denies that this ever happened and says that she is mentally ill.

20. The respondent contends that she was not aware of any order restraining her from leaving Pakistan with the children. On the contrary, her legal advice in Pakistan was that no one could stop her going to Ireland because they are Irish citizens. The respondent rejected the assertion that she left Pakistan secretly and stated that her husband knew she wanted to return to Ireland with the children although they were not speaking at the point of departure. The respondent freely acknowledges the importance of a father in the life of children. The respondent stood over her evidence which she believed to have been consistent in relation to her allegations that the applicant had beaten her, been sexually violent towards her and in relation to the incidents which she says occurred in Pakistan. She denies trying to protect a secret bank account using a protection order. The respondent adamantly denies trying to kill herself and/or ever beating her children and she said that she would confiscate their laptop or "ground" them as a punishment if necessary. She denies that she ever made efforts to alienate the children or to coach them in relation to the assessor's reports.

21. At the point at which this respondent was cross examined by her husband he had dispensed with legal team and this Court noted that in the witness box over an entire day the respondent shook visibly. The respondent's belief is that if she were to return to Pakistan she would not have any life and may be killed for fighting this particular case. The respondent stated that if there is an order for the return of the children she cannot go with them.

Assessment of the Children

22. This Court ordered a report to be carried out by a professional assessor initially to ensure the re-introduction of access between the children and their father which he originally sought. In order to re-institute access the assessor agreed to be present with the children during the initial access visits as the children refused to attend access without an adult being present. The assessor was subsequently detailed to ascertain the views of the children in relation to access and their potential return to Pakistan and the assessor was asked by the Court with the agreement of both parties and at their request, to look at this case in the context of ss. 31 and 32 of the Guardianship of Infant Act 1964 as amended. When the applicant indicated that he did not want further access in Ireland but wanted the children to be returned to Pakistan, he rejected the recommendation of therapy to assist access. The aim was for the assessor to be in a position to advise the Court as to the best welfare interests of these children as well as their views. The family law assessor was appointed on 3rd December, 2015. She gave evidence of having clinical psychological training which involved being playful, accepting, demonstrating curiosity and showing empathy and the technique was described as active listening without specific questions being put.

Assessment of the eldest child

23. Although well travelled as a fifteen year old and showing an interest in world history, the assessor described this young man as somewhat innocent but essentially a person who is at cross purposes with his father and who has a very negative view of his father. The assessor found that the eldest boy was very negative about Pakistan and sees himself as settled in Ireland. She describes him as very frightened of the prospect of going back to Pakistan and that his fear is so great that he cannot allow the positives to be explored. He also describes the school in Pakistan in negative terms.

24. Crucially, the assessor found that this boy has formed his own views, is not easily influenced and the boy's view does not come from his mother and in fact, the mother was very distressed about her son's view of the father. The assessor attended the son's access with his father and noted a physiological response in the boy before and during face-to-face access which she described as the boy saying he was very nervous, that he made several trips to the bathroom and he had his head down and his shoulders were very tense during the access visit. The assessor found that the son needs mental health support and she would not be in favour of

him separating from his mother. The assessor concluded that this son was part of the sibling pool, that he plays an important part of the lives of his sisters and that the three children should remain together. The assessor says that the son has spent his formative years in Ireland and that he is going through the normal developmental tasks of separating and clinging to his mother and pulling away until he can separate from her more fully and the assessor would not recommend that process to be stopped. Of particular note is her assessment that the boy does not have a secure attachment to his father.

25. The applicant's view of his son during the access was that he had lost weight, had poor skin, was avoiding eye contact, would not engage in the bowling game and was sullen and withdrawn. The applicant was only willing to engage in building relationships in Ireland if the children were definitely going to be moving to Pakistan otherwise his threat was that he would "walk away" from the children. The applicant suggested that the two girls could live with their mother and the son could live with him in Pakistan and that each child would have access to the non resident parent. The other option the applicant put forward was that the respondent could remain in Ireland with the two girls and that the son ought to go to Pakistan with him. However, the assessor found that the son was absolutely opposed to this and horrified that he would be separated from his mother and siblings.

Assessment of the second child, a girl aged eleven years

26. This child described herself as frightened of her father and insisted that the assessor would be present at the access and would not have attended the meeting without an adult being there and indeed would have preferred to have had her mother with her. This child objects to living in Pakistan and objects to living with her father. The reasons she gave were that she did not like being there nor did she like the children at the school. She found the car journeys to and from school very unpleasant as the air conditioning did not work. In particular, this child noted the incident in the paternal relative's house and said that they had to fetch and carry if they left their own rooms in the house and that they had to do what they were told by the father's relatives. She was much more positive about her maternal uncle's house where they got toys and got help with their homework and were taken to parks and restaurants.

27. The assessor described this child as worried and preoccupied and that she had bad dreams thinking about things that had happened in Pakistan but that sleeping in her mother's bed had helped her. The assessor formed the view that this child is not influenced by her mother and that although she is loyal to her mother, she is actually frustrated by her mother's actions in insisting on Skype access. This assessor reported that after the face-to-face access with the father this child did not want to have any face-to-face contact with her father again.

28. This child also wrote to the Court setting out her clear reasoning as to why she should not be returned to Pakistan or removed from her mother's care. The assessor concluded that this child was currently thriving in all aspects of her life in Ireland and recommended that the Court ought to be very reluctant to remove her from Ireland. The assessor considered it of note that the child's mother felt she could not protect her daughter in Pakistan and gave her opinion that such a return would not be in this child's best interests. She has an integrated situation in her school and children of the Muslim faith are adapted for in her school in Ireland. The assessor noted that the child's fear of being separated from her mother is immense.

Assessment of the youngest child, a girl

29. This child, although young, made it clear that she does not wish to go to Pakistan even with her mother and does not want to see her father or speak to him. She was found to be very resistant to face-to-face access with her father and refuses to attend further access. The assessor found this child to be angry, hurt, resentful and fearful of her father and believes that the relationship between father and daughter should be carefully worked on. The child's major attachment figure is her mother, she trusts her mother can protect her and provide for her and she also sleeps in her mother's bed. This child described the main row between her parents as having occurred lasting five hours with lots of shouting and screaming. She described her wishes that she did not want to have to go to Pakistan and she did not want to ever have to talk to her father again.

General findings of the assessor

30. The assessor found that the proceedings are very unsettling for the respondent wife and very distressing for the applicant husband but she found no constellation of symptoms indicating depression. It is the assessor's belief that there was physical and sexual abuse of the respondent in the relationship. She noted that the respondent apologised to the applicant for the rudeness of the children to him but felt that the applicant did not give any credit to the respondent. On the contrary, the applicant felt that he ought to have been praised for his sacrifice in terms of a lack of sexual intercourse with his wife and he noted again that in his culture a wife does not have entitlement to refuse sexual intercourse with her husband. The assessor noted that the applicant was very hurt by the children's attitude to him and suggested therapeutic intervention. The applicant would only engage if the children were being returned to Pakistan as he does not intend remaining in Ireland. The assessor found that the father would use any opportunity to be negative about the respondent and denies all allegations against him while the respondent showed him compassion and understood how difficult it was for him because of the children's attitude towards him.

