REDACTED
THE COURT OF APPEAL

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964

AND IN THE MATTER OF N, AN INFANT

Neutral Citation Number: [2017] IECA 174

Finlay Geoghegan J.

Irvine J.

Hogan J.

2017/217

BETWEEN:

A.B.

APPLICANT/RESPONDENT

AND

C.D.

RESPONDENT/APPELLANT

JUDGMENT delivered on Thursday the 1st day of June 2017 by Ms. Justice Finlay Geoghegan

1. This appeal is from an order of the High Court (Binchy J.) made on 10th May, 2017 that the infant named in the title ("N") be returned to Brunei Darussalam ("Brunei") on 19th May, 2017. Brunei is not a party to the 1980 Hague Convention on Child Abduction. The order was made pursuant to s. 11 of the Guardianship of Infants Act, 1964 (as amended) (the "1964 Act") following a determination by the trial judge on the evidence before him that such order was in the best interests of N.

2. A notice of appeal was issued on 11th May, 2017. A stay on the order was granted by the Court of Appeal and a hearing fixed for 26th May, 2017.

Background facts

3. The background facts are set out fully in the judgment of Binchy J. of 3rd May, 2017 ([2017] IEHC 274). For the purposes of the issues on appeal they may be summarised as follows.

4. The father who was the applicant in the High Court is an Irish citizen and the mother is a citizen of an Asian country. They met in 2005 when the father, was living and teaching in that country. They commenced a loving relationship and five years later, in September, 2010, they married there.

5. The parties jointly decided to move to work and live in Brunei in 2011. Initially both had similar professional jobs and as of the date of these proceedings, the father continues to have a position in an international institution in Brunei. The mother resigned from her job in November or December, 2016.

6. Their daughter, N., was born in Brunei in January, 2015 and is an Irish citizen. During her short life she has lived in Brunei and she has been taken on visits to both her mother's country and Ireland prior to March, 2017. It is not in dispute that she was as of March, 2017 habitually resident in Brunei.

7. Unfortunately, difficulties have arisen in the relationship between the father and the mother. They have attended marriage counselling.

8. On 6th March, 2017, without the knowledge or consent of the father, the mother took N. from Brunei to Ireland. She left a note informing the father that she was "gone" and that N. was with her. She did not initially say where she had gone. However she stated that she would contact the father once she and N. had landed safely.

9. The mother brought N. to Ireland in accordance with arrangements made with the assistance of a sister of the father who lives in Ireland. She has also been supported by the paternal grandfather of N. who also lives in Ireland. The father having made immediate enquiries of his family in Ireland was informed by his father that the mother and N. had landed safely in Dublin. The mother had a Skype conversation with the father approximately 34 hours after departing Brunei. The mother sent a text message on 8th March stating that she intended to stay permanently in Ireland with N. She and N. are residing with the father's sister and her husband. The father travelled to Dublin, arriving on 11th March and checked into a hotel where he has been residing since.

10. There were no proceedings relating to N. before the courts of Brunei when the mother brought her to Ireland.

The proceedings

11. The proceedings were commenced by the issue of a special summons on 27th March, 2017 seeking relief pursuant to the Guardianship of Infants Act, 1964 (as amended). The first order sought is an order "directing the return forthwith" of N. to her place of habitual residence in Brunei with the purpose of enforcing the father's rights of custody, guardianship and access with respect to N. An order was also sought directing that the proceedings be heard and determined summarily for the purpose of safeguarding the

welfare of the child and protecting the father's rights of custody as asserted. Interim interlocutory relief was also sought.

12. An interim order was made on an *ex parte* application on 28th March, 2017 *inter alia* restraining the removal of N. from Ireland pending the determination of the proceedings and granting leave to issue a motion returnable for the 29th March. On that day initial directions were given for the filing of replying affidavits and for supervised access for the father with the child on a daily basis.

13. On 5th April a hearing date was fixed for 27th April; the mother was directed to deliver and file an affidavit of laws within two weeks and on an undertaking of the father that he would not consume any alcohol during access times, there was an order for agreed access between the parties set out in the schedule. Essentially, it was unsupervised access for both father and mother for two days on and two days off.

14. The proceedings were heard on affidavit evidence. There was no formal application to adduce oral evidence nor was any notice to cross examine served.

15. In support of the application there were affidavits from the father and an affidavit of laws from Ms. Lisa Tan Yee Peng, an advocate and solicitor in Brunei. Her *curriculum vitae* exhibited discloses that in addition to being admitted as an advocate and solicitor of the Brunei Supreme Court she also has academic law degrees from England and was both called to the Bar of England and Wales and admitted as a solicitor in England.

