

## THE HIGH COURT

[2017 No. 24 M.]

## IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964

## AND IN THE MATTER OF N, AN INFANT

BETWEEN

A.B.

APPLICANT

AND

C.D.

RESPONDENT

**DECISION of Mr. Justice Binchy delivered on the 3rd day of May, 2017.**

1. By this application the applicant seeks an order of the Court directing the return of the parties' daughter, N, to her place of habitual residence in Brunei, Darussalam and, further, an order directing that these proceedings be heard and determined summarily for the purpose of safeguarding the welfare of the child and for the purpose of protecting the applicant's rights of custody.
2. The applicant also seeks a declaration that the respondent wrongfully removed the child from the jurisdiction of Brunei, Darussalam.

**Background**

3. The application is moved pursuant to the provisions of the Guardianship of Infants Act, 1964 (as amended) and specifically section 11 thereof. The parties are in agreement that this is appropriate and that neither the Hague Convention nor EC Council Regulation 2201/2003 – Brussels II bis – have any application to the circumstances of the case.

4. The applicant is an Irish national and the respondent is an Asian national. They met in 2005, when the applicant, a professional, was living and working in Asia. They commenced a romantic relationship and married in a civil ceremony in Asia in September 2010.

5. In 2011, the parties made a joint decision to relocate to Brunei, Darussalam. The applicant took up a professional position in an institution in Brunei. As of the date of these proceedings, the applicant is fifty-two years of age and the respondent is thirty-two years of age. N was born at Negara, Brunei, Darussalam on 26th January, 2015 and is an Irish citizen.

6. On 6th March, 2017, without the knowledge or consent of the applicant, the respondent took N from Brunei, Darussalam to Ireland. She left a moving type written note informing the applicant that she was "gone" and that N was with her; that she was filing for a divorce and that this was both her best interests and the best interests of N. She said she would contact the applicant once she and N had landed safely. The respondent had made these arrangements some time in advance, and travelled with N to Ireland. Perhaps unusually, the respondent has been assisted by the applicant's sister, who occupies a secure professional occupation in Dublin and who resides in the Dublin area and by the applicant's father, who swore an affidavit in support of the respondent in this application.

7. The applicant in his grounding affidavit describes how, following upon discovery of the note left by the respondent he reported the matter immediately at the local police station. Of course, at that time, he still did not know where the applicant and N. were, but he was fearful that the respondent may have been taken N. to Asia. He averred that some months previously the respondent had applied for employment opportunities in Asia and had indicated a desire to return there.

8. The applicant made such inquiries as he could in the circumstances as to where the respondent might be, including text messages to his father in the West of Ireland and his sister and brother-in-law in Dublin. The applicant's father telephoned him soon after his text message to confirm that the respondent and N had landed safely in Dublin some six hours earlier, and approximately thirty-four hours after departing Brunei. Later that night, the applicant had a Skype conversation with the respondent and on 8th March, the respondent sent the applicant a text message indicating that she intended to stay permanently in Ireland with N. The applicant then made arrangements to travel to Dublin, arriving on 11th March, and checked into a hotel where he has been residing ever since.

**The Evidence**

9. The applicant deposes that at the time the respondent and N. travelled to Ireland, he was the sole earner and financial contributor to the family household. He says that the respondent, who had been working, resigned from her position in November 2016. The applicant avers, and it is not in dispute, that the family enjoys a good standard of living in Brunei and that if they were to stay there, N would have access to high quality international schools as well as other education, sports and leisure opportunities in Brunei.

10. The applicant acknowledges that marital relations were not good at the time that the respondent left and says that he and the respondent had been working on their marriage and attending marriage counselling. Nonetheless, the parties were both looking after N. with the help of a nanny. While no legal proceedings of any kind had been issued up to the respondent's departure, the applicant says that he has now instructed legal proceedings to be issued in Brunei to deal with all issues arising out of the breakdown of the marriage, including issues of custody and access to N.

11. Following upon his arrival in Ireland, the applicant met with the respondent and N, on a number of occasions. On each occasion they were accompanied by the applicant's brother-in-law so that in effect the applicant's access to N was supervised to which he objected. The parties engaged solicitors and agreement was reached in respect of unsupervised access arrangements; while this application was pending. The parties agreed that access was shared on a two days on, two days off basis, which arrangements were incorporated in a court order made on 5th April, 2017. This access has continued since without difficulty.