31. Under cross-examination, the assessor noted that the son saw the father as having a temper and grabbing him by the wrist "very often". She referred to the main incident as having increased the trauma as there were a number of assailants and the mother was in a life threatening situation. The assessor found the children to be of average maturity for their ages and that they were able to formulate views based on their experiences. She would attach less weight to the view of the youngest child. The assessor felt that the sleeplessness of the children and the son's physiological reaction were evidence of a traumatic experience for them. The assessor concluded that the best interests of the children would be served by remaining in Ireland.

Court interview with the children

32. By agreement of both parents and at their request interviewed the three children in order to hear the voice of each child. The views of the children as expressed in this interview further reiterated their respective views as expressed by them in the assessment process. An issue arose in that the son of the parties had made an error of judgment which caused his father to strongly argue for the boy to be returned to Pakistan. The Court was asked to further interview the son by the parties and the Court did so. By this stage, the son's error had been corrected and he had matters explained to him by his mother. He expressed remorse for what he had done and explained to the Court that he regretted having let his mother down. Some time later in the proceedings, the applicant raised this issue again making serious allegations against his son which were not justified. Any lack of understanding of the true situation was cleared up and explained to the applicant. There had been a technical difficulty which was clarified.

33. The views of the three children as expressed to the Court were entirely consistent with those given to the assessor. The Court accorded their views the appropriate weight, giving less weight to the views of the youngest child because of her young age. The middle child set out her clear view to the Court in writing, that she did not wish to return to Pakistan, and that she did not wish to

talk to her father.

Applicant's Submission

34. The applicant brings this application before the Court as an abduction case concerning the alleged wrongful removal of children from a non-Hague Convention country. While Pakistan recently ratified the Hague Convention on Child Abduction 1980, the EU has not accepted Pakistan's accession. Despite the recognition that this involves a non-Contracting State, the applicant asserts that the 1996 Hague Convention governs jurisdiction in this case. In the alternative, the applicant asserts that the Court has an inherent jurisdiction to make an order for summary return of the children in this case. The applicant stated that international conventions preventing child abduction are all founded on the fundamental presumption that child abduction is not in the best interests of children and that it can result in termination of the relationship between the children and the left behind parent. The applicant relies on Article 11 of the 1996 Convention, which states as follows:-

"1. In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection

2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation

3. The measures taken under paragraph 1 with regard to a child who is habitually resident in a non Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question"

35. The applicant submitted that there is a long line of case law in Ireland in which the Irish Courts have found that it may be in the welfare of children that they are summarily returned to another jurisdiction. The applicant cited the case of *Oxfordshire County Council v. J.H. and V.H.* (Unreported Judgment, High Court, Costello J., 19th May 1988) where Costello J. stated that "the comity of courts is a powerful doctrine in all cases" and that "[i]t is not just because the courts of Ireland should have respect for the courts of England, which, of course, they do, but because in a situation such as this the courts in Ireland cannot ignore the fact that responsible courts in England have taken a certain course."

36. The applicant further cited *F. v. G.* [2014] IEHC 152 where Keane J. considered the issues around the doctrine of the comity of courts in the context of making orders under the Guardianship of Infants Act 1964 which reflected orders made by the courts in the US. Keane J. states at para. 80 that a "full welfare hearing" is not required in every case.

37. The applicant submitted that the Constitutional Amendment on the rights of the child did not effect any change to the law applying in this case. The applicant states that Article 42A of the Constitution provides that the best interests of the child shall be the paramount consideration only in proceedings brought by the State or "concerning the adoption, guardianship, custody of or access to any child". The applicant argues that these are not such proceedings and that the amendment does not apply. The applicant refers to the case of *C.K. v. C.K.* [1994] 1 I.R. 250 where the High Court was asked to interpret the Child Abduction and Enforcement of Custody Orders Act 1991, which implemented the 1980 Hague Convention on Civil Aspects of International Child Abduction, in a manner which mandated a full welfare hearing. The Court found that the Constitution did not require that a court hold an inquiry into the welfare of the children. The Court found that Article 13 and Article 20 of the 1980 Hague Convention sufficiently protected the children's rights. In the case of *C.K.*, it was found that the defendant had not made the case that the Australian procedures would be inadequate in carrying out an inquiry into the welfare of the children and in protecting the rights of the children. It is submitted on behalf of the applicant that the constitutional amendment and any implementing legislation have not changed the substantive international conflicts of laws rules and in particular those rules whereby the State has undertaken international binding obligations concerning children.

38. The applicant submitted that the EU Council Regulation 2201 of 2003, also known as Brussels II bis, specifically provides that courts, in determining matters of parental responsibility, shall exercise it on the basis of habitual residence. The Regulation does not govern situations arising where no other EU Member State has jurisdiction, and as such, the applicant states that those situations are governed by the 1996 Hague Convention. The applicant asserts that the children were habitually resident in Pakistan and were wrongfully removed to Ireland and are merely physically present in this jurisdiction. According to the applicant, the Irish Court has jurisdiction to take necessary measures of protection in the event it is deemed a situation of urgency arises. The applicant further asserts that it is necessary for the protection of the welfare of these children that they are returned to Pakistan.

39. In the alternative, the applicant requests that the Court exercise its inherent jurisdiction to order the return of the children to give effect to and recognize the Pakistani orders. The applicant noted that, on many occasions, foreign courts, including the Pakistani courts have been asked to give effect to and recognize UK orders. There is a UK-Pakistan Judicial Protocol on Children Matters created after conferences in 2003 although no such agreement exists between this State and Pakistan. The applicant refers to the decision *Re S. (A child)* [2015] EWFC 86 where the mother sought permission of the Court to relocate to Pakistan. Expert evidence was available in that case that UK court orders would be given effect to in Pakistan.

40. The applicant highlighted the order from the Guardian Court of Lahore that the children must not be removed from the jurisdiction and the mother's actions in bringing the children to Ireland in contravention of that order. The applicant submits that the Pakistani court order makes the removal of the children "wrongful" within the definition of the 1996 Hague Convention at Article 7 (2):-

"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 applicant further outlined his successful judicial review proceedings in relation to the decision of the District Court suspending the requirement of the father to consent to the issuing of passports to the children. The High Court declared the District Court order invalid by reason of lack of territorial jurisdiction and due to the fact that the father had not been put on notice of the application.

