

# IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-678 of 2022

[Mohammad Faraaz Shaikh .....v.....Ms. Javeria Shahani & others]

Date of Hearing : 25.01.2024  
Petitioner through : Mr. Syed Mustafa Mahdi, Advocate.  
Respondents through : Mr. Peer Syed Asadullah Shah Rashidi,  
Advocate for respondent No.1  
Petitioner Father & Respondent  
mother also present.

## ORDER

**Zulfiqar Ahmad Khan, J:-** This petition was disposed of vide order dated 06.10.2023 and matter was remanded to the learned Family Court to decide the fate of foreign couple, and when an affirmative judgment was handed down, the petitioner has moved the instant application being CMA No.1226/2024 to give effect to his prayers under the Hague Convention.

2. Being a family dispute, this case also has a checkered past. As per memo of petition the Petitioner is a citizen of the United States who got married to the Respondent No.1 in the US on August 21, 2017 and following the marriage, the couple travelled to Karachi for a wedding reception, and from the said wedlock, Rohaan Faraz Shaikh (Respondent No.2) was born on January 8. 2019 in USA, hence gained the US citizenship by birth. The couple got separated on October 2, 2021, whereafter a case was instituted in the US for the Custody of the Minor, which case was pending at the time of the institution of this petition (but now decided) where the Order for Temporary Child Custody was passed on February 3, 2022 stating that the mother and father will share the Temporary Joint Physical Custody of the Minor

as well jointly consult regarding the minor's health, education, day-to-day activities etc. Following the forementioned Temporary Joint Custody Order, the Petitioner, on May 6, 2022 arrived at the usual exchange location to find that there was no sign of anyone at the house which prompted the petitioner to contact area Police, which informed the petitioner with pictures of the Respondent No.1 and the Minor seen at JFK (New York) boarding a flight to Doha - Karachi on April 28, 2022. Per learned counsel the Respondent No.1 upon her arrival in Karachi maliciously filed for Guardianship & Pakistani citizenship for the Minor without knowledge or consent of the Father after "illegally abducting" the minor to save her from the US Courts, in Order dated May 9, 2022, wherein, Court had given Temporary Full Custody of Minor/Respondent No.2 to Petitioner/Father. Per learned counsel of the Petitioner, the Petitioner has Full Custody of the Minor as per US Court, and as to claim of the mother that the Father was cruel and unfit, an officer from the Council For Children's Rights was appointed by the US Court, who found that in fact the Mother was unfit and capable of causing irreparable harm to the minor if the minor remained in her custody. The learned counsel also stated that the Respondent No.1 has illegally abducted the Minor from the US, resultantly there is a live Criminal Contempt Order for her arrest and imprisonment for 30 days and for a fine for \$500 USD. Additionally, she also has a Felony Custody Order Violation from the Mecklenburg County Sheriff Office due to kidnapping. Additionally, she has a Federal Warrant under US seal for unlawful flight to avoid prosecution which calls for her arrest from the US Department of Justice, Federal Bureau of Investigation (FBI).

3. Learned counsel adds that Respondent No. 1 filed a Domestic Violence Case in the US, which was dismissed by a US Judge on January 12, 2022 because it turned out to be false and baseless, as well the Respondent No.1 also filed two cases with Department of Social Services alleging abuse and both cases were dismissed due to lack of merit. Following the Child abduction by the Respondent No.1, the Court of Justice District Court Division passed an Ex Parte Temporary Emergency Custody Order on May 9, 2022 which awarded the Petitioner temporary care, full custody and control of the minor and ordered the Respondent No.1 to return to the State of North Carolina and turn the child over to the Applicant. The Court also requested Pakistan's authorities to enforce said Order, seize minor child and return him to Father's custody, pending a full hearing on Father's claim for Custody.