12. In a nutshell, it is the applicant's case that it is in the best interest of N that she is returned forthwith to her family home, where she has resided since she was born, where both parents can have access to her, and that all issues arising out of the breakdown of the marriage, including issues as to custody and access, can be dealt with by the Courts of Brunei, in accordance with the laws of Brunei. As to the laws of Brunei, the applicant supported his application with an affidavit of laws sworn by Ms. Lisa Tan Yee Pen, advocate and solicitor and partner in the firm of Ahmad Isa and Partners and dated 30th March, 2017. I will address this affidavit later in this judgment

13. The respondent swore a replying affidavit on 4th April, 2017. This is a short affidavit in which the respondent deposes that she had no option but to leave the applicant on 6th March, 2017 "due to his abusive and controlling behaviour". She also says that his behaviour is having an upsetting effect on N.'s emotions. She avers that the applicant abuses alcohol to a most worrying extent on a daily basis and becomes very aggressive towards her and towards N. She says that they had agreed to purchase a house in Ireland in March 2016, and that the applicant required the respondent to transfer funds from their joint bank account in Brunei to an AIB account in the applicant's sole name for the purpose of such purchase, but that the applicant changed his mind at the last minute. The respondent describes this conduct as "irrational and impulsive". She says that the applicant has refused to transfer back to her half of the funds in the joint account which she says belong to her.

14. The respondent also says that "the second class treatment of women in Brunei" is another reason as to why she does not wish to return there, and it is not where she wishes N to grow up. She says that in official documents she is regarded as the applicant's employee, further demonstrating the lack of equality for women in Brunei.

15. The applicant filed a replying affidavit on 5th April 2017, the same day the matter came before the Court for the first time. In his affidavit, the applicant complains about the lack of particularity of the abusive and aggressive conduct alleged by the respondent. He denies engaging in controlling, abusive or aggressive behaviour and denies abusing alcohol. He accepts that monies were transferred from a joint account in Brunei into an account in his sole name in AIB in Ireland and also accepts that the respondent made a contribution, directly and indirectly towards those funds which he says are marital assets. But he does not accept that respondent is entitled to a half share of the same as of right. He expresses the view that these assets should be dealt with in the context of matrimonial proceedings in a manner that ensures proper provision for both parties. He says that the funds concerned were accumulated from 2011 onwards, as part of an earnest effort to save and with a view to demonstrating regular savings for the purpose of any mortgage application that they might make in the future. The applicant avers that the purchase of property in Ireland which the parties were contemplating fell through because his foreign income was not deemed acceptable for the purpose of his mortgage application.

16. The applicant also denies the respondent's assertion that women in Brunei are treated as "second class" which he points out the respondent did not particularise in any way. He says that the respondent is not described as his "employee" in official documents but she is described as his dependent on his employment visa. He avers that the respondent trained and worked in a professional occupation in Brunei in her own right.

17. On 5th April 2017, the Court ordered the respondent deliver a further replying affidavit within one week, and that she also deliver and file an affidavit of laws within two weeks. The respondent, in compliance with this order, swore a further affidavit on 11th April, 2017, but did not file an affidavit of laws and indeed did not do so at all subsequently. At the hearing of this application, the respondent did not dispute or put in issue the content of the affidavit of laws delivered on behalf of the applicant.

18. In her replying affidavit of 11th April, 2017, the respondent states that she is presently residing in a four bedroomed house with her sister-in-law, and her husband, in Dublin. She says that she worked in the same institution as the applicant on a part-time basis from September 2011 to June 2012, and then took up a full-time position in a different institution in Brunei from in or around August 2013 until December 2016. She does not say why the position came to an end at that point, but in his further replying affidavit, the applicant says that she resigned from the position.

19. Having described the background to the relationship, consistent with that outlined by the applicant, she says that she and the applicant made a joint decision to relocate to Brunei in or about August 2011. However, she says that at that time she had concerns about the applicant's alcohol intake and alcohol abuse. The respondent avers that they committed to working on their marriage. She says that in their twelve years together, the applicant had always consumed alcohol "almost every night except from when he was taking medications" and that "the applicant drinks approximately one hundred bottles of beer and at least one bottle of whisky each month."

20. She goes on to describe marital and relationship difficulties following the birth of N. She describes an upsetting incident in October of 2015 when they were visiting her family in Asia. She describes other upsetting incidents when visiting the applicant's family in the West of Ireland during Christmas 2015, at which time the applicant's mother was dying, passing away on 24th December, 2015. She says that in late December 2015 she attended with COPE, a domestic violence service in the West of Ireland. She says that she made enquiries from the immigration office in the West of Ireland and also met with a solicitor to establish her immigration status with a view to living and working in Ireland on a permanent basis. She says that the applicant was abusing her psychologically at this stage, but she was not prepared to leave the marriage because N. was only one year old. Accordingly, she went back to Brunei with the applicant and N. She says their marital difficulties continued during 2016, and that she broached the subject of divorce a number of times with the applicant, who was of the view that there is still hope in their marriage. The respondent goes on to deal with the saving of funds with the view to purchasing a property in Ireland. In this affidavit she says that the purchase fell through because the applicant's salary was not being paid in a recognised currency, and not as a result of irrational or impulsive behaviour.