16. On behalf of the mother there were her own affidavits and an affidavit from the paternal grandfather.

High Court judgment
The trial judge identified the agreed issue he was asked to determine and the agreed applicable principles by stating:-

> "47. The parties are in agreement that the only issue for determination on this application is whether or not the courts in this jurisdiction or the courts in Brunei should determine the issues of custody and access that arise from the breakdown of the parties' marriage. It is also agreed that since this is not a case to which either the Hague Convention or Brussels II bis (EC Council Regulation No. 2201/2003) apply, that this question is to be determined by reference to the best interests of the child. In determining what is in the best interests of the child, the Court should have regard to the factors and circumstances set out in s. 31 of the Guardianship of Infants Act, 1964 (as inserted by s. 63 of the Children and Family Relationships Act, 2015 ("the Act of 2015")).
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> 48. There are no reported cases in this jurisdiction in which neither The Hague Convention nor Brussels II bis applies. Accordingly, nearly all of the authorities relied upon by the parties are authorities of the courts of the United Kingdom. Counsel for each of the parties in this case agrees that of those authorities, the most important is the decision of Baroness Hale in the House of Lords in *Re J. (child custody rights: jurisdiction*) [2005] UKHL 40. At para. 25, p. 91, Baroness Hale states:
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> > *"Hence, in all non- Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. If they do decide to return the child, that is because it is in his best interests to do so, not because the welfare principle has been superseded by some other jurisdiction."*
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> Later in the same paragraph she notes that since it is the welfare of the child that is paramount, the specialist rules and concepts of The Hague Convention are not to be applied by analogy in a non-Convention case. While no argument was made to the contrary in these proceedings, since there has been no report of a non-Convention case in this jurisdiction, I think it opportune to say that this represents a statement of the law in this jurisdiction also."

17. I would observe that the above description of the "only issue" is not quite correct.

The trial judge was required to and did later in the judgment consider and decide whether he should make an order for the "return forthwith" of N. to Brunei. On the facts, the inevitable consequences of such an order would be that the courts of Brunei would determine the anticipated custody application. However, what had to be decided and what he did decide was whether the order for return was in the best interests of N.

18. The trial judge prior to that had recorded in some detail the evidence given on affidavit by the parties (paras. 9 to 37). He records clearly the differing views of the father and mother as to what is in the best interests of N. in relation to whether or not he should now make an order for her return to Brunei. The concerns of each and disputes in relation to certain allegations, particularly those of the mother, are set out. The mother alleges that the father engaged in controlling, abusive and aggressive behaviour; excessive use of alcohol and what is alleged to be "irrational and impulsive" behaviour, particularly in relation to the transfer of joint funds into a single bank account in his name.

19. He also set out the undisputed evidence in relation to the living arrangements in Brunei. The father has a post in the international institution run by a multinational firm from which he earns a tax free income of approximately €4,000 per month. He is also provided with accommodation, utility bills paid, "gold plated" full medical and health insurance cover and generous travel allowances for return to Ireland. The parties were living in an ex-patriate community and employed a live-in nanny who had cared for N. since she was four months old. Since he came to Ireland, the father has been facilitated by his employer initially with two weeks holiday and is now on a leave which has a finite period. If, however, he does not return shortly to Brunei there is a real danger that his employment contract might be terminated.

20. The trial judge recorded undertakings given by the father in relation to the provision of maintenance and accommodation for the mother on her return to Brunei and also that he would do nothing to jeopardise her entitlement to remain in Brunei either "by purporting to cancel her work permit or by instituting divorce proceedings".

21. The mother in her affidavit expresses concerns in relation to her entitlement to remain in Brunei. It was not in dispute that the mother is dependent upon the father for her residence in Brunei. The father's current work visa expires on 31st December, 2018. He may get a further extension of his contract.

22. The evidence from the affidavit of laws of Ms. Peng to which I will return is also considered as are the submissions prior to the decision.

23. The decision of the trial judge falls into three parts. First, he decided (which was not in dispute) that the Irish courts had jurisdiction to hear the application and that it was to be decided by reference to the best interests of the child. Further, that in determining what is in the best interests of the child the Court should have regard to the relevant factors and circumstances including those set out in s. 31 of the Act of 1964 (as inserted by s. 63 of the Children and Family Relationship Act, 2015 ("2015 Act")).

24. Second, he assessed the legal position in Brunei having regard to the contents of the affidavit of laws from Ms. Peng. At paras. 77 – 78, he stated:-

> "77. The Court has been given the benefit of an affidavit of the laws of Brunei by the applicant. The content of this affidavit has not been put in issue by the respondent, and although she was directed to procure the same, she has not done so, or given any reason why she has not done so.
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> 78. It is clear from this affidavit that if issues relating to custody fall to be determined by the Courts of Brunei, they must be determined by what is considered to be in the best interests of the child, which Ms. Peng states is "paramount." It is also clear from the affidavit of laws that decisions of the Courts of the United Kingdom are persuasive. It appears from Ms. Peng's affidavit that the jurisdiction of the courts in Brunei in matters of custody and maintenance is very similar to the jurisdiction of the courts here. Moreover, the courts in Brunei, when considering custody and related issues, will be far better placed to have proper regard to the residency status of the parties."

