THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 97

Appeal Number [2017/00299]

Peart J.
Hogan J.
Whelan J.

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

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

AND IN THE MATTER OF THE MINOR CHILDREN T.A., I.A. AND K.A.

BETWEEN/

A.M.Q.

APPLICANT/

APPELLANT

- AND -

K.J. (Otherwise K.A.)

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 12th day of March, 2018

1. This is an appeal against the refusal of the High Court to order the summary return of three children habitually resident in Pakistan to that state.

The facts
2. A.M.Q. (hereinafter referred to as "the father") married his first cousin K.J. (otherwise K.A.) (hereinafter referred to as "the mother") in April, 2001 in Pakistan. The father and mother were both born in Pakistan. The mother's parents have for many years resided in Kuwait and operate a business there.

3. Shortly after their marriage in 2001 the couple moved to Ireland where they resided for the following thirteen years. The father is a medical consultant and worked on a locum basis in hospitals in this jurisdiction and in the United Kingdom.

4. Three children were born of the marriage, namely: T. born in March 2002, now aged about 16 years, I. born in March 2005, now aged about 14; and K. born in February 2008, now aged 10. The children were born in Ireland and resided in this jurisdiction and were habitually and ordinarily resident here from birth until August 2014.

5. The children have dual nationality, being citizens of Ireland and of Pakistan. The father and mother acquired Irish citizenship. They purchased a family home in Ireland. During school vacation time the children travelled with their mother to spend time with their extended maternal family in Kuwait. As of 2014, they were all in full-time education in Ireland.

2014
6. Unhappy differences developed between the father and mother, the mother alleging that she was subjected to assault by the father. This he denies. On 10th February 2014 the mother secured a protection order *ex parte* in the District Court pursuant to the provisions of the Domestic Violence Act 1996 (as amended) and was given a return date for a barring order / safety order. The mother asserts that she was subjected to pressure from the father but also from her own mother not to proceed with the District Court barring order application.

7. In an affidavit sworn on 2nd December 2015 in these proceedings she deposes:

> "I say that my mother in Kuwait with whom I share everything was distraught at the idea that I would sin by causing the breakdown of my marriage. I was also very upset that my mother disapproved of my actions. She and the applicant put me under significant pressure not to proceed with my District Court application at this time. The applicant promised that he would mend his ways and suggested that we move to give life a try in Pakistan because his brother's marriage had been saved by moving with his wife to Lahore."

8. In an affidavit sworn by the mother in proceedings brought before the Guardian Court in Lahore which refers to the events between the couple in February 2014, she deposed that the father had apologised and promised to change his ways;

> "and as a result of that I withdrew my application under the Domestic Violence Acts in the Irish Courts."

The indications suggest that the parties agreed to relocate to Pakistan for the purposes of having a fresh start and in an attempt to resolve marital difficulties between them. The family commenced residence in Pakistan on or about 4th August 2014.

Events in Pakistan
9. All the family's belongings were packed up and shipped to Pakistan from Ireland. The husband had purchased a house in Lahore and the understanding of the wife was that the family would reside there. However, on arrival they commenced residence with the

father's extended family being his mother, his brothers and their spouses. As events transpired, the family never resided in the newly acquired home in Lahore. It appears clear that the children had significant difficulty adjusting to life and schooling in Pakistan. The mother experienced material restraints on her personal freedom and offers by way of example that she was not allowed the use of a car - a facility which had been available to her over the previous 13 years while she had been resident in Ireland. The father took possession of the children's passports.

10. It appears that between August 2014 and November 2015 the father travelled to the United Kingdom to take up locum positions for periods of approximately six weeks or so on two separate occasions.

11. It appears that an altercation took place between the father and mother in Lahore in October, 2014 during the course of which the father ordered the mother to leave the house and go to reside with her uncle. She was not permitted to take the children with her however. After one week or so she returned. It appears there was an attempted reconciliation between the parties.

12. The evidence suggests that relations deteriorated between the parties in or about the month of April 2015. She claims she was assaulted by her husband and by his two brothers. At that time it was agreed between two uncles of the parties that the mother would return again to reside with her maternal uncle bringing the three children with her. It appears that the children ceased to attend school.

13. According to the wife a further serious incident that occurred on 1st May 2015 when the father and his two brothers entered the place of residence of the mother and assaulted her resulting in her sustaining injuries and bruising. The mother asserts that there was an attempt by the father and his brothers to forcibly remove the three children from her care and that she was otherwise threatened. The children were present in the house when the incident occurred. The events of the 1st May 2015 appear to have precipitated two separate court applications.

Orders of the court in Lahore
14. -On 2nd May 2015, proceedings issued in the Guardian Court in Lahore, Pakistan, for directions regarding the welfare of the three children. On that date, on the application of the father an *ex parte* order was made restraining the children's mother from removing the children from Pakistan.

- On 4th May 2015, an ex parte order was made by the Guardian Court in Lahore granting the mother custody of the three children pending a full hearing. On that date the mother also applied for and was granted an *ex parte* order in the said Guardian Court restraining the father from removing the children from her custody.

Neither proceedings ever progressed to an *inter partes* hearing or final court orders.

15. On 17th October 2015, the father applied to the Guardian Court in Lahore and obtained an *ex parte* order restraining the mother from applying for passports in respect of the three children this order being made at a hearing on 19th October, 2015. No substantive hearing took place. The father and mother were both independently legally represented before the courts in Pakistan. The mother was represented by a legal firm in which her own uncle is a partner. The mother's application for custody was listed for directions on at least six separate occasions prior to the date on which she departed Pakistan with the children on or about 3rd of November, 2015. .

Ex parte orders in Dublin District Court and The Irish passports
16. The mother appears to have travelled to Ireland in the month of September 2015 without the father's knowledge and made an *ex parte* application to the Dublin Metropolitan District Court for an order dispensing with the consent of the father to the issue of Irish passports for the three minors. The said order was procured on 25th September 2015.

High Court proceedings
17. On 7th November, 2015 the father became aware of the children's departure from Pakistan. On 9th November, 2015 he arrived in Ireland. Acting with all due expedition within 48 hours he instituted these proceedings. It is a matter of no little concern that the ensuing substantive action did not conclude before the High Court until over 18 months later.

Reliefs sought
18. The father's family law summons of 11th November 2015 seeks an order pursuant to Article 11 of the Hague Convention 1996 or in the alternative pursuant to the inherent jurisdiction of the Irish courts directing the immediate return of the three children to the jurisdiction of the courts of Pakistan. He also seeks an order pursuant to the inherent jurisdiction of the High Court and the international comity of courts recognising and giving legal effect to the orders made by the Guardian Court in Lahore on 2nd May 2015, 4th May 2015 and 19th October 2015.

Orders made in the above entitled litigation
19. At the conclusion of this action over 18 months later, an order was made on 26th May 2017, which was perfected on 15th June 2017, refusing to return the 3 children to Pakistan. On the face of that order the family law summons is recited as having come ". . . on for hearing before Court on the 12th, 13th, 20th and 27th days of November 2015, the 3rd and 21st days of December 2015, the 24th and 26th days of February 2016, the 14th and 16th days of March 2016, the 19th and 20th days of July 2016, the 13th and 14th days of December 2016, the 13th January 2017, the 20th, 21st and 22nd days of February 2017 and the 22nd and 31st days of March 2017." The extent of delays, apparent from the face of the order itself, is central to this appeal and an issue which is considered further below.

Orders made
20. In the course of the protracted hearing it would appear that the following relevant orders were made;

> Following listings in the High Court on 11th, 12th, 13th and 20th November, on 27th November 2015: a key development on the latter date was the appointment by the trial judge of an independent assessor Ms Ruth More O'Ferrall (hereinafter the "independent assessor")
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> > (i) The Court made directions regarding passports and delivery of affidavits. The father and mother were directed to liaise with the independent assessor of Barnardos.
> >
> > (ii) The independent assessor was appointed to carry out an interim s. 47 report to advise the Court as to the views of the children regarding face-to-face access with the father.
> >
> > (iii) The independent assessor was also appointed to also carry out a full s. 47 report to advise as to the children's

overall views on where they would like to live using the framework of the child abduction protocol.

(iv) Certain other directions were made including providing for access by the father with the children by telephone and Skype.

21. As this was a case where the provisions of the Hague Convention on International Child Abduction of 1980 were not engaged and a summary return was hence not mandated it appears that the trial judge decided, quite correctly in my view, that a welfare evaluation of the children was required prior to making final orders in the case.