21. It is averred that on the insistence of the applicant, the parties attended with a marriage counsellor in October 2016, but the counselling was unsuccessful. The respondent complains of being a victim of financial abuse and claims that the applicant blocked her access to bank accounts, providing her with grocery money only. She expressed fear that the applicant might leave Brunei to travel to Ireland with N, and that she would not see N. again. At the same time, she says that she told the applicant on 10th January, 2017, that she would like the family to move to Ireland as she felt it would be in the best interests of N. At around this time, she says the applicant, having previously taken N's passport, gave it back to her.

22. She avers that on 14th January, 2017, she suggested to the applicant that the family should come to Ireland to live and find employment on a permanent basis here, in order to provide N with a stable environment in the long term. She said she was supported in this by the applicant's father but the applicant refused. She avers that on 19th January, 2017, she went to see a family law solicitor in Brunei and that she was led to believe that by the lawyer that "because Brunei is an Islamic country, if I were to file for a divorce in Brunei, the applicant would have no obligations in terms of maintenance or alimony". She says she was led to believe she would probably end up jobless, homeless and with no future prospects. The respondent avers that she borrowed B\$4,000 from a close friend, to be used as legal fees. However, she later used that money to purchase flights from Brunei to Ireland for herself and N. The flights were booked for 31st January, 2017. Her motivation for doing this, she says, was that she discovered a document, on 11th January, 2017, appearing to be an instruction to a firm of solicitors in Brunei, to act on behalf of the applicant in divorce proceedings. She claims that on the same day the parties had made a decision to commit to working on their marriage. The respondent exhibits that document to her affidavit.

23. The applicant had to abandon the intention to fly to Ireland with N. on 6th February, 2017, because N became sick. She rearranged the flights for 6th March, 2017, the day that she and N travelled to Ireland. She says that her Brunei visa was due to

expire on 7th February, 2017, but that appears to be incorrect.

24. The respondent claims that in recent times, the applicant indicated to his father that he wished to raise N in Dubai until she is in secondary school; that he has also explored the idea of opening up a B&B in the West of Ireland; that he has spoken of going to an island for a couple of months in order to be "stress free" and also that he sent job applications for both himself and the respondent, to Asia. It is clear from her affidavit that the respondent's single biggest concern is that, in her view, the applicant has no stability or overall life plan and that it is unsuitable to raise N in such a transitory and unstable environment. She expresses fear that N will be raised in Brunei, which she describes as a country where basic human rights do not exist.

25. The applicant was granted a visitor visa in this country, valid until 8th April, 2017, which has recently been extended to August 2017. Upon arrival here, she was met by the applicant's sister and her husband and their son, N's first cousin, with whom they have stayed with ever since. She says that she contacted the applicant and made a Skype call to him on the day of their arrival in Ireland as soon as N had awoken from sleep.

26. The respondent attests that since arrival in Ireland, she has taken the following steps:-

- (i) obtained a PPS Number for both herself and N;
- (ii) enrolled N. in the under six's GP scheme;
- (iii) applied for employment;
- (iv) applied to open bank accounts in AIB and Bank of Ireland. She says she has a bank account with Ulster Bank and a local Credit Union; and
- (v) joined both herself and N. in a library in Dublin.

27. The respondent also refers in her affidavit to access which she facilitated for the applicant upon his arrival in Ireland, in the company of his brother in law.

28. Dealing with the concern expressed by the applicant that she might go back to Asia, she says that she inquired from an Embassy in Brunei about moving back to Asia with N. but was informed that it was not an option because N would not be granted legal status to live in Asia for a number of reasons, not least of which is that she is an Irish citizen and Asia does not permit dual citizenship. The respondent also deposes that the applicant often believed that he was going to lose his job in Brunei and that he was fully aware of the fact that she was applying for jobs as a couple, including in Asia. The respondent deposes as to the great support she has enjoyed from the applicant's sister and her husband, as well as the applicant's father.

29. The applicant responded to this affidavit with a further lengthy affidavit of his own sworn on 21st April 2017. At this point, it is unnecessary to summarise this affidavit in any great detail. Suffice to say that he takes a different view of the specific incidents which the respondent complained of as having occurred in Asia and Ireland in October and December 2015 respectively. He absolutely denies that he drinks to excess and points to the fact that Brunei is a dry country and consumption of alcohol is necessarily restricted. The applicant denies the suggestion that he is not able to cope with looking after N, while acknowledging that he did find it challenging at times to look after a young infant by himself, but rejects any suggestion that he is incapable of or unsuited to looking after N.