25. Third, he decided the question as to whether or not it was in N.'s best interests that he make an order for her return to Brunei by considering what would happen if he made such an order or if he refused it. He set out his assessment and conclusion at paras. 79 – 85 as follows:-

> "79. In order to arrive at a conclusion on this application, it is simplest to consider what happens if it is granted and if it is refused. If the application is granted, N will be returned to Brunei, presumably to the family home pending any court orders to the contrary. This is a comfortable and secure home where N has until very recently grown up. One or another of the parties will have to institute proceedings in Brunei to determine issues relating to custody, access and maintenance. In determining that application, the courts will have regard to the best interests of N. That may not mirror precisely the same considerations as apply in this jurisdiction but the court will be influenced by decisions of the Courts of the United Kingdom. There is no reason to believe that such proceedings would result in any outcome other than one that is in N's best interests, any more than if the issues are determined in this jurisdiction.
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> 80. The applicant has agreed to maintain the respondent during the course of any such proceedings and to provide accommodation for her. He has also undertaken not to do anything which might cancel or jeopardise her residency status. While there is uncertainty as to the standing of such an undertaking before the Courts of Brunei, it is difficult to see how courts that are substantially influenced by the laws of England would not look with great disapproval on a breach of such solemn undertakings to this Court.
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> 81. During the currency of any family law proceedings in Brunei, the applicant will have the benefit of his continued employment and is likely to be able to renew that employment which yields the family a comfortable income and other benefits for the foreseeable future. The respondent will be able, should she chose to do so, to apply for further employment in Brunei. But it cannot be denied that the status of the respondent in Brunei or indeed the status of the family generally in Brunei is somewhat insecure and dependent upon the constant renewal of short-term employment contracts. That said, the applicant's contract has been renewed on that basis for six years.
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> 82. If on the other hand this application is refused and the substantive dispute is determined in Ireland, the respondent will be able to continue with her efforts to secure an appropriate visa to live and work in Ireland as well as her efforts to secure employment. N will develop her relationship with her first cousin as well as her aunt and paternal grandfather. N will no doubt be well cared for during the currency of any family law proceedings.
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> 83. But that scenario poses a great difficulty to the applicant. He is faced with a choice; either he returns at some stage during the course of the next seven weeks to his employment or he stays here to contest the proceedings, in which case he is likely to lose his employment, forcing him to return to Ireland to seek employment here. He is qualified as a [ ] and is aged fifty-one. It is difficult to know what his employment prospects are here, so he would be required in effect to move from a position in which he has a very good remuneration package (even if it does not have long-term security) to a position of considerable uncertainty in Ireland.
>
> 84. On the other hand if he returns to Brunei pending the determination of proceedings in Ireland, he will start to lose contact with N and it is difficult to predict for how long that might persist. It is undeniable that his relationship with N may suffer as a consequence and that is every bit as much to N's detriment as it is to the applicant.
>
> 85. With so many matters hanging finely in the balance, and having regard to s. 31 of the Act of 1964 and the matters set out therein, I consider there are three factors that are determinative:
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> (1) In circumstances where N's material welfare is likely to be catered for equally well in either jurisdiction, the Court should avoid taking any steps that may result in creating, unnecessarily, a breach in the relationship between N and either parent;
>
> (2) The Court should avoid taking any steps that might cause the family unit financial harm, and
>
> (3) All else being equal it is better to return N to what has been her home until very recently.
>
> I think it is clear that having regard to these factors, and having regard to the fact that custody issues in Brunei will be determined by reference to what is in N's best interests, it is in N's best interests now that she be returned to Brunei, subject to the undertakings proffered on behalf of the applicant, and the provision of appropriate financial support for the respondent, which I will discuss with counsel."

Appeal

26. The appeal is complicated by the changing approach on behalf of the mother. The notice of appeal identifies 11 grounds of appeal which might be described as generalised grounds of appeal in relation to errors made by the trial judge "in law and/or in fact, or on a mixed question of law and fact" in relation to the assessments made by him of the probable consequences of making an order for return which formed part of his reasoning. Many of these were not pursued in the written or oral submissions.

27. At Ground 10 it was stated:

> "The learned High Court judge erred in law and/or in fact, or on a mixed question of law and fact in refusing to hear the respondent/appellant's oral evidence in the matter."