Aspects of the matter were adjourned further before the High Court to 3rd, 4th and 21st December 2015

22. There being irreconcilable differences disclosed in the affidavits filed by the parties on matters of central materiality to the issues which the trial judge had to determine regarding welfare, best interests and views of the children, it was clear from the outset that the case would have to proceed to an oral hearing. The matter was listed for hearing on 24th February 2016. By then the report of the independent assessor as to the welfare and wishes of the children was prepared but not circulated to the parties and their legal advisors.

23. On 26th February 2016 the trial judge having heard oral evidence from the independent assessor regarding access made a further order;

The assessor was directed to carry out a further assessment and provide an updated report for the Court in accordance with s. 32 of the Children and Family Relationships Act 2015. In my view that order was appropriate being necessitated by virtue of the coming into operation of the latter Act on 18th January 2016 which had amended the Guardianship of Infants Act 1964.

The matter was then adjourned to 14th March, 2016.

24. The hearing resumed on 14th March 2016 and continued on 16th March 2016 but it was not disposed of and was adjourned for a significant period of four months and resumed hearing on 19th and 20th July 2016. All momentum was lost when the hearing failed to conclude before the long vacation. The case was unfortunately further adjourned resuming in December.

25. On 13th December 2016 the trial judge granted liberty to the father's solicitor to come off record. At that stage the evidence before the Court was that the father had incurred liabilities and fees in excess of €77,000 in pursuance of the within proceedings.

26. On 14th December 2016 the Court considered correspondence from Barnardos and one Freda McKittrick. The Court also heard submissions from counsel on behalf of Barnardos, the employer of the independent assessor. The father was self represented. The Court made, *inter alia*, the following orders:

i. The independent assessor to be put on notice to attend before the Court at 2 pm on Monday, the 20th day of February 2017.

ii. There be no direct communication by either the father or mother or mother's solicitors with the independent assessor.

iii. The father was ordered to send a written copy of a complaint against the independent assessor to counsel for the respondent.

iv. The father to e-mail a copy of the complaint made against the independent assessor to the court registrar.

v. The Court noted the undertaking by counsel for Barnardos to establish the attendance fee for the independent assessor and to notify same to the father in person. It was ordered that the father discharge the attendance fee for the independent assessor, such fee to be discharged in advance of her attendance at court.

27. The matter was then adjourned for further hearing to 20th February 2017. It was clear from the statements of the trial judge and the terms of the orders made on that date that the independent assessor was to be before the Court at 2pm on 20th February and make herself available for further cross examination by the father. The circumstances whereby the Court failed to make good on its own order to facilitate the cross examination by the father of the independent assessor is a significant issue in this appeal and is considered further hereafter. The manner in which Barnardos intervened and successfully impeded the recall of an independent professional witness in this *in camera* matter to the potential detriment of a litigant in person parent who had the temerity to raise a complaint with Barnardos which they had apparently already considered and dismissed raises questions which are considered further hereafter.

28. On the 13th February 2017 the father's motion seeking recusal of the judge came on for hearing. The Court noted that the trial of the action was set down for hearing for four days commencing at 11 am on Monday 20th February 2017. The motion was then struck out. At the hearing of this appeal counsel on behalf of the father fairly admitted that the sole purpose of this motion was to secure a conclusion to the hearing and final orders in the case. By then the case had been before the High Court for over 15 months.

29. The matter was further heard or considered by the trial judge on 20th, 21st and 22nd February 2017 and 22nd, 26th and 31st March 2017 when judgment was reserved.

25. The judgment of 26th May 2017 is considered below. On that date the Court made an order refusing to return the three minors to Pakistan and, *inter alia*, the following relevant orders;

- The father was at liberty to maintain his existing Skype access to the three children.

- He was ordered to pay the solicitors for the mother fifty per cent of the costs of the application to be taxed in default of agreement.

- Liberty was granted to both parties to apply to the High Court regarding access.

Judgment of the High Court

30. The judgment of the trial judge delivered on 26th May 2017 reviews the marital history of the parties. The Court recorded that the father's contention was that the son, then 15 years of age, wished to reside in Pakistan. (para. 3) The judgment notes that:

> *"At a late stage in the case when he was representing himself and when the assessor's cross examination had been concluded he attempted to have the assessor removed from the case and complained to her employer, Barnardos, arguing that the reports went beyond the scope and purpose intended. The applicant contended that his concerns were not included in the assessor's reports and that the various questions and issues were not pursued with the children in particular around violence and fear. The applicant argues that the reports were full of contradictions."* (para. 7)

The Court further noted the mother asserted her compliance in travelling to Pakistan was;

> "a method of survival and she would never have agreed to go if she had been aware of the social welfare assistance available in Ireland."

31. The trial judge states at para. 22 of the judgment that the aim of the Court in appointing an assessor was initially to ensure the reintroduction of access between the children and their father and subsequently to ascertain the views of the children and to consider the case in the context of ss. 31 and 32 of the Guardianship of Infants Act 1964 as amended. The trial judge found (at para. 25);

> *"The applicant was only willing to engage in building relationships in Ireland if the children were definitely going to be moving to Pakistan otherwise his threat was that he would "walk away" from the children. The applicant suggested that the two girls could live with their mother and the son could live with him in Pakistan and that each child would have access to the non-resident parent. The other option the applicant put forward was that the respondent could remain in Ireland with the two girls and that the son ought to go to Pakistan with him. However, the assessor found that the son was absolutely opposed to this and horrified that he would be separated from his mother and siblings."*

32. The parties' daughter, born in March 2005, wrote to the Court setting out her clear reasoning as to why she should not be returned to Pakistan or removed from her mother's care. In this appeal the father contends, *inter alia*, that this letter should not have been considered. The trial judge considered the independent assessor's report. The assessor considered it of note that the child's mother felt she could not protect her daughter in Pakistan and gave her opinion that such a return would not be in this child's best interests. (para. 28). The trial judge noted that it appeared from the assessor's report that the children were found to be of average maturity for their ages and they were able to formulate views based on their experiences. The assessment concluded that the best interests of the children would be served by remaining in Ireland and it appears that that reflected the wishes of each of the children and their views. With the consent of both parents, the trial judge interviewed the three children in order to comply with Article 42A of the Constitution and to hear the voice of each child and have regard to their views.

Trial judge's consideration of legal arguments on behalf of father

33. It was asserted on behalf of the father that the 1996 Hague Convention governed jurisdiction in the case or in the alternative that the Court had inherent jurisdiction to make orders for summary return of the children. The Court noted the arguments on behalf of the father that a full welfare hearing was not necessitated in every case particularly having regard to the doctrine of the comity of courts and in particular the Court noted the judgment of Keane J. in the High Court in *F. v. G.* [2014] IEHC 152. It was submitted on behalf of the father that Brussels II *bis* Regulation EC 2201/2003 should be taken into account and in particular that in determining matters of parental responsibility jurisdiction should be exercised on the basis of habitual residence. The father's contention in this regard was that the children were habitually resident in Pakistan at all material times and were wrongfully removed to Ireland and were merely physically present in this jurisdiction. The Court noted the arguments on behalf of the father that the UK-Pakistan Judicial Protocol on Children Matters created following conferences in 2003 should be given effect to in this jurisdiction. Being contended on behalf of the father was that the Pakistani court orders made the removal of the children wrongful within the definition of the 1996 Hague Convention Article 7(2) and in breach of rights of custody attributed to the father. It was further contended that there were little differences between the affidavits of law furnished on behalf of both parents - both accepted that the welfare of children is paramount in the Guardian and Wards Court in Pakistan.

Trial judge's consideration of legal arguments made on behalf of mother

34. On behalf of the mother it was contended that the operative international agreement was the Brussels II bis Regulation and the issue of whether Ireland can exercise jurisdiction under the Hague Convention 1996 as determined by the provisions of the Brussels II bis Regulation. The judgment noted (para. 47) the mother's contention that for Article 11 to apply the Court must be of the view that the 1996 Convention applies and that the relationship between Brussels II *bis* and the 1996 Hague Convention is governed and clarified by Articles 61 and 62 of the Brussels II *bis* Regulation. Article 62 sets out that the 1996 Hague Convention will continue to have effect in relation to matters not governed by Brussels II *bis* and that the 1980 Hague Convention will continue to produce effects between the member states.