30. As to the suggestion of the respondent that the applicant was exploring the possibility of relocating, he says that the inquiries to which the respondent has referred in her affidavit were made to facilitate the respondent who had left her job in Brunei in November 2016, but he denies that there was any discussion about returning to Ireland and attending marriage counselling in this country. In relation to the possible purchase of the house in the West of Ireland, he says that was intended as an investment and that the parties had not agreed to relocate to Ireland from Brunei in 2016.

31. He also denies the suggestion that it is his intention to raise N in Brunei until she attended secondary school and then to relocate. He denies that he made any comments about going to live on an island or opening a B&B in the West of Ireland. He takes issue with the fact that the respondent waited seven hours after arriving in Ireland to contact the applicant, when the respondent would have known that he was "frantic" in Brunei.

32. The applicant avers that his remuneration package in Brunei is very generous. He earns a tax free income of approximately €4,000 per month, and is provided with accommodation and utility bills paid. He says that both he and the respondent are provided with generous travel allowances to return to Ireland and that they have "gold plated" full medical and health insurance cover, free of charge through his work. Moreover, N. is entitled to free education, and N. is enrolled in pre-nursery school from next August/September. They are able to afford a live-in nanny who has cared for N. since she was four months old. He says that both Brunei and the neighbourhood in which they live are extremely safe and very child friendly. He describes a very attractive living environment, in which there is an informal play group in the neighbourhood with children attending with mothers/parents in each others' houses on a rota system. He says that in his opinion and in his experience, Brunei is one of the most peaceful and safest of places to live and rear children. While acknowledging that it is a very different society to Ireland, he says that it is a tolerant one and that this tolerance is demonstrated by the fact that notwithstanding that Brunei is a "dry" country, his employer is permitted access to alcohol through a special importation system which is strictly controlled and operated through a quota.

33. The applicant says that the upheaval caused by recent events has brought home to him the huge advantages of his job and the lifestyle enjoyed by the parties in Brunei, as well as the opportunities for N. He says that Brunei represents a good and stable environment for N to be brought up in, and he has no intentions of residing elsewhere in the medium to long term.

34. He further avers that there are no societal barriers to the respondent working or living independently as a woman in Brunei, save for the work visa requirement which applies equally to the applicant. He says there are employment opportunities for the respondent, which would quite likely provide accommodation to the respondent also, as part of her remuneration package. He acknowledges, however, that while the respondent has applied for professional positions, as of yet she has not secured any employment nor any right to work there, and is for the time being therefore dependent on the applicant for her residence in Brunei. The applicant's current work visa expires on 31st December, 2018.

35. The applicant expresses concern about the inquiries that the respondent has made with an Embassy in Brunei about the entitlements of N to secure the necessary permit to live in Asia. Insofar as the respondent says that this is not possible owing to the

fact that Asia does not acknowledge dual citizenship, the applicant says that he remains concerned that the respondent could enter Asia in the same way that she has entered Ireland.

36. Insofar as the central issue in this matter is the welfare of N, the applicant says that he enjoys a close and loving relationship with her, and that the respondent, by her conduct, has attempted to sever that bond. The applicant volunteers an undertaking to pay maintenance to the respondent so that she can be accommodated in Brunei pending any hearing before a Brunei court arising out of the breakdown of the marriage and pending orders as to custody and access. The applicant has also undertaken that he will do nothing to jeopardise the respondent's entitlement to remain in Brunei, either by purporting to cancel her work permit or by instituting divorce proceedings.

37. As to his employment, the applicant says that his employers have been very understanding but, having initially facilitated him with two weeks holidays, he is now on sick leave. In accordance with company sick leave policy, if he is away from his employment any longer than the period permitted, his employer can terminate his employment contract. The Court was informed that he has, at most, seven weeks of sick leave left before his employment contract might be terminated, which would result in his losing his entitlement to remain in Brunei. He argues that it would be grossly unfair if he were, through the unilateral actions of the respondent, forced to return to Brunei in order to save his job and preserve his ability to maintain and support N, and in so doing lose contact with N at such an important stage in her development.