In the written submissions, this was expanded and it was contended that the trial judge erred in law in making an order for the summary return of the child to Brunei without oral evidence and/or cross examination of the deponent and a full consideration of the welfare principles. It was further contended that the making of a summary return order in the absence of such a hearing was in breach of the child's constitutional rights to fair procedures. However, at the subsequent oral hearing this was not pursued in full. It was accepted that a court could, depending on the facts, make an order pursuant to s.11 of the 1964 Act as amended for the summary return of a child to a non-Convention country without an oral hearing.

28. The grounds of appeal do not specifically address any inadequacy in the evidence relating to the law and procedure in Brunei concerning applications in relation to custody or access or the assessment or findings made by the trial judge. In the written submissions, no specific argument was advanced addressing this issue notwithstanding that the submissions identified as one issue to be decided by this Court on appeal as:-

> "Whether the learned High Court judge erred in his conclusion that sufficient evidence was before him that the courts of the jurisdiction of Brunei Darussalam were, in relation to their consideration of welfare issues affecting children, sufficiently proximate to those of Ireland that a cessation of the jurisdiction of the Irish courts was warranted in the circumstances".

The written submissions did not, however, address that issue as such.

29. At the oral hearing, however, Mr. Corrigan SC appearing for the first time on behalf of the mother sought to advance a submission that there was no proper evidential basis in Ms. Peng's affidavit for the findings made by the trial judge at para. 78 and 79 of the judgment that the Brunei courts in determining issues relating to custody, access and maintenance concerning N. "will have regard to the best interests of N." or that the jurisdiction is very similar to that here. Those findings were central to the trial judge's subsequent assessment and decision.

30. The written submissions on behalf of the father, in addition to relying on the judgment of the trial judge and a number of findings made therein, object to a submission being made on appeal, contrary to the case made in the High Court, that an order directing a summary return of a child is not open to the Court without an oral hearing and full consideration of all the welfare principles in accordance with s. 31 as a violation of constitutional principles. If the Court is prepared to consider such a ground of appeal then it is submitted that there is nothing in the provisions of the 1964 Act that mandates an oral hearing in every case. Rather the Act mandates only that the child's best interests are served and submits that the Act should be interpreted in such a way as to allow for maximum speed and flexibility in meeting the welfare needs of children effectively. Counsel for the father similarly submits that even when construed in accordance with Art. 42A of the Constitution that the 1964 Act does not mandate an oral hearing in every case.

31. At the oral hearing, Ms. O'Toole SC, who appeared for the father in both courts, submitted that there was no formal application for oral evidence in the High Court. It was acknowledged that an indication was given that the mother would wish to give oral evidence particularly in relation to the issue of her future entitlement to a visa and the possibility of obtaining employment in Brunei. It was, however, pointed out that this evidence could have been given on affidavit as the last affidavit of the father was sworn on 21st April, 2017 and no further affidavit was sought to be delivered by the mother prior to the hearing on 27th April. In addition, it was submitted that there was substantive agreement as to the procedure to be followed in the High Court and that no application to cross examine the father had been made.

32. In relation to the alleged inadequacy of the evidence of the law and procedure in Brunei concerning custody disputes, it was submitted that it would be procedurally unfair to permit this ground of appeal now to be pursued. In the High Court after the delivery of Ms. Peng's affidavit, the mother was directed by the Court to obtain her own affidavit of laws. She did not do so and no explanation was given as to why she did not do so. No submission was made to the trial judge of any *lacuna* in the information provided by Ms. Peng in her affidavit in relation to the law and practice in Brunei relating to custody or access disputes concerning a child. Counsel submits that if any such submission had been made in the High Court then the opportunity could have been taken to seek further clarification from Ms. Peng as to the basis for certain of her statements.

33. Counsel for the father recognised the obligations of the Court of Appeal in hearing and determining an application affecting a child where that child was not a party and not represented before the Court. Nevertheless, it was submitted that it would be procedurally unfair to permit that ground of appeal now to be advanced in circumstances where if the Court considered it was a good ground of appeal the father would be prejudiced by reason of the fact it had not been advanced in the High Court as it could have been met by additional evidence.

The Law

34. There is no real dispute in relation to the applicable legal principles. However as it appears that this is the first application for what has been termed the "summary return" of a child to a country which has not acceded to the 1980 Hague Convention on Child Abduction ("a non-Convention country") since the entry into force of Article 42A of the Constitution in April 2015 and the amendments made to the 1964 Act by the 2015 Act, it is necessary to set them out to consider the issues raised or sought to be raised on the appeal.

35. The application for the return of the child to Brunei is made pursuant to s. 11 of the 1964 Act (as amended). The child is present in the jurisdiction and the Irish courts have jurisdiction to consider the application in accordance with Irish law and Article 14 of Regulation 2201/2003. Section 11(1) of the 1964 Act (as amended) provides:

> "(1) Any person being a guardian of a child may apply to the court for its direction on any question affecting the welfare of the child and the court may make such order as it thinks proper."