> *"According to the respondent, for the purposes of determining the basis upon which this Court should exercise jurisdiction, it is clear from the provisions of Article 61(a) of the Brussels II bis that, once the child is habitually resident on the territory of an EU member state, the jurisdictional rules of Brussels II bis apply. Where a child is habitually resident in a non-EU contracting state to the 1996 Convention then jurisdiction must be found under the Convention. In the circumstances of this case the children may not be habitually resident in a contracting state to the Convention as Pakistan is not a party to the Convention."* (para. 47 of the judgment)

35. It was contended on behalf of the mother that the children never lost their habitual residence in Ireland at all throughout their stay in Pakistan and accordingly that the Irish courts had jurisdiction in relation to these children under the provisions of Brussels II *bis*, Article 8. It was contended that should the children be found not to be habitually resident in Ireland, nonetheless jurisdiction pursuant to Brussels II *bis* could be conferred on the courts of this state by virtue of Article 12(4) where it is in the child's interest, particularly if it is found to be impossible to hold proceedings in the third state.

36. The judgment noted the mother's contention that this explicitly confers jurisdiction on member state courts even where the child is habitually resident in a third state which is not a contracting party to the 1996 Convention, provided three conditions are fulfilled;-

- there exists a substantial connection with the child in the court seised;

- there must be agreement of the parties to the proceedings; and

- the best interests of the child are served by the Irish Court taking jurisdiction.

(para. 50 of the judgment)

37. The trial judge noted that Pakistan had ratified the Hague Convention on International Child Abduction of 1980 in January 2016 and at the date of hearing the European Union had not yet recognised accession by Pakistan to the Convention so as to bind member states of the Union:

> *"The respondent in this case argues … that this Court has jurisdiction to deal with the within case on the basis of Article 14 of Brussels II bis notwithstanding the existence of a rival non-member state jurisdiction. The respondent accepts that the 1996 Hague Convention falls within this consideration of domestic Irish law due to the 2000 Act. It was emphasised that the objectives of the 1996 Convention are to determine where jurisdiction lies in relation to a child and it does not replace the 1980 Child Abduction Convention."* (para. 56 of the judgment).

38. It will be recalled that Article 14 under Brussels II *bis* provides:-

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

39. The trial judge noted that both parties relied upon the dicta of Pauffley J. in the case of *Re S. (Wardship: Summary return: non-Convention country)* [2015] EWHC 176 (a decision which derived from principles set out by the UK House of Lords *In Re J* 2006 1 AC 80) in relation to the principles to be borne in mind by the trial judge in application for return of a minor to a non-Hague Convention state:

> (i) The welfare of the child is paramount. If a decision is made to return the child it must be because it is in his best interests to do so not because the welfare principle has been superseded by some other consideration.
>
> (ii) The specialist rules and concepts of the Hague Convention are not to be applied by analogy in a non-Convention case.
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> (iii) The court has the power in an appropriate case, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits.
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> (iv) "Kidnapping" or abduction, in relation to children is to be strongly discouraged, but the discouragement must take the form of a "swift, realistic and unsentimental assessment of the best interests of the child, leading in proper cases to the return of the child to his or her own country, but not the sacrifice of the child's welfare to some other principle of law".
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> (v) There is no presumption that it is likely to accord with the child's welfare needs to be returned to the state of habitual residence.
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> (vi) An important variable is the degree of connection of the child with each country.
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> (vii) 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.
>
> (viii) 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. . . our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction must do more than give a judge pause for thought. . . it may be a decisive factor. . . There are also bound to be many cases where the connection of the child and all the family with the other country is so strong that any difference between the legal systems here and there should carry little weight.
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> (ix) These considerations should not stand in the way of a swift decision to return the child to his home country even if that country is very different from our own if to do so is in the best interests of the child's welfare.

Findings of fact

40. The trial judge determined as follows:

> *- That the father had not made out a case that the respondent had alienated him or attempted to alienate him from the children.*
>
> *- The trial judge did not accept that it is only possible for the children to have a meaningful relationship with both parents if they return to Pakistan.*
>
> *- The Court found the mother to be a credible witness.*
>
> *- The mother came to Ireland in breach of a Pakistani order which restrained her from removing the children from that country. "It is a fact that the respondent came to Ireland in breach of a Pakistani order which restrained her from removing the children from that country." (para. 68)*

The judgment continues:

> *"However, this Court accepts the respondent's evidence that she was not aware of that order at the time. This Court notes the evidence given by the respondent of her fraught efforts to return to Ireland and of her belief that she was entitled, as an Irish citizen with Irish citizen children to return here. The respondent presented in Court as being in fear of the applicant. This Court finds her evidence of violence, sexual violence and oppression to be generally consistent although it is not for this Court to make a determination as to whether the particular incidents occurred as described by the respondent."* (para. 68)

41. With regard to the assessor, the Court concluded:

> *"This Court finds that the assessor was conscientious and careful in her assessment of the children. This Court does not accept that the reports are contradictory. This Court will give substantial weight to the views of the children as expressed by the assessor but that they wish to remain in Ireland with their mother."* (para. 69)

42. The Court approached the case, quite correctly in my view, on the basis of the best interests of the children having regard to the Guardianship of Infants Act 1964, as amended, including the detailed checklist at s. 31 incorporated into the act on 18th January 2016 . With regard to s. 31(2)(i) of the 1964 Act the trial judge stated:

> *"..it is quite clear that the proposals which the applicant father has made are not acceptable to the children and that he is only prepared to engage with the therapeutic work which has been recommended by the assessor if the children are to be returned to Pakistan and that otherwise he intends "walking away".* (para. 79)

The trial judge noted that the father's proposals with regard to facilitating a relationship between the children and their mother in the event that they return to Pakistan and the suggestion of splitting the sibling groups up, the girls to reside with the mother and the son with him in Pakistan was *"not acceptable to the children, in particular their son"* (para. 80). The Court proceeded to assess pursuant to s. 31(3)(b) of the Guardianship of Infants Act in relation to the child's personal wellbeing and concludes,

> *". . . on the balance of probabilities, it appears to this Court that the child's personal well-being is best served by the children remaining in the sole care and control of their mother in this jurisdiction, given the extensive findings of the assessor which this Court accepts but in particular because of their fears of their father and because of events that they witnessed which threatened their sense of security when in Pakistan."* (para. 82)

43. The trial judge noted at para. 83:

> *"The applicant came quickly to the point in this case, in the context of the access difficulties, where he asserted his position that he would only consider going forward with access if the end result were to be a return of the children to Pakistan. He was unwilling to consider putting the needs of the children first and was unwilling to meet their need for security and reassurance from him on that issue."*

44. The trial judge concluded that the children were habitually resident in Pakistan at the date of their removal by the mother on or about the 3rd November 2015. She also determined that jurisdiction may be found in Article 14 of the Brussels II bis Regulation whereby the domestic laws of Ireland were to be applied:

> *"Pakistan is not an accession state for the purpose of the 1996 Convention and therefore the majority of the Convention cannot apply. However, this Court is empowered by Article 11 of the 1996 Convention to take a measure of protection:-*
>
> > *'1. In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.' (para. 89)*

45. The trial judge declined to find a wrongful removal, finding that the term was

> *"a legalistic term of art that is viewed in the context of the 1980 Child Abduction Convention which does not apply in this case as Pakistan has not been accepted by the EU as an accession state to that convention."* (para. 90)

It was the view of the trial judge that the children in question had a more substantial degree of connection with Ireland than with Pakistan:

> *"All three children were born in Ireland, are Irish citizens and have lived the majority of their lives in Ireland, English is their first language although they are proficient in Urdu, they have received the vast majority of their education in Ireland and seem to be well placed in their schools here. It is the view of the Court that these children should be encouraged to maintain a link with their cultural and linguistic heritage in Pakistan which can happen in Ireland as a multicultural society."* (para. 91)

46. The trial judge found that the decision of the UK Supreme Court in Re J. [2015] UKSC 70 was distinguishable from the facts in the instant case:

> *"It is the view of this Court that it would not cause these children irreparable harm to refuse to make an order returning them to Pakistan. It may even be the case that it could cause these children irreparable harm to be returned to Pakistan and separated from their mother."* (para. 93)

The judgment continues;

> *"While there may be some cases where the assessment of the best interests of the child would automatically result in the determination that they should be returned to their country of habitual residence for determinations to be made as to their future this is not one of those cases due to the particular facts. As is more broadly discussed above, applying the framework set out in ss. 31 and 32 of the Guardianship of Infants Act 1964 as amended, it is in the best interests of these children to remain in the care of their mother in Ireland."* (para. 94)

Delay

47. It will be recalled that s. 31(5) of the Guardianship of Infants Act 1964, as amended, expressly provides;

> *"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."*

Adverting to this statutory principle the trial judge stated:

> *"There was no unreasonable delay in determining the proceedings in the context of date listings, although delay occurred when the applicant refused to accept the assessor's report and wished to have her dismissed and indeed made a formal complaint to Barnardos about her. This in itself took up a day of court time and necessitated then further court dates." (para. 84)*

For my part I would very respectfully demur for the reasons set out later.