#### **Affidavit of Laws**

38. In her affidavit, Ms. Pen she describes the legal system in Brunei. She avers that:-

*"the Supreme Court of Brunei, Darussalam is the body wholly responsible for the administration of justice in civil and criminal law and has within its hierarchical structure, the Court of Appeal and the High Court. There is also an Intermediate Court, a Magistrates Court, a Small Claims Tribunal and Juvenile Courts. However, issues relating to the dissolution of a marriage, and guardianship or custody of minors are within the jurisdiction of the High Court."*

39. She avers that the civil jurisdiction of the Sharia Courts of Brunei only extends to proceedings which relate to marriage or any matrimonial matter where one or both of the parties to the marriage is a Muslim. She says that the Sharia Courts do not have civil jurisdiction over non-Muslim marriages or matters such as commercial, contractual and tortious claims. The Sharia Courts also have jurisdiction over criminal offences under the Sharia penal code which applies substantially to Muslims, but there are some offences which apply to non-Muslims as well.

40. She says that since neither of the parties in these proceedings are Muslims, and since their marriage is not a Muslim marriage, Sharia law would have no application to any proceedings issued by either party regarding the dissolution of their marriage or in relation to the custody of N. She says:

*"The courts of Brunei, Darussalam uphold the human rights of all parties and are zealous in upholding the rule of law. Further, I am instructed that there is no court order made by the Courts of Brunei, Darussalam in place prohibiting the infant N.'s removal from the jurisdiction of Brunei at the time of removal. The unilateral removal of the infant N. from the jurisdiction by the respondent does not give rise to any criminal offence under the Sharia penal code."*

41. Ms. Pen goes on to say that under the Dissolution of Marriage Act, the High Court of Brunei has jurisdiction to grant decrees of divorce, nullity and judicial separation where at the date of the petition, either party to the marriage had a substantial connection to Brunei, Darussalam or has been ordinarily resident in Brunei in at least twelve months preceding the presentation of the petition.

42. The respondent would be entitled to make an application for maintenance for her own and/or N's support in Brunei. The United Kingdom Matrimonial Causes Act 1973, is applicable and therefore in deciding the appropriate financial orders to be made in divorce proceedings, the Brunei, Darussalam courts will have regard to the matter set out in s. 25 of that Act, which include the income earning capacity of the parties, their financial needs, their standard of living, their ages and capacity, the contributions which they have made or may make in the future to the welfare of the family, the conduct of the parties and the value to each of the parties of any benefit which by reason of the dissolution of the marriage that party will lose.

43. As to custody, the natural parents have parental rights of custody and access to a child and may apply to have issues relating to the same 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 the move. She says that 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 interest of the child. She says *"this is paramount"*.

44. She says there are no hard and fast rules and each case depends on its circumstances. The courts will weigh the reasons why a party wants to remove a child from the jurisdiction and weigh those against the rights of the other party having regard to that party's rights to access if the child is removed from the jurisdiction. Ultimately however the Brunei, Darussalam courts will decide the matter based on what is in the best interest of the child. Immigration law issues will also be considered in arriving at a decision.

45. Ms. Pen 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 Common Wealth.

46. It is common case that currently, the legal status of the respondent in Brunei is one of a dependent of the applicant. The applicant has an employment pass that is valid until 31st December, 2018. The respondent's dependent's pass will remain valid for the same period as the applicants'. However, after a decree of divorce is granted, or otherwise upon the expiration or cancellation of the respondent's dependent's pass, the respondent will have to leave Brunei, Darussalam and if she wishes to re-enter she will have to do so under a social visit pass, usually with a validity period of one month. For longer periods, the respondent would have to apply for an employment pass. Since Ms. Pen mentioned the possibility of cancellation of the respondent's pass, the question arose during the course of this application as to whether or not the applicant could effect such a cancellation and I will return to that issue below.

#### **Submissions**

##### **Submissions of the Applicant**

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")).

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:

*"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."*

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.

49. The Hague Convention was, in the words of Baroness Hale:-

*"motivated by the belief that it is in the best interests of children for disputes about their future to be decided in their home countries, and that one parent should not be able to take a child from one country to another ... This necessarily meant that the receiving country might on occasion have to do something which was not in the best interests of the individual child involved. The states which became parties to these treaties accepted this disadvantage to some individual children for the sake of the greater advantage to children in general."*

Baroness Hale observes that the Convention is widely regarded as a great success. However, one significant effect of The Hague Convention is to take away from the courts in the country to which the child has been taken the discretion, that they would otherwise enjoy, to decide what is in the best interests of the child; it follows therefore that in cases where The Hague Convention does not apply, the Court must make an individual determination as to what is in the best interests of the child.