4. Thrust of the arguments of the learned counsel was that the Petitioner also submitted an application under the Hague Convention on the Civil Aspects of International Child Abduction to the US State Department requesting the said Department to facilitate return of his child, who was illegally and unlawfully removed and retained by the Respondent No.1 since Article 9 of the Convention, to which Pakistan is signatory, states that a Child must not be taken or retained across an international border, away from his or her habitual residence, without the consent of a parent who has rights of custody under the law of the habitual residence. Reliance was placed on the case reported as 2019 CLC 1311 as well on PLD 2016 SC 174. With regards the proceedings initiated by Respondent No.1 which even

have culminated in favor of the petitioner, reliance was placed on 2019 CLC 562.

5. To conclude per learned counsel the objectives of Hague Convention are to protect children from wrongful international removals or retentions from their lawful custodians by requiring that Children be returned to their country of habitual residence for resolution of any custody dispute and in compliance of Article 12, the child be returned, and any dispute over permanent custody be litigated at the place of habitual residence which view is reaffirmed in the case of Ms. LOUISE ANNE FAIRLEY v. SAJJAD AHMED RANA (PLD 2007 Lahore 293) holding that “..the Respondents No. 1 and 2 shall handover the custody of the minor Misbah Ahmed Rana within seven days from today to some Senior Female Officer of the British High Commission, who shall be responsible to send the minor onward to Scotland, where her custody should be restored to the Petitioner; Respondents Nos. 1 and 2 are also directed to hand over the two passports of Misbah Ahmed Rana to such Officer of the British High Commission for her journey”.

6. Mr. Asadullah Shah Rashidi, Advocate set forth the case of the respondent mother. The main stance of Mr. Rashidi is that, per prescriptions of Mohammeden Law by D.F. Mullah, the respondent mother is entitled to the custody of minor as a right of Hizanat. He next contended that mother is entitled to the custody of minor in preference to the father during Hizanat and all Juristic Schools conferred first preference to a mother’s claim to physical custody of her young child, therefore, the petition at hand be dismissed and the

order of the learned Family Court dated 18.01.2024 directing the respondent mother to hand over the custody of the minor to petitioner father be annulled and set aside. He also took stance that judgment of a foreign court can only be enforced in terms of the mechanism prescribed by section 13 of the Code of Civil Procedure, 1908 and the Judgment of the US Court being against the principles of natural justice is not enforceable. He made reference to the judgments cited as PLD 2015 Sindh 382, 1994 MLD 1370 (Lahore), PLD 2020 SC 508 and PLD 2020 Lahore 716.

7. So as to meet the mandate of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 with regards right to fair trial, the petitioner father as well as respondent mother were also heard. Petitioner father pleaded that he is a Liability Specialist in an US insurance company earning a handsome amount for his livelihood as well as that of the minor. Further stated that minor is very loving, affectionate and friendly with him, always plays games with him as well as the favorite cartoon character of the minor is T.Rex. Further stated that respondent mother committed a fraud by using his credit cards without his permission by making questionable transactions. Respondent mother stated that petitioner father is of bad character never spent a single money on the minor and she used to pay all medical expenses by herself being a Doctor by profession and that she is looking after and caring the minor and the welfare of the minor lies with her instead of the father.

8. This Court heard the detailed arguments of the respective learned counsel and reviewed the record made available to the

Court. It is an admitted position that the U.S. Court as well as Family Court of Pakistan had already decided the issue of custody of the minor in favour of the petitioner father. Pakistan signed the Hague Convention on the Civil Aspects of International Child Abduction, 1980 in December, 2016 which has been enforced w.e.f. 01.03.2017 to secure the prompt return of the children wrongfully removed or retained and to ensure allied rights of the children. As Pakistan is a Federation and, in her Constitution, the subject pertaining to family and children is vested with the provinces, to effectively implement the Convention, "The Hague Convention, 1980" has been added in the Schedule of the West Pakistan Family Courts Act, 1964 to bring international child abduction cases within the jurisdiction of the Family Courts of Pakistan.