Conclusion
48. The trial judge concluded:

> *"It is the view of this Court that the objections to return raised by the children reach the standard required under the 1980 Convention. This Court finds that the children have formed their own views in relation to Pakistan and Ireland and are in a good position to evaluate the two places, and they have not been overly influenced by their mother. Their objections are to a return to Pakistan and not merely an expression of a preference for a particular parent and are based on traumatic events that occurred while in Pakistan."* (para. 95)
>
> *"In summary, this Court refuses to make an order returning these children to Pakistan and thereby vacates the interim orders made herein. The children shall remain in Ireland where they live with their mother."* (para. 96)

Notice of appeal
49. By notice of expedited appeal the father appealed the entire decision of the High Court save the finding that the children were habitually resident in Pakistan. Twenty-two distinct grounds of appeal are relied upon. The key grounds of appeal include the following:

> i. That the delays in the conduct of the case in the High Court were unconscionable.
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> ii. The High Court should have had greater regard to the existence of family law proceedings which had been instituted before the Pakistan courts.
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> iii. The finding of the High Court that the mother did not know of the existence of an order made in the Guardian Court in Lahore in May 2015 restraining her from leaving Pakistan with the children is not supported by the evidence.
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> iv. The return of the children ought to have been ordered pursuant to the principle of the comity of courts.
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> v. The credibility of the mother was erroneously accepted by the High Court in circumstances where the children had been removed by her in breach of orders of the Guardian Court of Lahore where orders had been improperly obtained in the District Court in Dublin for the purposes of procuring Irish travel documentation to secure the removal of the children from Pakistan.
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> vi. That the High Court judge ought to have recused herself in the circumstances.
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> vii. That the Court should have had regard to the fact that the 1980 Hague Convention had come into force in Pakistan on 1st March 2017 prior to the delivery of judgment by the High Court judge on 26th May 2017.
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> viii. The High Court had erred in the manner in which it relied upon the reports of a court-appointed assessor. The High Court had erred in admitting a letter written by one of the children in the context of ascertaining the wishes of the children. The High Court had adopted incorrect tests in regards to "global welfare" and "irreparable harm".
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> ix. That the High Court erred in determining that the children were sufficiently mature to evaluate their own wishes and views in regard to future residence either in Pakistan or in Ireland.
>
> x. That the trial judge was erroneous in relying upon "traumatic events" in justifying the determinations made.

The respondent mother opposes the appeal.

Jurisdiction
50. When a transnational case comes before the Court involving children which raises potential issues around competing jurisdictions, it is imperative in the first instance that an early and careful consideration be carried out as to whether the courts of this State have jurisdiction to hear the case or make orders or whether there is some other state which has jurisdiction to hear the case or make orders or indeed has already done so. Where orders have already been made in another state, the issue of their recognition and enforcement by the courts of Ireland also requires consideration. Accordingly, in any case involving children with a foreign element, the jurisdiction issue requires to be addressed at the outset. In the instant case it was clear from the outset that it involved the jurisdiction of Pakistan, which at the date of commencement of the proceedings was a non-Convention country.

Habitual residence
51. The cornerstone of jurisdiction in children cases with an international dimension is now habitual residence. Given the central importance of habitual residence in determining whether any one of a variety of international agreements governing child welfare are engaged or not, in every case concerning a child where there is an international dimension, the starting point ought to be an enquiry as to where the child was habitually resident at the date of institution of the proceedings, irrespective of whether the issue is being raised by one of the parties to the action or not.

52. Having regard to the ambit of the Brussels II *bis* Regulation, otherwise Regulation 2201/2003, an early determination of the habitual residence of the children in question is imperative irrespective of whether they reside within the EU or in a non-Regulation country. That regulation is not only applicable to the question of whether the Courts of Ireland have jurisdiction where the other jurisdiction concerned is a member state of the EU. Article 12 of the Brussels II *bis* Regulation is capable of applying in certain circumstances even where the child in question is lawfully resident outside the EU. Article 3 of the Brussels II *bis* Regulation identifies approximately seven distinct bases of jurisdiction. Thus, as the jurisprudence on the Brussels II bis Regulation in other jurisdictions has demonstrated, a court in this State can potentially have jurisdiction pursuant to Article 3 notwithstanding that the child is habitually resident in a non-regulation state.

53. On the basis of the information disclosed in these pleadings and the transcripts it is clear that at no time did the father accept the jurisdiction of the Irish courts to make welfare decisions in an unequivocal manner for the purposes of Article 12(1)(b) of the Brussels II *bis* Regulation. It is noteworthy at the outset that the appellant father's proceedings invoked the inherent jurisdiction of the High Court and the principles of equity and the international comity of courts seeking a summary return and for the recognition

and giving legal effect to the orders of 2nd May and 4th May 2015 and 19th October 2015 in the Guardian Court of Lahore, Pakistan.

Independent assessor
54. On 27th November, 2015, just over two weeks after the institution of the proceedings, the trial judge appointed Ms Ruth More O'Ferrall as a s. 47 independent assessor. Initially, the Court was informed on behalf of the father that there was an objection to a full welfare assessment. However, the Court made clear that the independent assessor would have a hybrid role ascertaining the child's views and also carrying out an assessment as to the best interests of the child. Initially, the assessor had functions in regard to establishing access between the father and the children pending the hearing. A factor in this case is that after the appointment of the assessor and prior to the hearing date, which was fixed for 24th February 2016, the provisions of the Children and Family Relationships Act 2015 came into effect on 18th January 2016, amending the Guardianship of Infants Act 1964 and introducing a welfare checklist. There are two comprehensive reports from the independent assessor who is a guardian ad litem with Barnardos Services. The reports are thorough, and very comprehensive.

55. It is clear on the facts that Article 42A (4) of the Constitution was engaged and accordingly it was necessary for the Court to approach the case having due regard to the best interests of the children as the paramount consideration and further to ensure as far as practicable that were any of the three children concerned capable of forming his or her view, same should be ascertained and given due weight having regard to the respective ages and maturity of the children in question.

Expedition
56. Undue delay can put the Court in the position of not being able to do justice between the parties to family proceedings according to the merits of the case. There are certain detrimental consequences of delay; it engenders bitterness and hostility between the parties which is detrimental to the whole family and, in particular, to the children of the family. When making decisions concerning the welfare of a family it is important to be mindful of its constitutional status as the natural primary and fundamental unit group of our society.

57. Parents have but a summer's lease upon the lives of their children. Where adverse circumstances brings the family into contact with the courts then time is of the essence and the Court's involvement should be for no longer a duration than is necessitated in the interests of providing a speedy, rational and fair resolution to the issue arising. The Court bears a solemn responsibility when dealing with issues concerning welfare in a family context to keep in mind the risk of harm and detriment that excessive delay can cause in undermining the constitutionally protected interests of the family and its constituent members. Welfare proceedings which fall outside the purview of the sui generis international child abduction principles are inquisitorial in nature and the duty of the trial judge is to further the welfare of the child and hence the judge enjoys a broad discretion to determine the way in which a welfare application will proceed provided the process adopted is both fair and expeditious.

58. It is generally acknowledged that court-prolonged litigation about their future is deeply damaging to children, not only because of the uncertainty, fear and anxiety it inevitably brings for them but also because of the harm it does to the relationship between the parents and their capacity to co-operate with one another in the future. Excessive delay , as occurred in this instance, risks harming the innate resiliencies of the family concerned and is contrary to the public interest.

59. Undoubtedly, any delay in determining the welfare issues is likely to prejudice the welfare of the child. Furthermore, courts, when dealing with child welfare issues, must be cognisant of the requirements of s. 31(5) of the Guardianship of Infants Act 1964, as amended, a domestic measure which is informed by the principles enshrined in Article 6 of the European Convention on Human Rights which underlines the need for speed in processing all cases involving children. The said provision is exclusively directed towards preventing unreasonable delay as being inimical to the best interests of the children.

1980 Hague Convention not retrospective
60. On 1st March 2017, the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Hague Convention") entered into force for Pakistan. Thus, while not a member state of the Hague Conference, Pakistan is now a contracting party to the 1980 Hague Convention but not to the 1996 Hague Convention. The 1980 Hague Convention was given the force of law in this jurisdiction for the purposes of Article 29.6 of the Constitution by virtue of the Child Abduction and Enforcement of Custody Orders Act 1991 .