41. The applicant submits that the children were habitually resident in Pakistan at the time of their wrongful removal. He sets out,

although a conflict arises on the evidence of the parties, that the move to Pakistan from Ireland was a long planned one and co-ordinated for the purpose of the schooling and integration of the children in their culture and religion in Pakistan. The Court of Appeal held in the case of *K.W. v. P.W.* [2016] IECA 364 that the children's habitual residence did not change to Ireland because the mother did not fully consent to the move and the children did not socially integrate in Ireland to a sufficient extent. The applicant argues that this case can be distinguished from the *K.W.* case and that the respondent conceded that she agreed to the move to Pakistan and was part of the planning and picking the school for the children in January 2014 and choosing the family home there which the applicant bought in 2012. He submits that he did not put any pressure on her and did not force her to move to Pakistan. He points to various alleged inconsistencies in the respondent's story. The applicant also notes that they applied for new Irish passports prior to their departure which shows that the plan was to remain in Pakistan for an extended period. He also points to the fact that all of their furniture was shipped to Pakistan from Ireland. He further argues that the children integrated socially in Pakistan and gained habitual residence there by attending school and connecting with their extended family in Pakistan over a period of 18 months. The applicant submits also that the respondent invoked the jurisdiction of the Pakistani Courts seeking custody of the children and deduces from this that she accepted that the children were habitually resident in Pakistan. He also highlighted that he was attempting to sell the family home in Ireland where the respondent and the children currently live. He submitted that the children would have a much better life in Pakistan and that they are currently living in deprived conditions in Ireland.

42. The applicant cited the English case of *Re S. (Wardship: Summary return: non-Convention country)* [2015] EWHC 176 which in turn refers to the House of Lords decision in *Re J. (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40 in which eight factors were set out in the evaluation of the connection of the children with a particular country as being; race, ethnicity, religion, culture, education, language, nationality and where the child has lived most of their life. The applicant submits that six and a half of these factors go in favour of a greater connection with Pakistan. He argues that the children are more connected with Pakistan than Ireland. He alleges in his legal submissions that the children never spent more than two or three months at a time in Ireland although this did not form part of the evidence before the Court. The applicant submits that the eldest child never wanted to live in Ireland and identifies himself solely as Pakistani which is at variance with the findings of the assessor regarding the voice of this child.

43. The applicant cited the most recent authority relating to the 1996 Hague Convention as being that of the UK Supreme Court in the case of *Re J. (A Child) (1996 Hague Convention) (Morocco)* [2015] UKSC 70. The UK Supreme Court held that Article 11 gives jurisdiction to enable a court to make an order for the return of a child to the country where he or she is habitually resident. The UK Supreme Court emphasized that three matters were required for the court to exercise its jurisdiction; (i) a case of "urgency", (ii) the presence of the child or his or her property, and (iii) that measures of protection be necessary. The applicant pointed to the fact that the Court did not decide that such cases must be determined in like manner as those under the 1980 Hague Convention, or that a full hearing as to welfare needs to be embarked upon when determining such an application. It was held by the UK Supreme Court that Article 11 provides an additional jurisdiction to the courts of a Contracting State where the child is present in that state and permits a return order to a country that is not party to either the 1980 nor the 1996 Hague Convention. Baroness Hale, on behalf of the UK Supreme Court, also stated that "possible objections to return, analogous to those in Article 13 of the 1980 Convention, may become relevant". He places emphasis on this case above any Irish case law and above the submissions of the respondent in relation to handbooks and practice guidelines. It was submitted by the applicant that this Court only has jurisdiction to make a protective measure under Article 11 and that the primary jurisdiction in relation to the future of these children lies in Pakistan as their place of habitual residence.

44. The applicant highlighted that there are few differences between the Affidavits of Laws supplied by both sides. It is accepted that the welfare of children is paramount in the Guardian and Wards Court in Pakistan. The applicant submits that the existence of a bilateral agreement between the UK and Pakistan judiciary must have considerable weight in recognising and enforcing the Pakistani Court Order in these proceedings. He accepts that there is no applicable convention or agreement between Pakistan and the EU including Ireland. The applicant emphasised the international principle of the comity of courts. He submits that the Pakistani Courts strictly enforce court orders made in competent foreign countries and follow all international agreements and that children in other cases have been returned by the Pakistani Courts to France, Canada and the UK.

45. The applicant outlined some studies found by him on the harmful effects of parental alienation and the importance of meaningful relations with both parents. He submitted that the purpose of the conventions and international agreements is to protect children from the long term harmful effect of international abduction. The applicant submits that an effort is being made by the respondent to alienate him from his children and that there has been no true access since their arrival in Ireland. He submits that it is only possible for the children to have a meaningful relationship with both parents if they return to Pakistan. He cited the English case of *Re D.D.* [2016] EWHC 3546 where an order was made for return to a non Hague Convention country, Northern Cyprus after a series of undertakings were given and any risk of violence or harm was seen to be capable of being addressed by the Northern Cyprus authorities.

46. The applicant submits that it is not in the best interests of the children for them to remain with their mother as he alleges that she has made multiple suicide attempts, one of which occurred in the presence of the children. It was also submitted that the issue of welfare is better decided in the place of the children's habitual residence. He feels that there have been extensive errors made in this case, that the children are in Ireland due to errors on the part of the Irish passport officials, the Irish embassy, the District Court and these errors should be rectified by returning the children to Pakistan.

Respondent's Submissions

47. The respondent submits that the case falls within the scope of the Brussels II bis Regulation. According to the respondent, the issue of whether Ireland can exercise jurisdiction under the Hague Convention at all, is determined by the provisions of the Brussels II bis Regulation. For Article 11 to apply, the Court must be of the view that the 1996 Convention applies, and that Article is the basis upon which jurisdiction can be exercised under the Convention. The relationship between the Brussels II bis Regulation and the 1996 Convention is governed and clarified by Article 61 and 62 of the Brussels II bis Regulation. Article 61 states that the Regulation shall apply where the child is habitually resident in a member state and involves the recognition and enforcement of a judgment given in another member state. Article 62 sets out that the 1996 Hague Convention will continue to have effect in relation to matters not governed by Brussels II bis and that the 1980 Hague Convention will continue to produce effects between the Member States. According to the respondent, for the purposes of determining the basis upon which this Court should exercise jurisdiction, it is clear from the provisions of Article 61(a) of Brussels II bis that, once the child is habitually resident on the territory of an EU Member State, the jurisdictional rules of Brussels II bis apply. Where a child is habitually resident in a non EU, Contracting State to the 1996 Convention, then jurisdiction must be found under the Convention. In the circumstances of this case, the children may not be habitually resident in a Contracting State to the Convention as Pakistan is not a party to the Convention.

48. The respondent submitted that the children in this case retained their habitual residence in Ireland at all times throughout their stay in Pakistan and were habitually resident in Ireland as of the date of the within proceedings, and that this Court has jurisdiction in relation to these children under the provisions of Brussels II bis under Article 8. The respondent's case is that the children never

settled in Pakistan. It is a matter for the Court to decide, on the basis of the facts before it, whether the children's habitual residence is Ireland or Pakistan. In determining habitual residence, this Court must consider whether there was some degree of integration by the child in a social and family environment and parental intention is only one factor. It was submitted on behalf of the respondent that the children did not socially integrate in Pakistan as they never moved into the proposed family home in Lahore but remained in the applicant's mother's home and the applicant never started working in Pakistan. It was highlighted that the respondent fled in April 2015 with the children to her uncle's home and from that point was trying to get to Ireland. It was submitted that she only agreed to go to Pakistan because the applicant promised that he would improve his behaviour towards her and the children and she also believed that there was a risk she could be left with nothing if she stayed in Ireland. While the respondent accepts that the applicant previously expressed an interest in the family spending some time in Pakistan she was of the understanding that the intention was always that the children would receive their third level education in Ireland.