50. It also follows from that that principles which have evolved for the purposes of giving effect to The Hague Convention have no application. As Baroness Hale stated at para. 29, the focus of the trial judge in deciding on an application for summary return has to be on the individual child in the particular circumstances of the case. Policy considerations which led to the conclusion of international treaties for the good of children are irrelevant. However, later at para. 32 she states that:

*"...the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed, in this or any other case, that allowing a child to remain here while his future is decided here inevitably means that he will remain here for ever."*

#### **And at paragraph 33:-**

33. One important variable, as indicated in *Re L* [1974] 1 WLR 250, is the degree of connection of the child with each country. This is not to apply what has become the technical concept of habitual residence, but to ask in a common sense way with which country the child has the closer connection. What is his "home" country? Factors such as his nationality, where he has lived for most of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far will all come into this."

51. Finally, as far as *Re J.* is concerned, Baroness Hale also has some helpful guidance as to consideration of differences between legal systems. At para. 39 she states:

*"In a case where the choice lies between deciding the question here or deciding it in a foreign country, differences between the legal systems cannot be irrelevant. But their relevance will depend upon the facts of the individual case. 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 the father wishes, so that the mother cannot ask them to decide, with an open mind, whether the child will be better off living here or there, then our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard."*

52. Counsel for the applicant, Ms. O'Toole SC, referred the Court to a number of other cases; none of those cases deviate from the principles articulated by Baroness Hale in the House of Lords. In *Re S.* [2015] EWHC 176, a decision of the High Court in England, Pauffley J. helpfully summarised the principles identified by Baroness Hale in *Re J.* In that case she was dealing with a summary application for the return to the United Arab Emirates ("UAE") of an infant aged a little over two years. As in this case, none of the parties were nationals of the country in which the infant had resided until he was removed by his father to the United Kingdom without the permission of his mother. She concluded by "a wide margin" that the child should be returned to the UAE because that was the country with which he had the strongest connection. She found that Abu Dhabi was his home, that he was immersed in the culture and religion of the UAE and surrounded there by all his closest family members. His mother did not have an entitlement to reside in the United Kingdom, other than temporarily. Pauffley J. found that to allow S. to remain where his mother could not stay for long and far away from his maternal grandparents, with whom he has a close relationship, would be contrary to his welfare. Accordingly she directed the return of S. to the UAE.

53. Similarly, in *S. v. S.* [2014] EWHC 575, the parties who were both British nationals, had been resident in Bermuda for almost twenty years when the mother, who was visiting London, decided to accept employment (provided by her employers in Bermuda) in London. With the consent of her husband, she had taken the infant L, who was aged two years eleven months with her, and did not wish to return to Bermuda. At the time, the father was unemployed in Bermuda.

54. The court asked itself the question as to whether it was in the best interests of L to remain in the United Kingdom so that the dispute between its parents could be decided there, or to return to Bermuda to have the dispute resolved in that jurisdiction? The

court found that there were powerful welfare considerations on each side of the argument. It decided in favour of directing the return of L to Bermuda with his mother. Key considerations in the decision were that if L was not returned to Bermuda, it would have an adverse impact on his relationship with his father and that Bermuda had been his main home. The father gave undertakings to help in the provision of suitable independent accommodation for the mother.

55. In *LM v. DR* [2016] EWHC 1943 (Fam), a decision of the High Court of England and Wales, McDonald J. ordered the return of the infant N, who was aged two years, to Azerbaijan. In that case the father was English and the mother was Azerbaijani. The father had removed the child to England without the consent of the mother. The background to the proceedings was highly contentious, and before the removal of N from the jurisdiction, proceedings were in being in the Baku District Court in Azerbaijan and in fact an order had been made restricting the father from leaving the jurisdiction pending the resolution of proceedings (concerning N) before the District Court. The court held that removal of N from Azerbaijan without the knowledge or consent of his mother, rather than the legality or otherwise of that course of action under Azerbaijani law (a question was raised in the proceedings as to whether or not the District Court order was valid) was the important factor when considering the best interests of N. The court found that it was not in N's best interests to be kept away from his home environment and from his mother, pending the determination of welfare issues in respect of him. It appears the mother would not have been able to remain in the United Kingdom for the duration of the proceedings. The court felt that that left her in a precarious position, reliant on N's father. On the other hand, the father had a home and employment and a settled life in Azerbaijan. The court expressed the view that:-

*"Generally, the courts of the country from which a child is being abducted would be in a better position to resolve disputes relating to the child's future and I am satisfied that that is the case here".*

Later, at para. 68, McDonald J. stated:-

*"In circumstances where the events which will fall to be examined in determining the welfare issues in respect of N took place primarily in the jurisdiction in which the parents and child made their home, where the relevant witnesses are in Azerbaijan and where any assessments will need to consider N's home environment in Azerbaijan, I am satisfied that the Azerbaijani courts are, practically, better placed to conduct a fully informed welfare hearing."*