36. The primary direction being sought in these proceedings is a direction for "the return forthwith" of the child to Brunei. It is claimed

to be for the purpose of enforcing the father's rights of custody, guardianship and access with respect to the child.

37. Section 3(1) of the 1964 Act as amended applies to the decision to be taken. It provides:-

> "3. (1) Where, in any proceedings before any court, the -
>
> (a) guardianship, custody or upbringing of, or access to, a child, or
>
> (b) administration of any property belonging to or held on trust for a child or the application of the income thereof,
>
> is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration."

38. In circumstances where the parents are in dispute as to whether or not an order for the prompt return of a child to its country of habitual residence should or should not be made obviously its upbringing and indeed probably the question of access is in question. This legislative requirement is underpinned by Article 42A of the Constitution.

39. As set out by the trial judge s. 31 of the 1964 Act as amended applies. Insofar as relevant it provides:-

> "31. (1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.
>
> (2) The factors and circumstances referred to in subsection (1) include:
>
> (a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;
>
> (b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);
>
> (c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;
>
> (d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;
>
> (e) the child's religious, spiritual, cultural and linguistic upbringing and needs;
>
> (f) the child's social, intellectual and educational upbringing and needs;
>
> (g) the child's age and any special characteristics;
>
> (h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;
>
> (i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;
>
> (j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;
>
> (k) the capacity of each person in respect of whom an application is made under this Act—
>
> (i) to care for and meet the needs of the child,
>
> (ii) to communicate and co-operate on issues relating to the child, and
>
> (iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.
>
> …
>
> (4) For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only.
>
> (5) In any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child.
>
> …"

40. Section 32 of the 1964 Act (as amended) was referred to in the submissions. It is sufficient to observe that it permits a court to obtain a report from an expert "on any question affecting the welfare of the child" or to appoint an expert to determine and convey the child's views. This provision is, however, simply permissive, but not mandatory. The child's views do not arise on the facts of this application having regard to the child's age. No application was made to the High Court to make an order under s. 32 nor any submission pursued on appeal in reliance thereon.

41. In the High Court, the procedure for an application under the 1964 Act in accordance with Ord. 70A of the Rules of the Superior

Courts is by special summons grounded on a verifying affidavit.

42. Order 70A, rule 13(1) and (2) provides:

> "13. (1) Save where the Court otherwise directs, the hearing of any interim or interlocutory application brought under the Acts shall be on the affidavits of the parties subject to the right of the parties to seek to cross examine the opposing party on their affidavit. Any party may serve a notice to cross examine in relation to the deponent of any affidavit served on him.
>
> (2) Save where the court otherwise directs the hearing of any application under the Acts shall be on the oral evidence of the parties."

43. In these proceedings, as already stated, leave was granted on 28th March, 2017 to bring a motion returnable for 29th March. That motion, in substance, sought the reliefs claimed on the summons. It was initially adjourned to the 5th April with directions for affidavits. On 5th April, the "matter" was listed for hearing on 27th April, 2017 with further directions in relation to the filing of affidavits. The matter listed for hearing was undoubtedly the full application brought on the special summons. Whilst the order makes no express reference to Ord. 70A, r. 13(2) it appears that, by implication, on 5th April, 2017, the High Court (Reynolds J.) directed a hearing on affidavit.

44. No provision in the 1964 Act as amended mandates an oral hearing, nor do the Rules of Court. It remains within the discretion of the Court.

45. The parties were in agreement that the Hague Convention as implemented in this jurisdiction by the Child Abduction and Enforcement of Custody Orders Act, 1991 did not apply to this application.

46. On the facts of this case, it is important in considering the legal principles applicable to the return order sought to observe that at the time the mother removed the child from Brunei without the permission of the father there were no proceedings pending in Brunei and obviously no court order of Brunei preventing her from doing so. No issue in reliance upon principles of comity of courts accordingly arises on the facts of these proceedings.

47. The question of principle which is relevant to one of the submissions sought to be advanced on appeal is whether the High Court application under s. 11 of the 1964 Act as amended for an order for the prompt return of a child to a non-Convention country in which it was habitually resident has jurisdiction to determine on affidavit evidence alone that it is in the best interests of the child to make the order for return.

48. My conclusion on the issue is that no constitutional principle or any provision in the 1964 Act as amended precludes the High Court from making such a decision following a hearing on affidavit evidence alone. Whether or not it is correct to do so will depend upon the issues in dispute to be decided and the facts in dispute between the parties.