49. Counsel for the respondent submitted that while the instant case is not a 1980 Hague Child Abduction Convention case, the understanding of the term "habitual residence" may be informed by decisions such as the recent *K.W. v. P.W.* [2016] IECA 364 case in the Court of Appeal. It was highlighted that there are certain similarities between the instant case and *K.W.* as in both cases the mothers were reluctant to move from their previous place of habitual residence and the Court of Appeal held that this reluctance amounted to not changing the habitual residence of the children. Counsel for the respondent argues that there was no "joint settled intention" to move to Pakistan as required for a change of habitual residence in *A.S. v. C.S.* [2009] IESC 77. It was submitted that there was not a sufficient degree of social integration by the children in Pakistan, while they did go to school it was only for a limited period of time and the views of the children outlined in the assessor's reports clearly show their unhappiness while living in Pakistan. It is accepted that the children were present in Pakistan for a period of approximately 18 months and that may well be considered an "appreciable period of time" for the purpose of gaining habitual residence. However, it was argued that the Court should take into consideration the fact that the respondent was trying to leave with the children and return to Ireland from April, 2015 which was ten months after their arrival.

50. If the Court does not accept the assertion that the children are habitually resident in Ireland then the respondent submits that this Court can exercise jurisdiction either on the basis of Article 12, Article 13, or on the basis of national rules pursuant to Article 14 of Brussels II bis. Article 12(4) specifically provides for circumstances where a child may have a habitual residence in the territory of a third State which is not a contracting party to the 1996 Convention where it is in the child's interest, particularly if it is found to be impossible to hold proceedings in the third State. The respondent submits that this explicitly confers jurisdiction on Member State courts even where the child is habitually resident in a third State not a contracting party to the 1996 Convention provided three conditions are fulfilled; (i) there exists a substantial connection with the child and the Court seised, (ii) there must be agreement of the parties to the proceedings, and (iii) the best interests of the child are served by the Irish Courts taking jurisdiction.

51. The Protection of Children (Hague Convention) Act 2000 came into effect in January 2011 and brought the Hague Convention of the 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children into effect in Ireland. The 1996 Convention provides for the recognition and enforcement within all Contracting States of measures directed to the protection of children's person and property and to establish the necessary cooperation between Contracting States to achieve this purpose. Pakistan is not a party to the 1996 Convention and is thus not a Contracting State to the Convention. Pakistan ratified the 1980 Hague Convention on Child Abduction in January 2016 however the European Union have not accepted Pakistan's accession to the Convention and therefore it cannot apply in a case involving Ireland and Pakistan. The respondent submits that this Court should also be wary of the fact that there would be no reciprocation between a contracting state and a non contracting state. The 1980 Child Abduction Convention has certain overall aims including a general desire to discourage child abduction and therefore, there is a tendency to tilt in favour of a return order in the event of any ambiguity. It is submitted that such overarching Convention aims do not apply here.

52. The 1996 Hague Convention Practice Guide issued by the UK Ministry of Justice considers the jurisdiction of any EU Member State court to deal with matters within the scope of the 1996 Convention and Brussels II bis in circumstances where the child concerned is neither habitually resident in an EU Member State nor a 1996 Convention State. The Practice Guide says in relation to a child who is present in the jurisdiction of a Member State:-

"Where a child is present in the jurisdiction but habitually resident in a third state the geographical scope of the convention is not engaged. Brussels IIa could apply in such situations under the prorogation mechanism of Article 12, but as to whether Article 13 (presence) could be applicable depends on the interpretation and scope of that provision.

Where neither Brussels IIa nor the Convention is applicable the door could be open to the application of residual rules and jurisdiction."

The steps concerning an application for provisional or urgent measures in accordance with the Practice Guide are that a court can exercise jurisdiction in relation to matters within the scope of Brussels IIbis or the Conventions when the child is habitually resident in a non-Regulation, non-Convention State and the child is present in Ireland and no other Regulation State has jurisdiction.

53. The respondent submits, applying the steps provided by the UK Minister of Justice Practice Guide, that the 1996 Convention should not be used in the circumstances arising in this case to make an order for return of these children. The respondent argues that even if there had been a return order made in Pakistan it would not be entitled to automatic recognition in this State under the 1996 Convention as Pakistan is not a contracting state and any such order would be dealt with under the rules of Irish private international law. The respondent accepts that this Court must consider the principles of the international comity of courts and the general public interest in deterring child abduction although the respondent submits that the primary concern of this Court should be the welfare of the children. The respondent submits that if the Court is not satisfied that Article 12(4) or Article 13 under Brussels II bis applies, this matter can be resolved on the basis of Article 14:-

"Where no court of a Member State has jurisdiction pursuant to Article 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State."

54. Under domestic rules, this Court is entitled to make orders in respect of Irish children. In the case of *CM v. Delegacion de Malaga* [1999] 2 I.R. 263, McGuinness J. held that the Irish Court had jurisdiction to protect the rights and welfare of any child who is an Irish citizen. However, such jurisdiction must be exercised with caution in circumstances where the child was abroad and its rights and welfare were subject to the jurisdiction of foreign courts. The respondent submitted that because the children in this case are Irish citizens and present in Ireland this Court can approach the exercise of jurisdiction with far less caution in those circumstances.

55. The UK Supreme Court has recently considered the questions as to whether the English Courts had jurisdiction based on the nationality of a child in the case of *Re A. (Children) (A.P.)* [2013] UKSC 60. The mother and father in that case were both of Pakistani

origin, the father lived in the UK since birth and the mother moved to the UK following their marriage. They had three children in the UK before the marriage deteriorated and the father spent increasing periods of time in Pakistan. The mother visited Pakistan with the children and was persuaded to attempt reconciliation. The children's passports were seized. While in Pakistan the mother gave birth to a fourth child, but continued to attempt to return to the UK which eventually she was able to do with the assistance of family members albeit without any of the children. The issue arose as to whether the English Court had jurisdiction to make an Order directing the return of the children to England. The UK Supreme Court found that the three older children and their mother had retained their habitual residence in England as they were being detained in Pakistan against their will. However, in relation to the youngest child, they felt that there were difficulties saying that an individual could acquire habitual residence without ever setting foot in a country. They were of the view that Article 14 of Brussels II bis formed the basis of an alternative jurisdiction and applied where no court of a Member State had jurisdiction. Baroness Hale stated:-

"There is no doubt that this jurisdiction can be exercised if the child is a British National. The original basis of the jurisdiction was that the child owed allegiance to the Crown and in return the Crown had a protective or *parens patriae* jurisdiction over the child wherever he was."