61. The father asserts that the trial judge ought to have regard to the fact that the 1980 Hague Convention came into force in Pakistan on 1st March 2017. In my view this is not a sound proposition. Article 35 of the 1980 Hague Convention makes it clear that the convention only applies to wrongful removals or retentions occurring after implementation by a contracting state. Furthermore, whilst the State of Pakistan has signed and ratified The Hague Convention of 1980, the EU had not recognised such ratification on behalf of its constituent member states, including this State, and accordingly it would have been erroneous to approach this case on the basis that the provisions of the 1980 Hague Convention were applicable. Quite apart from Article 35, since the children were removed from the state of their habitual residence on a date prior to Pakistan becoming a High Contracting Party to the 1980 Hague Convention the Court had no jurisdiction to order their return to Pakistan under that convention. The High Court was correct in finding that the provisions of the 1980 Hague Convention did not apply. This ground of appeal cannot succeed.

Unlawful removal
62. The father contends that the High Court judge erred in failing to find that there was an unlawful removal of the children from the jurisdiction of Pakistan to Ireland. It is important at the earliest available opportunity for a judge seised of proceedings where it is asserted that minor children have been taken into this jurisdiction in breach of rights of custody attributable to an applicant or a foreign court that the Court make an early determination as to who precisely are the holders of rights of custody as of the date of institution of the proceedings and in particular whether a respondent parent was free to remove the children without the consent of the applicant from the state of habitual resident pursuant to the domestic law of that other state.

63. In the instant case it was a matter of domestic Pakistani law to confirm what rights the father had pursuant to the laws of Pakistan where the three children were habitually resident immediately before their removal into this State on 4th November 2015.

64. In general, proof of foreign law is a question of fact. It is necessary for the Court properly seised of an application for the return of children to another jurisdiction to determine in accordance with the domestic law of that other state what rights were recognised by that law and the identity of all parties who were the holders of rights of custody in regard to the children concerned. In general, the matter can be determined in cases of dispute by an affidavit of foreign law or other expert evidence.

65. However it was necessary for the Court to make a determination as to whether the removal of the children by the mother was lawful or unlawful. Should the Court have determined that the removal was lawful, this would certainly have had significant consequences. The failure to make a determination one way or the other was unsatisfactory – particularly in light of the trial judge's

determination at para. 90

> *"The facts are accepted by the respondent that she did remove the children without the consent of the applicant and in contravention of the Pakistani court order although she claims she was unaware of that order. However, this Court is of the view that, while the applicant has informed himself to a certain extent in relation to this area of law and did have legal representation for the majority of this case, there is a fundamental misunderstanding in relation to the application of international law. The term "wrongful removal" is a legalistic term of art that is viewed in the context of the 1980 Child Abduction Convention which does not apply to this case as Pakistan has not been accepted by the EU as an accession state to that Convention."*

66. Material consequences potentially flow from the determination as to the lawfulness or otherwise of the removal of a child from another state. If the removal is lawful and not in breach of rights of custody or any extant court order of the foreign state then, of course, there is no "kidnapping" or abduction of any kind. In the instant case it is particularly noteworthy that it does not appear from the affidavits filed, including the affidavits of law on behalf of the mother, that it was ever contended that the removal of the children by the mother from the jurisdiction of the Courts of Pakistan was lawful, irrespective of whether she was aware or not aware of the making of an order by the Guardian Court in Lahore on 2nd May 2015 prohibiting the removal of the children from the jurisdiction of the said courts.

67. For my part I am satisfied that the evidence was consistent only with the removal of these children from Pakistan by the mother being in breach of the father's rights of custody and an unlawful act. Indeed para. 90 of the judgment of the High Court set out above is consistent with such a conclusion.

68. That said, as a matter of Irish law the circumstances in which the children came to be within this jurisdiction could not in themselves alter the constitutional and legal obligations imposed on the trial judge to make such orders as would be most conducive to the best interests and welfare of the three children in accordance with the entirety of the relevant evidence before the Court. The unlawful removal could never be more than a factor to be taken into account in the overall assessment of welfare. I am satisfied that the omission to make this determination has had no material impact on the ultimate determinations of the trial judge with regard to welfare in this case. The approach adopted at para. 84 of the judgment was correct. Custody is not an award for good behaviour.

Application to recuse
69. The father issued a motion on 9th January 2017 seeking that the trial judge recuse herself. The motion came on for hearing on 13th February 2017, however it was clear at the hearing of this appeal that the sole motive underpinning the said motion was to secure an early hearing date and have the case disposed of. The Court confirmed on 13th February, 2017 that the hearing would resume at 11 am on Monday, 20th February 2017. The recusal motion was accordingly struck out. I am satisfied therefore that this ground of appeal is accordingly not maintainable.

Social media page
70. The father expressed concerns with regard to certain materials posted on the son's social media page. I am satisfied that in all the circumstances the Court dealt appropriately and sensitively with this matter and in fact a reasonable technical explanation was available as to why, notwithstanding removal of the offensive material in question from the child's social media page it still remained visible. This matter was comprehensively remedied expeditiously. I am satisfied, accordingly, that the trial judge did not err in the manner in which this aspect was dealt with.

Welfare
71. Insofar as it is contended on behalf of the father that once the Court determined that the habitual residence of the children at the date of the commencement of the proceedings was in Pakistan, the sole concern of the High Court should have been to ascertain the views of the children, that is not a correct statement of the law. I am satisfied that in the exercise of the inherent jurisdiction of the Court in all non-Convention-type cases concerning children, the courts are obliged to act in accordance with the welfare of the children in question and to ascertain same prior to making final orders. If an Irish court decides to return the children to a non-Convention state it is because the court is satisfied that it is in their best interest to do so, and not because the welfare principle has been supplanted by some other considerations. It is not appropriate that Hague Convention concepts be automatically applied in non-Hague Convention cases.

72. It goes without saying that the High Court does have power in accordance with the welfare principle to order the expeditious return of children to a foreign jurisdiction without conducting an exhaustive investigation on the merits whenever it is considered that the welfare of the child in question is best served by doing so. Much will depend on the facts of the case and the extent to which the child or children have any nexus whatsoever with this jurisdiction.

73. One can readily envisage a scenario where a child is removed from her home country to this State in circumstances where she has no *nexus* whatsoever with Ireland, where, for argument's sake, she is not conversant with the English language and where her removal to this jurisdiction amounts to a complete interruption in her education, upbringing and lived experience and where such event has occurred in circumstances which are likely to be psychologically traumatic, perhaps resulting in a profound rupture to relationships with one parent and siblings. Were such a hypothetical scenario to present itself before the High Court in circumstances where the provisions of no international agreement on child abduction were engaged, it is readily foreseeable that the Court would promptly reach a conclusion that the best interests of the minor would be best served by an expeditious return to her state of habitual residence without the necessity for a full investigation into welfare. However, the facts in the instant case bear no relationship to such a hypothetical scenario.

74. In the context of exercising its inherent jurisdiction, it was necessary for the High Court to carry out a comprehensive evaluation of the welfare of these children, including of course having due regard to their views.

75. It requires to be borne in mind, particularly in cases which fall outside the international agreements and conventions, that in carrying out a welfare assessment, the courts of this state are merely operating and giving effect to the cardinal rule that the welfare and best interests of the child are the first and paramount consideration. Accordingly, whilst the conduct and behaviour of the removing parent is relevant, as are orders made by a foreign court, the weight to be given to either of same must be calibrated in terms of the interests of the child. It is no function of the Court in the exercise of its jurisdiction to penalise the parent who removed the child.

76. The obligation of the Court is to embark upon a swift, dispassionate and thorough assessment of the best interests of the children. There is no basis for a proposition that in non-Convention cases a summary return should be an automatic reaction to an authorised removal of a child into this jurisdiction. The determination of the Court in every case must be grounded on the best

interests of the individual child or children as determined by probative evidence considered by the trial judge. The views and wishes of the child are but one element to be considered by the Court prior to making a determination whether or not to direct summary return of children in non-Convention-type cases.