56. In conclusion, Ms. O'Toole SC on behalf of the applicant submitted that in this case, it is the Courts of Brunei that should determine what is in N's best interests, for the following reasons:-

- (i) N has resided for all of her short life to date in Brunei, although she has visited both Asia and Ireland. Any disputes as to fact are more conveniently and fairly decided in Brunei;
- (ii) the Courts of Brunei will be uniquely positioned to know and make decisions arising out of the residency status of the parties in that country;
- (iii) this is a classic situation in which there are no overriding welfare considerations in one jurisdiction or another. That being the case, the parties should be put back in the situation in which they were in before the respondent removed N. to Ireland;
- (iv) if the applicant is required to stay on in Ireland pending a full hearing to determine custody and related issues, there is every risk that he may lose his employment in Brunei taking into account the period he has already been away from his work and the length of time it may take to bring proceedings (including any possible appeal) to a conclusion in this jurisdiction. If the applicant loses his employment in Brunei and has to face the prospect of trying to secure employment in Ireland, there is all the uncertainty that goes with that, bearing in mind that he is fifty-one years of age and all the difficulties associated with procuring accommodation for both parties and N at reasonable cost in Ireland;
- (v) the respondent has not suggested that she could not obtain further employment the applicant has averred that she should be able to do so, and then secure her own work permit therefore her status in the country is not as precarious as she argues.

Additionally, it is submitted: -

- (i) It would not be correct for the courts here to determine N's best interest, simply because N is an Irish citizen, that would not be a consideration for best interest;
- (ii) the parties have made a decision to reside in Brunei and the respondent has changed her mind and seeks to impose her views unilaterally upon the applicant;
- (iii) any concerns that the respondent may have in relation to her accommodation or her residency status can be adequately addressed by undertakings from the applicant, which he volunteered to the Court; and

### **Submissions of the Respondent**

57. In reply, Mr. Fitzgerald SC further responded and urged there is a need for caution when looking at the authorities referred to by Ms. O'Toole SC. All of the authorities are very fact specific and require a careful weighing up of competing considerations.

58. In this case, Mr. Fitzgerald SC argues that N is an Irish citizen and has very little connection with Brunei, save as to her residency in the country for her two short years. Her extended family are in both Asia and Ireland. Her only first cousin of a similar age lives in Ireland. She has the support of her paternal grandfather and her paternal aunt and her paternal aunt's family. The respondent brought N to Ireland because she considered it to be in her best interests. The fact that she may have taken unilateral action has no bearing upon where N's best interest lies.

59. The respondent is concerned that there may be some ambiguity as to whether or not the applicant could terminate or cancel her residency status. She also has concerns that she might be subjected to Sharia law and went so far as to query whether or not the applicant might convert to Islam for that purpose.

60. Mr. Fitzgerald SC argued that the mere fact that the respondent has given the undertakings that he has of itself exposes the risks faced by the respondent, and he did not consider that undertakings were likely to be enforceable in Brunei. He opened authority

in support of this proposition – see Lowe, Everall & Nicholls, *International Movement of Children*, (2nd ed., 2016) at para 24.62.66.

61. Furthermore, he argued that the applicant's case assumes that there will be proceedings before the Brunei courts promptly. If the applicant does not issue such proceedings, could the respondent do so in light of the fact that she is his dependent?

62. He submitted that all of the doubts and concerns of the respondent are eliminated if the proceedings are litigated in this jurisdiction and that it is in N's best interests are dealt with here, for these reasons.

63. Furthermore, Mr. Fitzgerald SC submits that the family was only ever in Brunei because the applicant happens to work there. It has nothing to do with the culture of Brunei and the lifestyle of the family in Brunei is an expat lifestyle; N would never become integrated in the culture of Brunei. While this may be an issue for consideration at a full hearing of proceedings, nonetheless it is submitted that the Court has an obligation to take all issues into account when deciding this summary application. Mr. Fitzgerald SC argues that that is mandated by Article 42A of the Constitution and the Act of 2015. He further submitted that the Court should require compelling evidence, in order to fulfil its constitutional obligations that:

(1) The laws of Brunei, insofar as they are concerned with the protection of the rights of children, are on an equal standing to the laws of Ireland; and

(2) That the Courts of Brunei will enforce any undertakings given by the applicant.

64. He said that if the Court is satisfied about these matters then it could direct N's return to Brunei but should not do so if it is not satisfied about these matters. In considering this, the Court should take into account that Brunei has chosen not to become a party to The Hague Convention.

65. He argues that insofar as the parties have an affiliation with any country, it is Ireland. The applicant is an Irish citizen and N is an Irish citizen. The parties have given consideration to buying a property in Ireland. N has the support of her paternal grandfather and her paternal aunt and family.