56. The respondent in this case argues on this basis that this Court has jurisdiction to deal with the within case on the basis of Article 14 of Brussels II bis notwithstanding the existence of a rival non Member State jurisdiction. The respondent accepts that the 1996 Hague Convention falls within this consideration of domestic Irish law due to the 2000 Act. It was emphasised that the objectives of the 1996 Convention are to determine where jurisdiction lies in relation to a child and it does not replace the 1980 Child Abduction Convention. It was submitted on behalf of the respondent that Article 11 of the 1996 Convention provides a separate and distinct basis for the Court to take any necessary measures of protection in all cases of urgency relating to a child present in the State and it should be interpreted narrowly.

57. The respondent referred to the case of *Re J.* [2015] UKSC 70 and urged this Court to distinguish it from this case on the basis that *Re J.* involved a Contracting State, Morocco rather than a non-Contracting State like Pakistan and due to the fact that Article 7 of the 1996 Convention applied in that case but does not apply in the instant case. The respondent submitted that this Court should take the stricter approach suggested by Paul Lagarde's Explanatory Report and the Practical Handbook on the Operation of the 1996 Convention which state that Article 11 might be used where not doing so "might bring about irreparable harm for the child". The examples set out in the Practical Handbook include medical treatment to save the child's life, a need to immediately suspend contact with a parent where an allegation of abuse has been made and where there has been a wrongful removal or retention in the context of the 1980 Convention. The respondent argues that it may actually do the children irreparable harm to make an order for their return to Pakistan considering the circumstances of the case. It is submitted that there is no "urgent" reason why this court should make an order returning the children under Article 11. It is further submitted that the return is not "necessary" in line with the suggestion in the *Re J.* [2015] UKSC 70 decision that the court look at issues such as delay, objections to return and grave risk analogous to the 1980 Convention.

58. The respondent emphasised the children's clear objections to return to Pakistan as recorded by the assessor. It was submitted that their objections are independently formed, the children are sufficiently mature to form these views and that they are well placed to make a determination as to their preference for Ireland considering the fact that they have lived for periods of time in both countries and can compare the two. These objections are also objectively reasonable when considered in conjunction with the other evidence in this case. It was submitted that even if this Court were obliged to apply the standards of the 1980 Child Abduction Convention to this case the children's objections would meet that standard. The respondent cited the leading authority in this area as *A.U. v. T.M.U. (Child Abduction)* [2011] 3 IR 683.

59. The respondent also cited the UK case of *Re S. (Wardship Summary Return Non Convention Country)* [2015] EWHC 176 where the following principles were set out as applicable in the consideration of a non Hague Convention return:-

- "The welfare of the child is paramount. If a decision is made to return the child it must be in his best interests to do so not because the welfare principle has been superseded by other considerations.
- The special rules and concepts of the Hague Convention are not to be applied by analogy to a non Convention case.
- The court has the power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits.
- 'Kidnapping' or abduction, in common with other forms 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 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'.
- There is no presumption that it is likely to accord with the child's welfare needs to be returned. The most one can say... is that the judge may find it convenient to start from the proposition that it is likely to be better for the child to return to his home country for disputes about his future to be decided there. A case against his doing so has been 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 may be best for him in the short run. It should not be assumed that allowing a child to remain here while his future is decided here inevitably means he will stay here forever.
- One important variable is the degree of connection of the child with each country. Factors such as his nationality, where he has lived for most of his life, his race, ethnicity, religion, culture and education thus far will all come into this. Another closely related factor will be the length of time he has spent in each country.
- The extent to which it is relevant that the legal system of the country is different from our own depends upon the facts of the particular case. It would be wrong to say that the future of every child who is within the jurisdiction of our court should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not necessarily inevitable to be preferred to another... We are not so arrogant as to think that we (in England and Wales) know best.
- If there is a genuine issue between the parents as to whether it is in the best interests of the child to live in this country or elsewhere, it must be relevant whether that issue is capable of being tried in the courts of the country to which he is to be returned. If those courts have no choice but to do as father wishes... then our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard. The absence of a relocation

jurisdiction must do more than give a judge cause for thought...It may be a decisive factor...there are also bound to be many cases where the connection of the child and all the family with the other country is so strong that any difference between the legal systems here and there should carry little weight.

- These considerations shall not stand in the way of a swift and un-sentimental decision to return the child to his home country even if that country is very different from our own. But they may result in a decision that immediate return would not be appropriate, because the child's interests would be better served by allowing the dispute to be litigated here. Our concept of child welfare is quite capable of taking religious and cultural factors into account in deciding how a child should be brought up."

The respondent argues that this Court should apply these principles to this case although the emphasis on the best interests of the child is even more prominent in Irish law considering the constitutional imperative imposed by Article 42A. The respondent submits that these children have a greater degree of connection with Ireland than they do with Pakistan.

60. The case of *P.P. v. P.K.* [2016] IEHC 79 dealt with the situation pursuant to the inherent jurisdiction and s.11 of the Guardianship of Infants Act 1964. It involved an alleged abduction from the United Arab Emirates which, similar to Pakistan, is not a Contracting Party to the Convention and a child with Irish nationality. This Court held that the Hague Convention Rules are not applied by analogy to this particular type of case and that the welfare of the child is paramount. The Court also noted that it should take into account the Constitutional Amendment on the rights of the child pursuant to Article 42A, and the best interest principle together with the welfare check list now set out in the ss. 31 and 32 of the Guardianship of Infants Act 1964, as inserted by the Children and Family Relationships Act 2015. The respondent advocates an approach which includes a full welfare assessment according to the Constitutional Amendment and the subsequent legislation in deciding whether any order for return can be granted. The children have been assessed initially in an attempt to ascertain their views with the aim of ensuring the resumption of access and further to ascertain their views regarding a return to Pakistan as well as an assessment of their best interest in that regard. The children have expressed clear objections to a return to Pakistan and the respondent submits that this must be taken into account in the overall assessment by the Court.

Affidavits of Laws

61. Affidavits of Laws were supplied to the Court on behalf of the applicant and the respondent in relation to the legal processes and procedures in Pakistan.

62. Muhammad Saeed Tahir Sulheri, Advocate of the Supreme Court of Pakistan provided this Court with an affidavit of laws on behalf of the applicant dated 1st December, 2016. He set out that the law governing the grant of custody, guardianship and visitation for minors in Pakistan is provided for in the Guardian and Wards Act 1890, the West Pakistan Family Court Act 1964 and the West Pakistan Family Court Rules 1965 and not in accordance with any religious law. The Pakistani Courts has jurisdiction to hear matters relating to children present in Pakistan regardless of their nationality. The Lahore High Court cases of *Mariam Khan v. Mehryar Salim* (2008) YLR 2647 and *Louise Anne Fairley v. Sajjad Ahmed Rana* (2007) PLD 293 were cited as instances where return orders were made by the Pakistani Courts to Canada and the UK. He set out that the welfare of the minor is a paramount consideration for the Pakistani Courts and the views of the child are also taken into account. The Pakistani Courts have also made orders allowing the relocation of children to foreign countries based on the welfare of the children. If the respondent mother can prove in a Pakistani Court that it is in the welfare of the children for them to live in Ireland then such an order may be made. He also highlighted that the Pakistani Courts enforce foreign court orders in line with the UK Pakistan Protocol. He outlined that a marriage in Pakistan can be dissolved through divorce and maintenance may be provided to the mother if she has lawful custody of the children in accordance with the status of the father. The respondent can also claim her share in property in Ireland whether she is divorced in Pakistan or in Ireland as she is the joint owner of the Irish property. He accepted that the respondent may be subject to a fine for the wrongful removal of the children in contravention of the Pakistani Court Order. Any divorce would be separate to the custody dispute.