Inherent jurisdiction and welfare - weight to be given to a foreign order
77. Where, as here, the proceedings are determined by the trial judge to fall outside the provisions of any international agreement and the inherent jurisdiction of the Court has been invoked, it is necessary for the Court to apply the welfare principle and to that end carry out expeditiously an evaluation of the case on its merits and having done so conclude where the best interests of the children lie. In the exercise of the inherent jurisdiction of the courts the welfare and best interests of the children must be the paramount consideration. To this paramount consideration all others must yield. The orders of a foreign court of competent jurisdiction constitute no exception. Such an order, particularly an interim order, does not have the force of a foreign judgment. The rules of comity demand not the enforcement of a foreign order with regard to custody but its grave consideration. This is a fundamental distinction which has long been recognised by the courts. It rests on the peculiar characteristic common to all welfare orders and on the fact that an order providing for the custody of a minor can never in its nature be final but is rather an interim order. It must be subject to variation or alteration depending on what at the time of determination by a court of competent jurisdiction is determined to be in the best interests of the child or children in question. Accordingly, the weight to be accorded to a foreign order will very much depend on the circumstances of each case.

Court orders of the Guardian Court of Lahore
78. In the instant case, while orders had been made in Lahore no comprehensive hearing on the merits had taken place. The interlocutory orders appear to be of a holding nature including an order restraining the removal of the children from the jurisdiction of the Courts of Pakistan but at the date of the removal of the children no final determination based on welfare had occurred. In this appeal the father contends that in light of the existence of these orders a summary order for return to Pakistan was warranted.

79. The removal of children to this jurisdiction in breach of the laws and court orders made abroad requires consideration. Under the principles of private international law and judicial comity they warrant grave consideration. The Court must evaluate the nature of the orders, when they were made, how close in time to the removal of the children they were and whether they took place following a full and comprehensive hearing of all evidence in regard to welfare and provisions of any reserved judgment and the findings of fact therein contained. Notwithstanding any such orders, the Courts in this jurisdiction are entitled to investigate the full merits of any case where the inherent jurisdiction of the Court is invoked appropriately. The fact that one parent may have behaved reprehensively or in a high-handed fashion or removed the children in breach of rights of custody attributable to the other parent again is a factor to be taken into account and certainly should lead a court to proceed with its inquiry as to welfare with all due expedition lest delays cause grave injustice to the left behind parent. The Court has to evaluate on the one hand the public policy aspect such as the issue of comity and forum conveniens and the serious injustice perpetrated to a left-behind parent and on the other hand the best interests of the child. In light of Article 42A of the Constitution the best interests of the child enjoys paramountcy in this jurisdiction

80. As outlined above, there may well be circumstances where a court is entitled to make a summary order for the return of minors to the jurisdiction where the orders were made. However, the father's contention that greater weight ought to have been given by the trial judge to the Lahore Court orders is not made out on the facts in this case.

Inherent jurisdiction of the High Court
81. In submissions to this Court, the father seeks to rely on a line of authorities predating the coming into operation of the Child Abduction and Enforcement of Custody Orders Act 1991. A common factor to all the cases in question is the expedition with which the cases were dispatched before the High Court. Whilst there is a general acknowledgement throughout the jurisprudence that the comity of courts is a powerful doctrine, the case law of our Superior Courts demonstrates that the existence of a foreign order relating to custody does not necessarily determine the issue of whether a return of the children is to be ordered.

82. In some instances, the cases relied upon in my view are of limited assistance, particularly in situations where the applicant before the Court was a public authority and where the parent who removed the child from the foreign jurisdiction had lost custody after an *inter partes* hearing or where a determination had been made after detailed and due consideration by the foreign court of the merits of the case.

83. Considering the jurisprudence of the Superior Courts prior to 1991 in cases where one parent brought children to Ireland from abroad without the consent of the other parent or in breach of custody orders made by a foreign court, an example of the approach of the courts to the exercise of its inherent jurisdiction was visible in *D.A.D.v. P.J.D.* (7th February 1986, unreported, High Court). In that case a father removed the five year old daughter of the parties to this State, in breach of a custody order made in the context of divorce proceedings instituted by the mother in England. By the time the matter came before the High Court the minor had been living with her paternal grandparents and her father in Ireland for 13 months. Emphasis was placed on the paramount importance of the child's welfare. In the course of his judgment, the trial judge asserted that the welfare of the child remained the paramount consideration regardless of the circumstances whereby the minor happened to come into this jurisdiction, Blayney J. directing "a full investigation of every aspect of the case before a final order can be made." A like approach to welfare was followed in *L.R. v. D.R.* [1994] 1 IR 239.

84. The capacity of the High Court to assume jurisdiction in relation to a non-resident minor who is an Irish citizen has been considered in *C.M. v. Delegacion de Malaga* [1999] 2 IR 363 which concerned a child who was not habitually resident in this jurisdiction . The Court found that the High Court was entitled to assume jurisdiction in relation to the ascertainment of welfare and to make orders to protect the rights and welfare of any child who is an Irish citizen. The second issue however was whether it was appropriate in all the circumstances for the Irish courts to assume such jurisdiction. Having considered the principals of private international law and a range of authorities on the issue, the Supreme Court concluded that it would be inappropriate to assume jurisdiction in relation to this minor where the child was abroad was not habitually resident in this State and its rights on welfare were *prima facie* subject to the jurisdiction of the Spanish courts.

85. The decision of Keane J. in *F. v. G.* [2014] 1 IR 417 is also relevant where the learned judge held, *inter alia*, that the High Court had jurisdiction to protect the rights and welfare of any child who was an Irish citizen but who was not habitually resident in a contracting state to the 1996 Convention or a member state under Council Regulation (E.C.) No. 2201/2003 (Brussels II *bis*) regardless of where the child is living or present at the time of the proceedings, but that it is reasonable to do so only with caution or circumspection.

86. The above authorities continue to be good law in this state in cases where the provisions of an international agreement or convention on abduction are not engaged. The effect of the Guardianship of Infants Act 1964, as amended, when considered with Article 42A of the Constitution in such cases precludes the trial judge from abdicating responsibility from carrying out a welfare

assessment and making orders are considered on the specific facts and evidence to be most conducive to the welfare of the child or children concerned. Hence, I am satisfied that the approach of the trial judge in this case with regard to the ascertainment of welfare of the children was correct in law. That phrases such as "global welfare" and " irreparable harm" were used in the judgment do not detract from the substance of that finding.

1996 Hague Convention
87. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, concluded on 19th October 1996 ("The 1996 Convention"), came into force in this jurisdiction on 1st January 2011. The 1996 Hague Convention was given the force of law for the purposes of Article 29.6 of the Constitution by s. 2 of the Protection of Children (Hague Convention) Act of 2000 and became operative in this State by virtue of S.I. No. 650/2010 – Protection of Children (Hague Convention) Act 2000 (Commencement) Order 2010.

88. Pakistan has neither signed nor ratified the 1996 Hague Convention.

89. In the instant case the children enjoy dual citizenship of Ireland and Pakistan. The jurisdiction of the High Court to make orders in respect of the welfare of children has been expressly preserved by s. 12 of the Protection of Children (Hague Convention) Act 2000:

> "**Saving**
>
> Nothing in this Act shall affect—
>
> (a) . . . or
>
> (b) any jurisdiction—
>
> (i) apart from that provided for in Articles 11 and 12, of a court to take measures directed to the protection of the person or property of a child who is not habitually resident in a contracting state, or
>
> (ii) of a court to order the recognition, enforcement or non-recognition of measures which are directed to the protection of the person or property of a child and which have been taken by the authorities of a non-contracting state."

Procedural issues regarding conduct of the trial
90. The father raises a series of discrete issues in his appeal regarding the conduct of the trial and the findings of the trial judge, each of which is contested by the mother and same are considered hereinafter.

Deficits in process with court-appointed assessor
91. It is of concern to note that the evidence of the assessor, having been heard on 14th March 2016, the case was then further adjourned to 19th July 2016, four months later, to permit cross examination of the father by counsel for the mother in regard to issues which arose during the assessor's cross examination. The relatively significant gaps in time between the hearing dates of the case undoubtedly caused hardship to the father who was travelling from abroad. It is difficult to understand why the Court was not in a position to progress the case swiftly. Certainly delays of this nature over a protracted period of over a year are inimicable to the attainment of justice and do not engender confidence in the legal process. It is noteworthy from the transcript that on 19th July 2016 when issues arose concerning evidence given by the assessor over four months previously, in March 2016, the trial judge stated, referring to the assessor, *"We can recall her"*, and elsewhere states *"Even if it's next January, because there's going to be no complaint made that this Court was in any way unfair. We'll be scrupulously fair and always have been."* Elsewhere the trial judge stated *". . . We'll recall her when we get a day in January or February next year and we'll make sure that every basis [sic] is covered"* (pp. 30-1 of the transcript of 19th July 2016). There is no apparent reason why a period of half a year was permitted to elapse before the case would resume. That delay was unreasonable.