49. Where, as on the facts of this case, the relationship between the parents of the child appears to have broken down and it appears probable that there will be custody/ access proceedings in relation to the child, the Court is being asked to decide in which jurisdiction the child should live, in the short term, in a context that such decision also determines the jurisdiction in which those proceedings will take place.

50. Another way of putting it is that the Court is being asked to decide, whether it is in the best interests of the child that, in the short term, she live in Brunei with the inevitable consequences of proceedings relating to her long term custody and access taking place in the courts of Brunei or whether it is in her best interests that in the short term she remain in Ireland with similar proceedings taking place in Ireland.

51. On the facts of these proceedings, the trial judge did not identify any dispute of fact between the parties in relation to the living arrangements or the status of the father or the mother or the child in Brunei in the short term which could objectively be said to require a hearing on oral evidence. He identified correctly uncertainty into the future as to the status of the mother in particular and the family more generally in Brunei insofar as it is dependent upon the constant renewal of short term employment contracts (para. 81).

52. As there was only one affidavit of laws there was no factual dispute in relation to the law or procedure applicable to custody or access proceedings in Brunei.

53. The trial judge, in assessing whether or not it is in the best interests of the child to make the order for prompt return, is only required to resolve any matters in dispute between the parties which are relevant to the determination of that issue. The Court is required to determine what is in the best interests of the child in the short term. The parties currently share joint custody of the child. The application on behalf of the father did not seek to deprive the mother of custody. The Court was not required to determine a custody dispute between the parents.

54. On the facts of this application, there was no dispute between the parties in relation to the suitability of each parent to have access to the child. There was undoubtedly concern expressed by the mother in relation to the use of alcohol by the father. Subject to the undertaking not to use alcohol whilst enjoying access, the mother agreed to the father having two days access at a time whilst living in a hotel room in Dublin. As part of the trial judge's determination that the child should be returned to Brunei, he was not determining any access dispute between the parties. He did ultimately in his order, after delivering judgment and hearing the parties, include further provisions in relation to access following return to Brunei. These are referred to further below.

55. My conclusion is that, as a matter of principle, there was no obligation on the High Court to determine the father's application herein following an oral hearing. It has a discretion to decide whether or not to do so. Further, even if it were permissible for the mother to pursue this as a ground of appeal I am not satisfied that the submissions made on her behalf have identified any relevant fact in dispute in relation to which the trial judge ought to have heard oral evidence or permitted cross examination of a deponent. Accordingly, it is not necessary to decide whether the Court should permit such a ground to be pursued having regard to the approach taken on her behalf in the High Court.

Conclusion

56. I have concluded that this Court should uphold the decision of the trial judge and dismiss the appeal against the order made for the return of N. to Brunei. In reaching this conclusion I have taken into account to the extent permissible in accordance with fair

procedures the submissions made or sought to be made on appeal. My reasons for the conclusion reached are as follows.

57. The trial judge correctly identified in his judgment that, in determining the application pursuant to s. 11 of the 1964 Act as amended for the order for return forthwith or order for the prompt return of N. to Brunei, he should do so in accordance with ss. 3 and 31 of the 1964 Act as amended by determining whether or not such an order is in the best interests of N.

58. He also correctly concluded that, as this was not a case to which either the Hague Convention or Article 11 of Council Regulation (EC No. 2201/2003) applied, he should not apply either directly or by analogy the principles according to which applications under those provisions are determined.

59. He had regard to the persuasive authority of the opinion of Baroness Hale in *Re J. (Child Custody Rights: Jurisdiction)* [2005] UKHL 40 which identifies each of the above as the first two principles according to which such an application should be determined.

60. On the facts of this application, I consider that the trial judge was not in error in hearing the application on affidavit evidence alone. The 1964 Act as amended does not require an application under s. 11 which is to be determined with the best interests of the child as a paramount consideration to be heard on oral evidence. A hearing on oral evidence may well be appropriate and necessary in many applications under the Act. However it is not mandatory and s. 31(5) of the 1964 Act as amended obliges the Court in any proceedings to which s. 3(1)(a) applies to have regard "to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child". What may amount to "unreasonable delay" will depend upon the nature of the proceedings. An application for the return of a child to his home in his country of habitual residence, even where that is a non-Convention country where he has been removed without the consent of a parent is one which should be determined with particular expedition.

61. The orders made by the High Court and directions given in the days following the commencement of these proceedings appear to have proceeded upon the basis that the hearing would be on affidavit evidence alone. The order of the High Court (Reynolds J.) of 5th April, 2017 fixed the hearing date and gave further directions in relation to the filing of affidavits. It appears implicit in that order that the direction was for a hearing on affidavit evidence. Those orders were made without objection and may even have been on consent and were clearly directed at achieving an early hearing whilst giving the parties a reasonable time to adduce relevant evidence and prepare submissions.