63. Muhammad Saeed Tahir Sulheri prepared for the Court a further affidavit dated 16th February, 2017. He confirmed that the Pakistani Courts have jurisdiction to entertain a matter in relation to children residing in Pakistan and this is not impacted by the fact that the children have dual nationality. He restated the fact that paramount importance is placed on the welfare of the child. He also stated that there is no presumption against a custody order in favour of the mother due to the wrongful removal of the children. He highlighted the importance of the international comity of courts and that such cases are decided in relation to the international conventions. He also stated that Lahore is a cosmopolitan city with a properly functioning legal and security system and any complaint made by the respondent in relation to domestic abuse was dealt with properly by the police.

64. Sulema Jahangir, solicitor working in London expert in Pakistani law supplied the Court with affidavits dated 25th May, 2016 and 13th February, 2017 on behalf of the respondent. She sets out the applicable law in Pakistan as being the Guardian and Wards Act 1890, the West Pakistan Family Court Act 1964 and the West Pakistan Family Court Rules 1965. Applications for custody made in the Guardian Courts are primarily based on the welfare of the minor although the court will give regard to the personal law or the religious laws of the minor. According to the laws relating to Sunni children, a male child under the age of 7 and a female child until the age of puberty is preferred to stay in the custody of their mother although she may lose her right of physical temporary custody if she leads an immoral life, remarries, neglects the child or if her place of residence is not within accessible reach of the father. She accepted, however, that the Guardian Court will not apply or enforce traditional law rules of Islamic Law but will consider what is in the welfare of the minor as paramount. The Guardian Court may also take account of the views of the child under s.17 of the 1890 Act. In terms of financial relief, the respondent may claim maintenance for the children if they are in her custody and for herself while the divorce is pending, she would not be able to claim any capital award or property. Sulema Jahangir stated that the Pakistani Courts have jurisdiction when the children are resident in Pakistan. Significant discretion is held by the judge in such cases.

65. The respondent in this case may be found to be in contempt of the Pakistani Courts for breaching their order and may be fined accordingly and the Guardian Court may form a view about the respondent's character because of her actions. Sulema Jahangir noted that the applicant in this case has filed a criminal complaint against the mother in Pakistan. She stated that if the applicant can demonstrate to the Pakistani Court that he can provide the children with a good standard of life and that it would be against their welfare to move to Ireland the Court may not permit the mother to relocate with the children to Ireland. The respondent could appeal orders made by the Guardian Court to the District Judge of the Family Court and on to the High Court if there has been an error of law through a constitutional petition. The respondent may apply for permanent custody and an order permitting her to take the children to Ireland although this process is likely to take several years.

66. This Court has great respect for the international principle of the comity of courts and does not make any finding as to whether one set of laws is better than any other. The determination of this Court, as set out below, is on the basis of what it believes is in the best interests of these children in accordance with Irish constitutional requirements.

Findings of Fact

67. It is necessary for this Court to make a number of determinations in relation to the fundamental facts in this case. This Court finds that the applicant has not made out a case that the respondent has alienated him or attempted to alienate him from his children. It is clear from his stated view and attitude that he is only prepared to engage in therapeutic work on his relationship with his children if they are returned to Pakistan. This Court does not accept that it is only possible for the children to have a meaningful relationship with both parents if they are returned to Pakistan as the applicant asserts. It must be noted that the applicant succeeded in his judicial review of the District Court decision to allow the respondent to get duplicate passports for the children without his consent. However, the means with which the children returned to Ireland is not determinative of the legal issues at play.

68. This Court found the respondent to be a credible witness. It was clear from her evidence that she would not commit suicide and leave her children behind despite the applicant's many allegations. There is no basis for the allegations by the applicant that the respondent is unstable, nor for his allegation that she beats the children. This Court finds that the respondent has been consistent in her account of the parties' history, the incidents of violence and the events that led to her returning to Ireland from Pakistan. It is a fact that the respondent came to Ireland in breach of a Pakistani order which restrained her from removing the children from that country. However, this Court accepts the respondent's evidence that she was not aware of that order at the time. This Court notes the evidence given by the respondent of her fraught efforts to return to Ireland and of her belief that she was entitled, as an Irish citizen with Irish citizen children, to return here. The respondent presented in court as being in fear of the applicant. This Court finds her evidence of violence, sexual violence and oppression to be generally consistent although it is not for this Court to make a determination as to whether the particular incidents occurred as described by the respondent.

69. The applicant was highly critical of the assessor, her approach and her findings. However, he had a full opportunity through his legal representation at the time to cross-examine the assessor. This Court heard the evidence of the assessor, she is a person of significant experience and skill in dealing with children in a non-directive manner. This Court finds that the assessor was conscientious and careful in her assessment of the children. This Court does not accept that the reports are contradictory. This Court will give substantial weight to the views of the children as expressed by the assessor that they wish to remain in Ireland with their mother.

70. This Court accepts the circumstances of the move to Pakistan as outlined by the respondent, that the applicant discussed the potential of moving to live in a predominantly Muslim country for a period of time but that the plan crystallised very quickly after the withdrawal of the protection order. This Court accepts the respondent's evidence that she agreed to go to Pakistan because she felt that she had no choice and the applicant threatened that he would not support her financially if she remained in Ireland. This court accepts the evidence of the respondent and the children as recorded by the assessor that they did not enjoy their time in Pakistan, that they felt bullied in school there and that they did not have a positive bond with the extended family members they were living with. In contrast with this, the children have expressed positive views about living in Ireland with their mother, where they have spent the majority of their lives.

Application of domestic law to the facts as presented by the assessor

71. Decisions relating to the care of children are to be made in the best interest of the child. Welfare is comprised as religious, moral, intellectual, physical and social welfare. The Children and Family Relationships Act 2015 inserted a detailed check list at s. 31 of the Guardianship of Infants Act 1964. The Court will now analyse the different welfare elements of that check list.

72. In relation to s. 31(2)(a), the Court must look at the benefit to a child of having a meaningful relationship with each of his or her parents and with other relatives. In this regard, while the assessor supervised in an agreed setting the first access visit between the children and their father, her report bears testimony to the grave difficulties which exist in that relationship. The assessor is of the view it would be possible to improve on this poor relationship with the appropriate therapeutic interventions. The children are open to having a better relationship with their father but do not want to be under a threat of being returned to Pakistan. In relation to s. 31(2)(b), the views of each child has been ascertained in accordance with the Act.