9. The United Nations Convention on the Rights of the Child, 1989 (UNCRC) is an international treaty which sets out the rights of children, be it economic, social, health or family. The UNCRC was ratified by Pakistan in 1990 with reservations that it will adopt the Convention, subject to the requirements of the Islamic Law. However, in 1997, the ratification became absolute as the reservation was withdrawn. The UNCRC recognizes that the child should grow up in an environment of love, happiness and understanding. Article 3 provides that in all actions concerning children whether by courts of law or public, or private welfare institution amongst others, the best interest of the child shall be the primary consideration. Article 7 provides that every child has right to be cared for by their parents and Article 9 requires that in the event of separation between the parents, the child should be in contact

with both parents unless either one can cause any harm. Article 12 provides that a child capable of forming his or her own view should be able to express it and it should be given due weightage. This Article suggests that children's preferences can be a guiding factor in custody cases, hence, encouraging their participation and opinion in custody matters. This is essential because custody is about the care and comfort of the child and the right of the child to a family. Custody matters are always sensitive and require a great deal of care as the court has to weigh in all factors in order to determine where the welfare of the minor lies.

10. Reverting to the issue at hand, on January 25, 2022, the U.S. Court appointed Mr. Freeman, Council for Children's Rights to represent and advocate for minor's best interest who after thorough investigation introduced on record certain facts constituent of which were also discussed and delineated in the U.S Court edict and it is considered expedient to reproduce the same hereunder too:-

*“34. Mr. Freeman testified that Mother appeared to have coached Rohaan to make statements of abuse in videos she presented to CFCR.*

*35. Mr. Freeman testified that Father's home was clean and orderly. Rohaan and Father had a close and loving relationship. Father and Roohan's interaction was positive and appropriate. Rohaan was clean, well-fed, and happy in Father's care. Father was able to care for Roohan's needs and appeared happy doing so. Father was cooking dinner for Roohan when Mr. Freeman visited. Rohaan did not appear frightened or fearful of Father, and in fact, they played together happily.*

*35. Mr. Freeman testified that Mother's home appeared to be dirty and in disarray. Despite many empty rooms in the home, Rohaan's bed was on the floor next to mother's bed. There were toys strewn about the home. Mother did not seem to provide Rohaan with structure in the home.*

*36. Mr. Freeman testified that, based on CFCR's investigation, it seems that there is an unhealthy level of codependency between Mother and Rohaan.*

*37. It is not in the best interest of the minor child that he continue to be retained in Pakistan or anywhere outside of the State of North Carolina.*

*38. There is substantial risk of irreparable emotional and physical harm to the minor child should he be allowed to continue residing with mother."*

11. It is gleaned from appraisal of the foregoing that not only the U.S. Court, but also the Council of Children Rights in USA reported the attraction of the minor towards the father instead of the mother and that the petitioner father was declared to be the best caring option. It is also an admitted position that the minor is a foreign national who was brought into Pakistani territory secretly and residing within the precinct of this Court in defiance of Court's order. The U.S. Court as well as Family Court declared that the petitioner father is fit to be declared as guardian of the minor and that the Family Court in Pakistan also having observed the pros and cons of the matter at hand dismissed the plea of guardianship filed by the respondent mother and directed the mother as under:-

"Eventually, for whatever discussed hereinabove, this Court holds as under:-

a. The custody of the minor is already being regulated by the proper foreign Court.

b. The Applicant/mother is directed to handover the custody of minor Rohan Faraz Shaikh to the American consulates, Karachi Pakistan with his Pakistani and American passports.

c. in default of compliance of clause (b), above, the appropriate Authority of Federal Investigation Agency (FIA) Human Trafficking Cell, Karachi is authorized to recover the minor Rohan Faraz Shaikh and his Pakistani and American Passports from mother Javeria Shahani and handover his custody to the authorities of American consulate, Karachi for safe return of minor to foreign Court for further orders, if any, under intimation to this Court.



d. Instant Application at hand is barred under Section 19 of the Guardian & Wards Act, 1890, hence the same is dismissed along with all enlisted pending application(s), if any.”