62. Accordingly, when the matter came on for hearing before the trial judge on affidavit evidence in accordance with the prior directions given, it appears to me he was entitled, in the absence of a formal application being made to admit oral evidence or to cross examine, to proceed and hear the matter on the affidavit evidence. Whilst there were certain facts in dispute - particularly in relation to the complaints made by the mother about the father's conduct and consumption of alcohol - the trial judge did not consider it necessary to resolve them. The trial judge considered the complaints made by the mother but considered that even if they were well founded in the manner she alleged that the father nonetheless did not pose any threat to the wellbeing of N. and they could not be regarded as "in any way sufficiently serious as to influence the outcome of this application". In my view, that was a conclusion he was entitled to reach on the facts and has not been seriously disputed on appeal.

63. Next, the trial judge correctly, in accordance with s. 31(1) of the 1964 Act as amended, had regard to all of the factors or circumstances relevant to N. and her parents including but not limited to those expressly set out in s. 31(2). Section 31(2) does not include a factor highly relevant to this application to which the trial judge had regard, namely, the legal system in Brunei and, in particular, how the courts there would determine what regrettably appears to be an inevitable application by the father or the mother in relation to the longer term future custody, access and upbringing of N. The only evidence adduced of the legal system in Brunei was the affidavit of Ms. Peng. As noted by the trial judge, the content of the affidavit was not put in issue by or on behalf of the mother. Hence this evidence did not give rise to a need for oral evidence or cross examination. The affidavit had been available from the end of March and the mother had been directed to file an affidavit of laws but had not done so and had not given any reason for not doing so.

64. The trial judge summarises and quotes in part the affidavit of laws at paras. 38 – 46 of his judgment. No challenge has been made to the accuracy of the summary. Nevertheless, having regard to the submissions sought to be made on appeal, I propose referring to some aspects of the evidence.

65. The legal system in Brunei is described by Ms. Peng at para. 3 of her affidavit which is summarised by the trial judge accurately at para. 45 where he stated:

> "Ms. Peng avers that the sources of Brunei laws are statutes, subsidiary legislation and case law. The Application of Laws Act provides that the common law of England, the doctrines of equity, and statutes of general application as administered or enforced in England as of 25th April, 1951 are applicable in Brunei Darussalam, but only to the extent that such is permitted. She says that the doctrine of *stare decisis* applies, and persuasive authorities include the jurisdictions of Malaysia, Singapore, India and the United Kingdom, as well as other countries in the Commonwealth."

66. Ms. Peng explained the non-applicability of the Sharia courts to any marital proceedings between the father and the mother or in relation to the child as neither the father nor the mother are Muslim. That is not in dispute. She also stated that "the unilateral removal of the infant N. from the jurisdiction by the respondent does not give rise to any criminal offence under the Syariah penal code."

67. Ms. Peng deposed to the jurisdiction of the Brunei High Court to grant decrees of divorce, nullity and judicial separation and the fact that the United Kingdom Matrimonial Causes Act, 1973 is applicable in Brunei and set out certain of the relevant provisions.

68. The evidence given by Ms. Peng in relation to the resolution by the Brunei courts of disputes between parents regarding custody and access of a child is set out at paras. 10 – 12 of her affidavit:

> "**Custody and the rights of natural parents:**
>
> 10. The natural parents have parental rights (custody, care and control) over the child. A person can be appointed by deed or will or by the order of a court to be the guardian of a child.
>
> 11. If there is a dispute between parents regarding custody / access of a child they can apply to have that issue determined by the Courts of Brunei Darussalam. In particular, a parent can apply to the Brunei Darussalam Courts to determine whether they can relocate with a child outside of Brunei Darussalam in circumstances where the other parent

contests this move. In considering the orders to be made for the custody, care and control of a child of the family in divorce proceedings, the Brunei Darussalam courts will have regard to what is in the best interests of the child. This is paramount.

12. I am unable at this stage to advise as to how the Brunei courts are likely to determine what would be in the best interests of N. without being appraised of the full facts of the case. There are no hard and fast rules as each case depends on the prevailing circumstances of the case. The courts will weigh a party's reasons for wanting to remove a child from the jurisdiction against the abrogation of the rights of the other party to have access to the child if he/she is removed from the jurisdiction. Ultimately, the Brunei Darussalam courts will decide based on what would be in the best interests of the child. The issue of immigration laws will also have to be considered. The Brunei Darussalam courts are likely to take such practical considerations into account in making the orders in relation to the child."