73. In relation to s.31(2)(c), the physical, psychological and emotional needs of the children concerned, taking into consideration the children's ages and stages of development and the likely effect on them of any change of circumstances, has been clearly reported by the assessor. Her view is firmly that it would be seriously detrimental to the well-being of the children were they to be removed from Ireland to Pakistan and indeed, were they to be removed from the care of their mother.

74. In relation to s.31(2)(d), the assessment has indicated the history of the children's upbringing and care including the nature of the relationship between the children and each of the parents and other relatives. Skype access was set up to take place once per week between the children and their father and that is described as improving. It appears to this Court that the import of the assessor's report is that therapy would be necessary to further the building of a better relationship between the children and their father. It is quite clear that the children spent a major portion of their lives in Ireland and were substantially in the care of their mother while their father was described as working abroad as an ophthalmic surgeon. They do not describe themselves as close to their father's family and described trips to Pakistan and to Kuwaiti with greater contact with the mother's family.

75. In relation to s.31(2)(e), the children are all Muslim, they learn the Quran online and they are in an integrated school setting which provides a space for the practice of their religion although it is a Catholic school. Their cultural and linguistic needs are at present met in a multi cultural setting in Ireland where the main language is English although they have learnt Urdu and learn Irish in school here.

76. In relation to s. 31(2)(f), the social setting for the children has been and continues to be that they are integrated in this country. The children's social, intellectual upbringing and education have mainly taken place in Ireland and it was envisaged by both parents that they would proceed to third level education in Ireland.

77. In relation to s. 31(2)(g) and the children's ages and special characteristics, the eldest boy is described by the assessor as requiring some mental health support and indeed there is a consent of the parties that he now attend counselling. The two younger children are described as intelligent and are thriving academically.

78. In relation to s.31(2)(h), given the description by the children of their fears and concerns it is quite clear and it is the finding of the assessor that they may have suffered trauma and it is envisaged by the assessor that the safety and psychological well being of these children is best served by them remaining in this country with their mother with whom they are described as having a close attachment.

79. In relation to s.31(2)(i), it is quite clear that the proposals which the applicant father has made are not acceptable to the children and that he is only prepared to engage with the therapeutic work which has been recommended by the assessor if the children are to be returned to Pakistan and that otherwise he intends "walking away". The assessor recommends Skype access to

continue between the children and their father but not face to face access at this time.

80. In relation to s.31(2)(j), it seems to this Court that the willingness of the father to facilitate and encourage a close and continuing relationship between the children and himself is only on his own terms. He says that if the children are returned to Pakistan he would facilitate a relationship between them and their mother and he even suggests splitting the sibling group; the girls to live with their mother and his son ought to live with him in Pakistan. However, this is not acceptable to the children, in particular to their son.

81. In relation to s. 31(2)(k), it seems to this Court that the respondent mother has the capacity to care for and meet the needs of each child and to communicate and co-operate on issues relating to them and to exercise the relevant powers, responsibilities and entitlements which concern the children at this time.

82. It is further noted that s.31(3) of the Act requires the court to have regard to household violence that has occurred or is likely to occur including the impact or likely impact of such violence on the safety of the child and other members of the household concerned. In that regard, the assessor has major concerns for the safety of the children were they to be returned to the household in which they stayed with the applicant's extended family in Pakistan where the children witnessed an incident of violence which she deemed to be traumatising for the two younger girls who described finding their mother in a life threatening situation and going to her assistance. The Court also assesses under s.31(3)(b) in relation to the child's personal well being including the child's psychological and emotional well-being, and on the balance of probabilities, it appears to this Court that the child's personal well-being is best served by the children remaining in the sole care and control of their mother in this jurisdiction, given the extensive findings of the assessor which this Court accepts but in particular because of their fears of their father and because of events that they witnessed which threatened their sense of security when in Pakistan.

83. In relation to s.31(3)(d), it does not seem to this Court that the applicant has the capacity, on the balance of probabilities, to properly care for the children because he has failed to recognise or respect the wishes of the children, and their needs. The assessor described the necessity for the children and for the son in particular to have the threat of a return to Pakistan removed from them to enable their relationship with their father to be repaired. The applicant came quickly to the point in this case, in the context of the access difficulties, where he asserted his position that he would only consider going forward with access if the end result were to be a return of the children to Pakistan. He was unwilling to consider putting the needs of the children first and was unwilling to meet their need for security and reassurance from him on that issue. In addition, the children and their mother had endured a great deal of fear and trauma as a result of specific incidents of violence towards their mother and of verbal aggression and some violence towards some of the children, the son in particular. He has been described in the assessor's report by some of the children as shouting and screaming and as having become more angry in recent years which raises questions as to his relative stability as a care giver to the children.

84. With regard to s. 31(4) of the Act, this Court has considered the conduct of the parents to the extent that it is relevant to the children's welfare and best interest only. The Court has found the mother to be a conscientious and serious minded caring mother who puts the children's needs before her own. It is the view of this Court with regard to s. 31(5) that there was no unreasonable delay in determining the proceedings in the context of date listings, although delay occurred when the applicant refused to accept the assessor's report and wished to have her dismissed and indeed made a formal complaint to Barnados about her. This in itself took up a day of court time and necessitated then further court dates. The Court found that the father had a full opportunity through his then senior counsel to cross-examine the assessor at an earlier point and his rights had not been fettered in any way. With reference to s. 31(6), in obtaining the ascertainable views of the children, the Court has facilitated the free expression by the children of their views and ensured that any views so expressed by the children are not expressed as a result of undue influence.

85. The Children's Rights Amendment that inserted Article 42A provides that the views of the children must be ascertained and given due weight having regard to the age and maturity of the child in care proceedings, adoption, guardianship, custody or access proceedings in relation to the child. This Court accepts that the children are sufficiently mature to have a view and accepts that more weight ought to be given to the views of the two older children, aged fifteen and twelve respectively compared to the view of the younger child aged eight. This Court finds that the children have freely expressed their view and that their views are not as a result of influence by any adult and, in particular, they are not influenced by their mother's view.

86. In terms of the weight to be accorded to the report of the assessor, this Court notes the Supreme Court view in *McD. v. L.* [2009] IESC 81 that:-

"A court is neither obliged to accept the report, nor is it required to expressly specify its reasons for non-acceptance of the report. The report should be considered carefully by the trial judge together with all the factors and circumstances of the case and it may assist the trial judge in determining what is in the best interests of the child, whose welfare is the paramount consideration."

It is the view of the Court that together with all the factors and circumstances of the case, this report has been of particular assistance in aiding the Court in determining a pathway on access as well as what is in the best interest of the children concerned whose welfare is the paramount consideration, now enjoying additional constitutional protections. The report in this case is part of the evidence to be considered and is so considered.