92. Once the second report of the court-appointed assessor was to hand dated 13th March 2016, it was incumbent upon the Court to progress the hearing of the action to a conclusion with all due speed. To ensure that the perception of balance and neutrality is maintained by the trial judge, excessive or unreasonable delays are to be avoided since they are universally perceived as tending to injuriously impact upon the prospect of the left-behind parent succeeding in recovering the children and restoring the status quo ante.

93. Case management by the trial judge is imperative to ensure that witnesses are available and that appropriate and sufficient court time is set aside to commence and conclude the hearing of the action without any necessity for intervening adjournments save in exceptional or unusual circumstances.

Complaint by father to Barnardos
94. Ms Ruth More O'Ferrall was a court-appointed assessor for the purposes of s. 47 and subsequently was appointed for the purposes of discharging functions under the provisions of the Children and Family Relationships Act 2015. As such therefore, quite properly, counsel for Barnardos attended before the Court on 14th December 2016 to inform the Judge as a courtesy that a complaint had been received by Barnardos from the father regarding certain issues he was raising. It was appropriate to bring the matter to the attention of the Court and that was done. Furthermore Barnardos, having considered the complaint, had decided that it would be an unwarranted intrusion on the court process to investigate it further.

95. The manner in which this issue was dealt with by the Court and by the mother, and indeed by Barnardos thereafter, was nevertheless highly unsatisfactory and caused further unnecessary delays in reaching a final determination of these proceedings. In particular, it is noteworthy that on 14th December 2016 the trial judge made an order directing the father to *"send a written copy of the complaint made against the independent assessor to counsel for the respondent."*

96. An indication appeared to have been made to the father by the court in July, 2016 that the court-appointed assessor would be made available for further cross examination. On 14th December, the court accepted an undertaking from counsel for Barnardos to establish the attendance fee of the court-appointed assessor and to notify same to the father in person. The court ordered the father to discharge the attendance fees for the independent assessor and same were to be discharged in advance of the independent assessor's attendance at court which was fixed for Monday, 20th February 2017.

97. It is the father's case that his issues with Barnardos were entirely separate and distinct from the court process and it was, he

contends, unwarranted for the court to embark upon some kind of quasi-inquiry into the merits or demerits of same. The Court had delayed progressing the matter to conclusion in July 2016 on the basis that the court-appointed assessor could be available the following *"January or February"* (an exceptional delay in a summary matter). All the directions given on 14th December 2016 appear to support the fact that the Court would proceed to make the assessor available for further cross examination. The father had never introduced his complaint into the court process.

98. In their legal submissions to this Court and in their respondent's notice to the expedited appeal, the mother makes much of the father's complaint to Barnardos:

> *"The respondent was unaware of the making of the complaint or the substance of same and sought disclosure of the written materials submitted by the appellant to Barnardos to enable to consider same, in the appellant's application to further cross examine ..the independent assessor."* (para. 1 of respondent's notice)

99. The intervention of Barnardos on the afternoon of 20th February 2017 was regrettable. The independent assessor was an expert appointed by the Court. The Court had indicated as long ago as 19th July of the previous year that for the purposes of fairness and to avoid unfairness she would be recalled in January or February *"next year".* This intention had been reiterated on 14th December 2016 and relevant orders made. The conduct of Barnardos in appearing before the Court on the afternoon of 20th February 2017 and asserting that since there had been no "supervening event" the Court's own independent expert should not be recalled was quite inappropriate. The adjudicative process could have been subverted at the intervention of an entity which was not a party to these proceedings. There was no evidence that the independent assessor was unavailable for any reason and no prior notice or warning was given. If such an application were required for any reason to be brought by Barnardos then, in the interests of fairness, it should have been by way of a notice of motion and grounding affidavit giving the father adequate opportunity to be aware of the application. Barnardos was not a party to these proceedings and its interventions and submissions suggest it seriously misunderstood its professional obligations not just to the Court and the parties but also to the children of this family.

100. However, I have to have regard to the robust cross examination of the witness in question by the father's very eminent senior counsel which had taken place on a prior hearing date. Having reviewed that and the very comprehensive reports of the independent assessor I am left with no doubt that the unequivocal conclusions of the independent assessor, maintained throughout in her evidence to the court, with regard to the welfare of the three children as embodied in her reports would not have altered. Nonetheless, as the trial judge herself had admitted in July 2016 it would have been in the interests of fairness to have allowed the cross examination take place in accordance with the Order of 14th December 2016.

Telephonic witnesses
101. In cases concerning children where the respective parties to the litigation are the holders of rights of custody and where the outcome of the litigation will likely dictate to a significant extent the future dynamics in the relationships between the children and their respective parents, it is imperative that care be taken to ensure that each party has a reasonable opportunity to know what witnesses are likely to be called and the nature of the evidence likely to be given. In the instant case, regrettably that did not happen, particularly in the circumstances where, without notice or warning to the father at a time when he was a litigant in person, two siblings of the mother gave evidence by telephone and in the course of that evidence made serious allegations against the father of misconduct and violence.

102. The exercise of permitting the mother to call two witnesses via telephone without warning to the father was unsatisfactory. Such evidence was clearly inadmissible in this jurisdiction. In the course of this appeal and in the written submissions, it was asserted that the father was concerned that the disallowed evidence was influential or might have coloured the trial judge's views of him. Notwithstanding the concerns expressed this ground of appeal is not made out in my view.

Letter from daughter
103. As regards the trial judge's decision to admit a letter written by the daughter of the parties to the Court setting out her wishes, I am satisfied the trial judge was entitled to receive the said evidence and to attach weight to its content when considered in conjunction with the report of the court-appointed assessor with regard to the views and wishes of the said child in circumstances where there was evidence as to her degree of maturity and other material factors. This ground of appeal is not upheld.

Credibility of the witnesses
104. In a number of material respects the trial judge preferred the evidence of the mother. The evidence was that the mother took steps to procure travel documentation and get necessary orders before the District Court in a highly unorthodox fashion and without notice to the father. The father accordingly asserts that her evidence was not to be relied upon . However, a trial judge has the opportunity to observe the demeanour of witnesses in her court. The mother relies on *Hay v O'Grady* [1992] 1 I.R. 210 which is an important precedent on the function and jurisdiction of a Court on appeal in relation to findings of fact in the High Court, the inferences drawn in the High Court, and inferences (including contrary inferences) which may be drawn by this Court as an appellate Court. As the headnote to the decision succinctly states:

> *"1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.*
>
> *2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.*

Accordingly, the trial judge was entitled to reach the conclusions which she did with regard to credibility

Was the Court obliged to make an order for summary return
105. Whereas certain of the jurisprudence from neighbouring jurisdictions suggests that a child's welfare should not be the only consideration of a court in the process of the exercise of inherent jurisdiction, that does not reflect the law in this jurisdiction particularly since the coming into operation of Article 42A of the Constitution, nor in truth did it ever reflect the law in this State. Irrespective of the existence of any order of foreign jurisdiction the paramountcy principle embodied in Article 42A (4) must be applied by the Court. In approaching the welfare issue the Court should not seek to penalise any parent or holder of rights of custody in respect of any conduct. Such conduct might be a factor to be taken into account in the overall evaluation of welfare but the cardinal rule obtaining is that the welfare of the children, the subject matter of the application, must be the first and paramount consideration.

106. Whilst there is a general presumption that it is in a child's best interests for his or her needs and welfare to be evaluated and determined by the courts of the child's habitual residence, such a presumption is not freestanding and neither is it solely based on an approach informed by analogy to the provisions of the Hague Convention. Each case turns on its own particular facts. The factual matrix before the trial judge in the instant case included the following:

(i) The children and the parents had dual nationality and were both Irish citizens and Pakistani citizens.

(ii) All of the children were born in Ireland and had resided in this jurisdiction and were ordinarily resident here at all material times from birth, and first commenced residing in the State of Pakistan in or about the month of August 2014.

(iii) The duration of their sojourn in Pakistan was at most 14 months.

(iv) The marital relationship between the parents appears to have broken down.

(v) The children were residing with their mother who was their primary carer and were under her care and control at all material times from the time of birth.

(vi) That, for whatever reason, the children had not been attending school to any extent in Pakistan.

(vii) That after their removal by the mother without the knowledge or consent of the father in November 2015, they returned to reside in the dwelling house which had been their family home prior to their departure to Pakistan the previous year.

(viii) A comprehensive assessment of welfare was carried out.

(ix) A comprehensive assessment of the views and wishes of the children had been carried out and those reports were available to the Court from February 2016 and March 2016, respectively.

(x) Although both parents had invoked a jurisdiction of the Courts of Pakistan, no substantive hearing as to welfare had taken place and no final orders had been made by the said courts.