69. In the High Court no submission was made by the mother which objected to any lack of specificity or detail in the evidence given by Ms. Peng at paras. 10 – 12 above. Admittedly, any such submission might well have been difficult having regard to the failure of the mother to produce an affidavit of laws. The mother nevertheless had legal representation in this jurisdiction. She had, moreover, been directed and given the opportunity of putting in evidence of law or procedure which might contest, dispute or perhaps draw attention in more detail to the relevant approach of the Brunei courts with a view in turn perhaps to distinguishing their approach from the approach in this jurisdiction. In view of her failure to take up this option, I consider that the trial judge was entitled to make the finding at para. 79 in relation to proceedings as might be instituted by the father or the mother relating to custody, access or maintenance that:-

"In determining that application, the courts will have regard to the best interests of N. That may not mirror precisely the same considerations as apply in this jurisdiction but the court will be influenced by decisions of the Courts of the United Kingdom. There is no reason to believe that such proceedings would result in any outcome other than one that is in N's best interests, any more than if the issues are determined in this jurisdiction."

70. Whilst I have concluded on the particular facts of this case that the trial judge was entitled to make the findings which he did in relation to the approach of the Brunei courts to determining disputes relating to custody and access, nevertheless I do recognise that it would have been preferable that the affidavit of laws set out the relevant information in relation to the applicable statute law as had been done by Ms. Peng in relation to the matrimonial and maintenance proceedings. If the submission sought to be made at the appeal hearing had been made in the High Court and the trial judge considered that additional evidence was desirable or required, it could have been obtained by the father. It does not appear to me permissible for a submission to be made on behalf of the mother for the first time at the hearing of this appeal in this Court to the effect that the evidence in relation to the approach of the Brunei courts in relation to custody questions in general and the best interests of the child in particular was somehow inadequate to permit the trial judge accept the clear and unchallenged averments made by Ms. Peng to the effect that the Brunei courts will determine such disputes in the best interests of the child.

71. In this regard, I would add that it was not necessary for the High Court to be satisfied that either the factors to be taken into account by the Brunei courts or the approach of those courts to determining what is in the best interests of the child are identical to the statutory provisions in this jurisdiction. Pauffley J. in *Re S. (Wardship: Summary return: non-Convention country)* [2015] EWHC 176 (Fam) in summarising the principles which guide an English court when considering applications for what she termed "summary return" in non-Convention cases deriving from the judgment of the House of Lords in *Re J.* put it thus:-

"The extent to which it is relevant that the legal system of the other 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 courts 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 inevitably to be preferred to another … We are not so arrogant as to think that we (in England and Wales) know best."

72. I would respectfully agree with this approach. It appears to me that the trial judge was entitled to be satisfied on the evidence before him that the future custody disputes in relation to N. would be determined by the courts of Brunei in accordance with the best interests of N. Although he did not have evidence which permitted him to conclude that the factors to be taken into account would mirror exactly the factors which would be taken into consideration in determining this question in this jurisdiction, the evidence was nonetheless sufficient to enable him be satisfied that future custody or access disputes in Brunei would be determined in accordance with N.'s best interests.

73. Being so satisfied, the trial judge then conducted a careful weighing exercise of the differing factors affecting the father and mother and pointing each way. The matters taken into account were all relevant and in evidence before him. He identified carefully the uncertainties, in particular in relation to the mother's future status in Brunei and the standing of the undertakings proffered by the father. In relation to the latter, the evidence of the legal system in Brunei permitted him to infer as he did that "it is difficult to see how courts that are substantially influenced by the laws of England would not look with a great disapproval on a breach of such solemn undertaking s to this Court".

74. Finally, - and, correctly, in my view - he identified, in accordance with s. 31 of the 1964 Act, the preservation of the relationship between N. and each of her parents pending the resolution of the anticipated custody proceedings as being of such importance that avoiding a breach was a determinative factor. The avoidance of financial harm to the family unit was also relevant to N.'s best interest on the particular facts of this application and, in particular, having regard to the father's employment in Brunei, Binchy J. was entitled to include it as a second decisive factor and to conclude that the combination tipped the balance in favour of it being in N.'s best interests to make the order for return to Brunei.

75. Accordingly, therefore, I would dismiss the appeal against the order for return subject to the undertakings set out in the order of 10th May, 2017. In doing so I wish to make clear I recognise how difficult these proceedings are for the parties and am quite satisfied that each of the father and mother have a loving relationship with their daughter and are genuinely seeking to do what they consider to be in her best interests.

Addendum

76. The Court will hear Counsel in relation to a variation to the High Court order by reason of the fact that the date fixed by the High Court for return has now passed. In addition, whilst there was no appeal against that part of the order specifying the access pending orders of the Brunei courts, certain potential inconsistencies between it and the undertakings from the father recorded in the order were identified in the course of the hearing. The Court will also hear Counsel on a variation to give effect to the intention of the trial judge. The issue of disclosure to the Brunei courts and lawyers in Brunei also needs to be addressed.