Conclusions

87. The applicant seeks an order for the return of the three children the subject matter of these proceedings to Pakistan.

88. In order to determine what law applies in this case, this Court must consider whether the children were habitually resident in Pakistan or Ireland at the time of their departure from Pakistan. While this Court emphasises that this is not a 1980 Child Abduction Convention case, the discussion of the term "habitual residence" in such cases is useful in coming to a decision as to where these children were habitually resident. This Court applies the Court of Appeal decision in *K.W. v. P.W.* [2016] IECA 364. In the instant case the respondent reluctantly went to Pakistan in 2014 and felt that she had no option as the applicant had threatened to stop giving her any money. The family did not integrate socially in Pakistan as they never moved in to the proposed family home, the applicant did not start working in Pakistan and continued to travel to the UK to do locum work while the family were in Pakistan. The respondent's movements were restricted and it is clear that she never integrated fully and did not gain habitual residence in Pakistan. Although the family lived in Pakistan for a period of 18 months it should be noted that from April, 2015 when the respondent fled to her uncle's home she was trying to return with her children to Ireland and those attempts were fettered by the applicant. The children did attend school in Pakistan for a number of months which indicates a level of social integration although they were taken out of school after April, 2015 for fear of their father abducting them. While it may be seen that there are factors leaning in favour of Ireland being the place of habitual residence, this Court considers it to be particularly significant that the respondent acquiesced to the move, the length of time spent in Pakistan was 18 months and the fact that the respondent engaged the jurisdiction of the

Pakistani Courts. Therefore, this Court finds, on balance that the children were habitually resident in Pakistan at the relevant time.

89. Pakistan is a non-Hague Convention, non-Regulation State which means that jurisdiction for this application may be found in Article 14 of Brussels II bis whereby the domestic laws of Ireland are to be applied. The Protection of Children (Hague Convention) Act 2000 was commenced in 2011 and brought the 1996 Hague Convention into Irish law. Pakistan is not an accession state for the purpose of the 1996 Convention and therefore the majority of the Convention cannot apply. However, this Court is empowered by Article 11 of the 1996 Convention to take a measure of protection:-

"1. In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection."

It is argued by the applicant that an order for the return of the children to Pakistan would amount to a necessary and urgent measure of protection in accordance with the decision of the UK Supreme Court in *Re J.* [2015] UKSC 70.

90. The applicant's case is that the respondent wrongfully removed the children in accordance with the definition under Article 7 of the 1996 Convention when she left Pakistan in contravention of his rights as the father of the children and in contravention to the Pakistani court orders. He argues that this Court should automatically make an order for return and that Pakistan has jurisdiction to deal with any matters relating to the custody and access arrangements for these children. The facts are accepted by the respondent that she did remove the children without the consent of the applicant and in contravention of the Pakistani court order although she claims she was unaware of that order. However, this Court is of the view that, while the applicant has informed himself to a certain extent in relation to this area of law and did have legal representation for the majority of this case, there is a fundamental misunderstanding in relation to the application of international law. The term "wrongful removal" is a legalistic term of art that is viewed in the context of the 1980 Child Abduction Convention which does not apply to this case as Pakistan has not been accepted by the EU as an accession state to that Convention.

91. The applicant argues that this Court should take account of the degree of connection that these children have with Pakistan in accordance with the factors expressed in *Re S.* [2015] EWHC 176 when deciding whether to use Article 11 to make an order returning these children to Pakistan. While this Court accepts that these children obviously have a degree of connection with Pakistan, being of Pakistani descent and having family living in Pakistan, it is the view of this Court that these children have a more substantial degree of connection with Ireland. All three children were born in Ireland, are Irish citizens and have lived the majority of their lives in Ireland, English is their first language although they are proficient in Urdu, they have received the vast majority of their education in Ireland and seem to be well placed in their schools here. It is the view of the Court that these children should be encouraged to maintain a link with their cultural and linguistic heritage in Pakistan which can happen in Ireland as a multicultural society. In terms of religion the children are practicing Muslims, their faith is being facilitated and nurtured by their mother in Ireland and they study the Quran online. Their religion should not and does not curtail their significant degree of connection with Ireland.

92. The respondent submits that this Court can distinguish this case from that of *Re J.* [2015] UKSC 70 due to the fact that it involved Morocco, a Convention State unlike the present circumstances involving Pakistan, a non-Convention State. This Court is not bound by any decision of the UK Supreme Court although it may be persuasive. The respondent submits that s. 5 of the Protection of Children (Hague Convention) Act 2000 empowers this Court to take account of the Explanatory Report by Professor Paul Lagarde on the Convention and give such weight to it as is appropriate in the circumstances. The Explanatory Report indicates that "necessary" should be seen as a case where not making the requested order may cause "irreparable harm" to the child. However, the UK Supreme Court rejected the strict approach of the Explanatory Report and was more willing to make an order for the return of the child to Morocco. The question of whether an order for return would be necessary was sent back for consideration by the UK High Court although Baroness Hale noted that questions of possible objections to return analogous to those in Article 13 of the 1980 Convention may become relevant as part of that consideration. The children in the instant case have expressed clear objections to any order for return to Pakistan.

93. This Court finds that the decision in *Re J.* [2015] UKSC 70 was in the context of the whole of the 1996 Convention including Article 7 on wrongful removal which does not apply to the instant case and distinguishes this case on that basis. The Court is persuaded that the question of whether a measure of protection under Article 11 is necessary should be informed by the Explanatory Report guidance that a measure should only be taken to avoid "irreparable harm" to the child. It is the view of this Court that it would not cause these children irreparable harm to refuse to make an order returning them to Pakistan. It may even be the case that it could cause these children irreparable harm to be returned to Pakistan and separated from their mother.

94. The respondent argues that this Court should make its decision within Article 11 using a global welfare approach including looking at Article 42A of the Irish Constitution because of the particular facts of this case involving Irish children who have lived the majority of their lives in Ireland. While there may be some cases where the assessment of the best interests of the child would automatically result in the determination that they should be returned to their country of habitual residence for determinations to be made as to their future this is not one of those cases due to the particular facts. As is more broadly discussed above, applying the framework set out in ss. 31 and 32 of the Guardianship of Infants Act 1964 as amended, it is in the best interests of these children to remain in the care of their mother in Ireland.

95. The respondent argues that even if this Court were to apply the standards of the 1980 Child Abduction Convention which cannot apply due to Pakistan not being a Contracting State, the objections of the children would meet the requirements in Article 13 of the 1980 Convention. It is the view of this Court that the objections to return raised by the children reach the standard required under the 1980 Convention. This Court finds that the children have formed their own views in relation to Pakistan and Ireland and are in a good position to evaluate the two places, and they have not been overly influenced by their mother. Their objections are to a return to Pakistan and not merely an expression of a preference for a particular parent and are based on traumatic events that occurred while in Pakistan.

96. In summary, this Court refuses to make an order returning these children to Pakistan and thereby vacates the interim orders made herein. The children shall remain in Ireland where they live with their mother.