(xi) The mother has indicated that irrespective of the outcome of the proceedings, apparently she does not intend returning to the State of Pakistan and accordingly the Court was entitled to have regard to that fact in its overall assessment of welfare having due regard to the material facts as ascertained.

(xii) There is independent evidence of foreign law of a high quality before the trial judge indicating that in general daughters are permitted to reside with the mother up to the age of 15 and sons up to the age of 7 under the personal law obtaining in Pakistan. Whilst of course it is readily to be accepted that the application of Muslim law to a Sunni Muslim family is appropriate and acceptable, there is a further dimension to be borne in mind in the instant case in the overall evaluation of the welfare of these children, namely the paramountcy under Article 42A (4) of the Constitution of the best interests of the children must take priority over concepts of international comity and respect for foreign courts in non-Convention states.

Prejudgment

107. The father argued extensively that the trial judge had come to a predetermined view early on. Several excerpts from the transcripts were relied upon in support of this most serious contention; On 26th February 2016, at a time when the Court was considering issues concerning the son of the parties, the trial judge indicated that she was willing to meet the son of the parties if he wished. The trial judge indicated that her desire to see the son would be twofold: *"…to encourage him to socialise over the summer, maybe do some sort of a course that would bring him into contact with other children, a Euro languages course or go to the Gaeltacht or something as well as what was suggested in the report. Counsel on behalf of the father pointed out that there had never been a request on behalf of the father that the trial judge would "speak with the son but that was a suggestion of the Court."* This offers a mere example of the trial judge's approach.

108. The father also relies on an incident in court a year later, the case was still proceeding on 20th February 2017, towards the end of the hearing in the afternoon, the trial judge stated, in addressing counsel for the mother:

> *"I'd like your solicitor to get in touch with the nearest Garda station to alert them that this lady may be calling them in aid at the last minute, at a minute's notice. I appreciate that it can be very hard to get through on the line, but I think it should be done."*

109. Great care must be taken by a trial judge to avoid unnecessary interventions in the course of a hearing. This is particularly so in the context of cross examination.

Digital audio recordings

110. I have had the opportunity to listen to and consider key excerpts from the digital audio recordings, particularly in regard to aspects of the case which have been the subject of criticisms on the part of the appellant father in the course of this appeal. It would appear that a dominant intention on the part of the trial judge was to steer the father, by then a litigant in person, towards focusing on the key issues of relevance to the case to ensure that all of his issues were clearly articulated.

111. I am satisfied that the interventions were indeed quite frequent and possibly substantially more frequent than best practice would have dictated, however it would appear to me that they were designed to fulfil the permissible purposes of clearing up points and encouraging the litigant in person to focus on the matters at issue. It is important to have regard to the very high threshold an appellant must reach to establish prejudgment against a trial judge. Such a threshold is not reached in the instant case.

112. With regard to criticism of the trial judge's findings of fact, it is noteworthy that the judgment had been carefully prepared and considered and was delivered some months following the determination of the hearing. The trial judge adequately set forth the primary features of the evidence of all the key witnesses and identified those features of the evidence upon which she based her findings and conclusions. An issue of principle in this case is the proper approach to applications for the return of children to a country which is not a party to the Hague Convention and where the provisions of no international agreement or convention are engaged.

113. The assessment of welfare depended substantially on the judge's evaluation of the father's conduct towards the mother and the children and also his likely future behaviour and its impact upon the children in particular. There was objective evidence which entitled the trial judge to come to her conclusions in regard to welfare and the credibility of the witnesses who were heard and considered depended crucially on the trial judge's evaluation of the oral evidence. These were findings of credibility and primary fact with which this Court should be wholly reluctant to interfere. The trial judge having made such a determination, her finding is a factor to be weighed in the balance in the exercise of her discretion. Apart from the conduct of the father towards the mother, the allegations of assault, which were strenuously disputed and which the trial judge declined to make a determination in relation to, there were other strong factors and considerations strongly pointing towards a long-standing and deeply-established nexus between the State and the children.

114. They had all been born in Ireland and resided here throughout their entire lives, apart from the period of fourteen months or so spent in Pakistan. The ages of the children and the length of time that they had resided here and the very deep-rooted and substantial connections, educationally, socially, and so forth, that they had with this State were all relevant factors which were quite properly taken into account by the trial judge. The determination was not based solely on the expressed wishes of the children and the trial judge did have regard to those wishes in an appropriate way.

115. In substance, the arguments on appeal included that the trial judge impaired her ability to make accurate findings by the perceived procedural irregularities referred to in the notice of appeal and in the legal submissions and in argument before the Court and as outlined above. However, I am satisfied that these criticisms are not sustainable based on the evidence.

Delay

116. Applications for return of children to another jurisdiction, whether under the provisions of various conventions or regulations or arising from assertions based on comity of court or invoking the inherent jurisdiction of the High Court require great vigilance with regard to expedition.

117. Where applications are brought pursuant to the 1980 Hague Convention and where no decision is reached within six weeks of the commencement of the proceedings an applicant or the requesting central authority is entitled to request a statement for the reasons for the delay, for example pursuant to Article 11 of the Hague Convention 1980.

118. Where proceedings before the High Court involve a international dimension regarding children it is imperative that a pro-active case management approach is adopted from the first time the case appears in the High Court list to ensure that no adventitious advantage is conferred on the fleeing parent nor any injurious impact or prejudice visited upon a left-behind parent by virtue of the passage of time and unwarranted delays. It is not correct to say, as was suggested on behalf of the mother, that since the 1980 Hague Convention was not engaged expedition was not a consideration.

119. In the instant case it is noteworthy that the determination of the issues took over 18 months which represented a greater duration of time than the period during which the children resided in Pakistan. Inevitably, a protracted period of uncertainty has a deleterious impact on children and is contrary to their best interests.

120. As a general rule the judge seised of a non-Convention case should endeavour to adhere, by analogy, to the 1980 Hague Convention time frame of six weeks – save in exceptional circumstances or for just cause.

121. The trial judge's determination at para. 84 of the judgment that there was no unreasonable delay and that delay occurred when the father refused to accept the assessor's report and wished to have her dismissed, and indeed made a formal complaint to Barnardos about her, is not in accordance with the evidence. I am satisfied that at no time did the father seek to put complaints regarding the assessor before the Court. The initial application was moved within days of the removal of the children and accordingly no blame can rest at the feet of the father in regard to the delays.

122. Issues were raised with the assessor's own employer Barnardos. The trial judge in the month of July, 2016, December, 2016 and January, 2017, had repeatedly asserted that the independent assessor would be available for further cross examination in the interests of fairness. However I am satisfied that were the independent assessor to have been recalled there would not have been a different outcome to the primary order made in these proceedings.

123. The splitting up of the hearing and the ensuing delays resulted in a sustained period of uncertainty lasting for approximately a year and a half and indeed which continues to this day, over two years after the institution of the proceedings. Interrupted hearings with intervening weeks and months is not in the best interest of families and is to be avoided, particularly in cases involving children and their future.

124. I am satisfied having reviewed the transcripts, having heard key elements of the digital audio recording of the hearing, having reviewed the authorities and the legal arguments and submissions of the parties, that to remit the matter for a rehearing at this stage would not be in the interests of the children or the parties and would be wholly unlikely to lead to an alternative outcome.

125. Notwithstanding significant delays, there can be no doubt but that the focus of the trial judge was on the individual children in the particular circumstances that obtained in this case. In the instant case the children were Irish citizen children whose fixed places of abode throughout their entire lives had been Ireland apart from the period of fourteen months from August, 201. Notwithstanding the circumstances surrounding their being brought into this jurisdiction at the beginning of November, 2015, in reality they were returning to an environment and society with which they were completely familiar. The trial judge applied the checklist specified in the Guardianship of Infants Act 1964 as amended and there was full compliance with Article 42A of the Constitution which, *inter alia*, gives effect to Article 12 of the UN Convention on the Rights of the Child. There was cogent evidence before the Court on which she was entitled to rely that for reasons connected with her own personal welfare, the children's primary carer was not in a position to return to Pakistan. Were an application for leave to take the children out to be brought before the courts in Pakistan the independent expert evidence was that such a process could potentially take a couple of years. Accordingly, the trial judge was entitled to have regard to the very significant practical consequences for the children of a return to the jurisdiction of the Courts of Pakistan, a course of action to which they were each separately and individually implacably opposed.

126. Accordingly, since I am satisfied that the welfare of the children requires it and with considerable reluctance I would dismiss this appeal.