12. Now coming to the case law. To start with reference could be made to the matter recently adjudicated by the Islamabad High Court in its Constitutional Jurisdiction, bearing Case No: W.P No.3181-2022 where the said court has held that *“no one is allowed to abduct the minors, even though he is a father, like in this case. Respondent No.7/Saleem Muhammad has cheated the real mothers and deprived the minors from love and affection of their real mother, who are holding lawful custody in the Poland. The record clearly establishes that minors were illegally removed from foreign jurisdiction, they shall be returned to their habitual place of residence and parties are directed to approach the Guardian Court in Poland, who shall decide the matter in accordance with law”*. The court came to an irresistible conclusion that Respondent father had abducted the minors in breach of the legal obligation and commitment under the law of Poland as well as violated the right to life envisaged in Article 9 of the Constitution of Islamic Republic of Pakistan, 1973. The case was held to be exceptional and extraordinary, since minors were not being returned to Poland by using religion as a ground by father (a similar plea has also been taken by the Respondent Mother in the present case), which was held by the Court to be not a permissible ground, as the primary question always related to the welfare of the minors. In the said case Court did not shy away from holding that *“Pakistani Courts have duly regarded the foreign judgments and discourage such parents, who abduct the minors from foreign jurisdiction and came to Pakistan for their ill-motives”*.

13. Similar notion has previously been reaffirmed by Lahore High Court in the Writ Petition (PLD 2007 Lahore 293, Ms. LOUISE ANNE FAIRLEY v. SAJJAD AHMED RANA) which allowed the petition by holding that *“Respondents No. 1 and 2 shall hand over the custody of the minor Misbah Ahmed Rana within seven days from today to some Senior Female Officer of the British High Commission, who shall be responsible to send the minor onward to Scotland, where her custody should be restored to the Petitioner. Respondents Nos. 1 and 2 are also directed to hand over the two passports of Misbah Ahmed Rana to such Officer of the British High Commission for her journey”*.

14. A case similar to this instant Petition was decided by the Supreme Court of India in the Writ Petition and it is as reported as (1989 MLD 2209) where it was ordered that *“the minor boy, Dustan be restored forthwith to the custody of the petitioner i.e. the mother with liberty to the petitioner to take him to the United States. The child will be a ward of the concerned Court in Michigan and it will be open to the father, first respondent herein to move that Court for a review of the custody of the child, if he is so advised”*.

15. This court while dealing with the same natured case through its Constitutional Petition reported as (2019 CLC 1311, Mst Farhat v. Umair Hanif Ghanchi and other) has held that Courts should refrain themselves from exercising the jurisdiction to those matters which are already sub-judice in another international forum.

16. Now coming to the contentions of the learned counsel for the respondent that the child in the age of Hizanat hence cannot be handed out to the father, this aspect is covered by a number the judgment rendered in the Hon'ble Supreme Court where welfare of child is held to be the key consideration. In the constitutional jurisdiction this aspect cannot be well answered particularly in the presence of judgment from the Family Court given in the instant matter in the case of G&W Application No. 20 of 2022 dated 18 January 2024. The case reported as 2018 SCMR 427 (Mirjam Aberras Lehdeaho v. SHO PS Chung, Lahore) makes a Guardian Court as the final arbitrator to adjudicate upon the question of custody of a minor. In the case at hand the Mother was married in the U.S, marriage was registered under the US laws, child was born in the US and later on she chose to traffic the minor to Pakistan, such illegal acts have rendered the mother incapable of making right decisions in the best interests of the child. She seemingly has destroyed the US passport of the minor and have dug holes in the Pakistani passport of the child (her own admission in the court). She wasn't even willing to share details of the school where the child is being educated (if at all) in Karachi. Despite two opportunities having been given to her to bring the child to the court, she failed. It appears she wishes to keep the child "underground" and intends to hide herself from the Red Warrants issued against her. All of these indicators give me no confidence that she is a fit person to take care of the best interests of the minor.