66. Mr. Fitzgerald SC argued that the authorities make it clear that a relationship with extended family is a consideration in arriving at decisions of this kind, and he referred in particular to the emphasis placed on this factor in *Re: S*. He argues that the importance of extended family is enhanced when a marriage breaks down.

67. In conclusion, counsel for the respondent submits that:-

(i) Insofar as the parties have an affiliation with any country, it is with Ireland, both N and the applicant are Irish citizens, and N has extended family in Ireland;

(ii) N has very little connection with Brunei; while she has lived in Brunei for her two short years, her best interests are considered to be in Ireland, where she will be supported by her extended family;

(iii) N's parents were only ever in Brunei for employment reasons; the family live an ex-pat lifestyle and N would never become integrated in Brunei culture;

(iv) The status of the respondent in Brunei is uncertain, and undertakings provided by the applicant not to jeopardize her status are not enforceable in Brunei and should not be relied upon.

## Decision

68. While there is no dispute between the parties as regards to matter of jurisdiction, it is nonetheless desirable for me to address the question briefly at the outset. I am satisfied that this is not a case to which either the Hague Convention or EC Council Regulation 2201/2003 (Brussels II bis) applies. Article 14 of Brussels II bis states:-

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

The parties are in agreement that it is appropriate that this application is brought pursuant to the provisions of the Guardianship of Infants Act, 1964 (as amended). Section 11(1) of that Act states as follows:-

*"(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."*

69. Section 3(1) of the Act of 1964 (as amended) states:-

*"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."*

70. Section 31 of the Act of 1964 then sets out the factors that are to be taken into account in determining, for the purpose of the Act what is in the best interest of the child. These are stated to include (but are not limited to):-

*"(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."*

71. So it is, clear that this Court has jurisdiction to determine this application, and that in doing so it must do so having regard to the best interests of the child, and in particular the factors and circumstances identified in s. 31(2) of the Act of 1964 (as amended). It seems to me that this is the approach the court is mandated to take by the Act of 1964 in cases that are not governed by The Hague Convention or EC Regulation 2201/2003. This is also consistent with the approach taken by the Courts of the United Kingdom, in the cases discussed above, in cases that do not involve The Hague Convention or Council Regulation 2201/2003.

72. The cases reviewed demonstrate that the difficulties faced by the courts in such matters are not so much in identifying the applicable legal principles, but in applying those principles to the very different factual backgrounds that come before the courts. No two cases are the same and even what appear as small differences may be very material. In the course of the hearing of this application I have been referred to eleven authorities, the facts of which are in some ways similar, but in other ways are very different. As might be expected, none of the cases mirror precisely the circumstances of this case.

73. In this case, N was born to an Irish father and an Asian mother, in Asia, but N is an Irish and not an Asian citizen. Beyond doubt, N's habitual residence since she was born has been in Brunei. Her upbringing to date has been in comfortable surroundings. She is being brought up by two loving parents each of whom only has her best interests at heart. While the marital relationship has broken down, neither wants to deprive the other of access to N.

74. The respondent has clearly become concerned about the long term future for N, in the light of the breakdown of her marriage to the applicant and also having regard to what she perceives as an uncertain future in Brunei, especially from her own point of view, but also for the family as a whole. The applicant's visa expires at the end of 2018 and, as matters stand, the respondent is dependent upon the applicant for her residency status in Brunei. These are very legitimate concerns.

75. In contrast, N is an Irish citizen as is the applicant. The applicant's family are able, willing and happy to assist the respondent and N in relocating to Ireland which would foster relations as between N, her paternal grandfather, her aunt and extended family. The only person whose status is uncertain in Ireland is the respondent herself, but it seems likely that she could resolve that difficulty over time, if she is to stay on in Ireland with N.

76. While the respondent has made certain complaints about the applicant's conduct, taken at their height, it does not appear to me that they pose any threat to the wellbeing of N. Even if the applicant consumes alcohol regularly, there is nothing to suggest that his dependency on alcohol is such as to be determinative of this application. The respondent describes certain instances which she found very upsetting. The applicant denied her account of these events, but even if they occurred as the respondent describes, they do not seem to amount to very much more than heated discussion, distressing as they may have been for the respondent at the time. It is also noteworthy that no complaint was made of any such instances occurring since December 2015, even though the parties have been struggling in their relationship. There are certainly no instances that could be regarded as in any way sufficiently serious as to influence the outcome of this application.

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.

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. Pen 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. Pen'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.



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.

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.

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 choose 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.

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.

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 a professional 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:

- (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 arm, 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.