17. Now coming to the prescriptions of Sections 13 and 14 of CPC which deals with enforcement of foreign judgments and reproduced hereunder:-

13. *When foreign judgment, non conclusive.* A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) Where it has not been pronounced by a Court of competent jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Pakistan in cases in which such law is applicable;

(d) Where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) Where it has been obtained by fraud;

(f) Where it sustains a claim founded on a breach of any law in force in Pakistan.

14. *Presumptions as to foreign judgments.* The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

18. I have read the Judgment of the General Court of Justice District Court Division, State of North Carolina, County of Mecklenburg dated 9 June, 2023 a certified copy of which was supplied in the Court through statement dated 30 August, 2023 and do not find it offending to any of the exceptions listed under Section 13 except to the principle of Hizanat which the Guardian Court has already decided in favor of the Petitioner, hence the presumption attached under Section 14 as to the competency of the foreign court is well founded.

19. Now coming to the case law cited by the learned counsel for the respondent PLD 2020 SC 508 (Mst. Beena v. Raja Muhammad and

other) which is distinguishable as it dealt with a case where through a private agreement where it was agreed that if the mother seeks Khula, custody of the minors would be taken away from her. The Hon'ble Supreme Court held that such an agreement being against public policy was void per Section 23 of the Contract Act, 1872. *Mst. Marium Tariq v. SHO Police Lines Defence (PLD 2015 Sindh 382)* is also distinguishable as in that case an FIR was lodged against the mother as she travelled abroad with a minor to avoid visitation rights. This High Court quashed the FIR holding that use of such coercive means was not appropriate. In the said case there was no issue of the Hague Convention neither any of the party was a foreign national, it was purely a domestic dispute. Third case cited by the learned counsel for the Respondent pertained to the Hague Convention (*Sumayyah Moses v. SHO Faisalabad - PLD 2020 Lahore 716*) however no decision under the said Convention has been made. Court held that the two sons who admittedly were fathered by a Pakistani national will be treated as Pakistani nationals under Section 5 of the Citizenship Act, 1951. In the case at hand the father is a U.S national and in fact originally from an Indian Muslim family. Also the said judgement is of no relevance as the Court therein ordered the foreign mother to approach the Guardian court to get the matter resolved. In the case at hand the Guardian Court vide its judgment dated 18 January 2024 has already handed out guardianship and custody of the minor to the petitioner father. So in fact the case supports the cause of the petitioner. The last case cited by the learned counsel for the Petitioner (*Abu Saeed A Islahi v. Mrs. Talat Mir & others - 1994 MLD 1370*) relates to a custody battle arising out of a judgment of the US

Court however, it is rendered on 27 February 1994 when the Hague Convention to the extent of Pakistan was not in the field as Pakistan only became a signatory in the year 2017. Hence the said judgment in the presence of commitments made by Pakistan under Hague Convention is of no persuasive value.

20. During course of hearing, learned counsel for the petitioner filed a statement in which the petitioner father undertook to withdraw the contempt application filed against the respondent mother in the U.S Court and upon his doing so the warrant issued against the respondent mother would become ineffective and that the respondent mother would have rights granted to her by the U.S. Courts. The statement and undertaking dated January 25, 2024 filed by the petitioner father is taken on record and the petitioner is directed to adhere to the same.

21. For the forementioned reasons and in the presence of concurrent edicts decided in favor of the Petitioner father, the respondent mother is directed to hand out custody of the Minor to the father or the concerned authorities acting on his behalf, so also the concerned authorities to afford all facilities to the father to take the child back to the United States pursuant to the order passed by this Court and the U.S Courts and in case the mother wishes to follow the suit appropriate facilities also to be provided to her as and when requested. The above CMA is decided in these terms.

Karachi  
Dated: 25.01.2024.

JUDGE

Aadil Arab.