

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

RE: SABINA AND TAMIM
(Temporary removal from the jurisdiction to Bangladesh)

STEPHENS J

Introduction

[1] The applicant, Shakib, is a Bangladeshi national and an Irish passport holder aged 40. He applies for leave to remove his daughter Sabina 9 and his son Tamim 7 from the jurisdiction for a period of two months to allow him and the children to travel to Bangladesh, a non Hague Convention country and with which country there is no bilateral agreement. The main purpose of the visit is to allow the children to be present at the applicant's wedding to Shefali, 27, a Bangladeshi national. Other purposes include an opportunity for the children to meet their paternal grandparents and the extended paternal family and also an opportunity to see and gain a greater understanding of Bangladeshi culture and of their Bangladeshi heritage.

[2] The application was opposed by the mother, Shannon who was born in Northern Ireland and who has lived here all her life. The Southern Health and Social Services Trust who also appeared on the hearing of his application adopted a neutral stance.

[3] I have anonymised this judgment. The names and initials used are not the real names or initials of any of the individuals involved. Nothing should be reported which would identify the children or any member of their extended family. I refer to –

- (a) the children as **Sabina and Tamim**
- (b) the father as **Shakib**
- (c) the mother as **Shannon**
- (e) the mother's previous partner as **John**

(f) the children of the mother and John, and accordingly the children's maternal half siblings, as **Patrick, Eileen and Laura**.

[4] Mr Maguire appeared on behalf of the father, Shakib. Mrs Keegan QC and Ms Ciara Murphy appeared on behalf of the mother, Shannon. Ms Louise Murphy appeared on behalf of the Trust. I am indebted to all counsel for their industry and for their careful and thorough written and oral submissions.

[5] I heard the application yesterday and I now give this judgment this morning.

Factual background

[6] Shakib came to London on a Bangladeshi passport with a six month visitor's visa in 1996. He overstayed. In 1997 he met and married Shannon. Thereafter he obtained a United Kingdom visa for a period of four years. He applied for an Irish passport on the basis of his marriage to Shannon which application was granted and he was issued with that passport in 2002. That passport does not expire until 2012. I make it clear now that I require to see the original passport so that the applicant's evidence in this respect can be confirmed.

[7] Shakib is the main carer for the children. The children's welfare would be seriously affected if he left the jurisdiction and they were able to return but he was unable to do so. His immigration status is therefore highly relevant to this application. I direct that the applicant's original passport be lodged in court together with a photocopy of it. The purpose of keeping on the court file a photocopy is to assist in enforcement action if the applicant does not return with the children to Northern Ireland. In those circumstances he should be aware that a passport can in certain circumstances be revoked. I have already directed that the children's British passports are lodged in court and I will also direct that photocopies be taken of those passports so that if the children are not returned to Northern Ireland steps can also be considered in relation to those passports. One of the concerns raised in this case by the mother was in relation to a forced marriage for Sabina. Having seen the father give evidence I reject that as a concern of any substance in this case. However as a general principle if Sabina were not returned to Northern Ireland and at some subsequent stage wished to re-enter the country from Bangladesh on her passport accompanied by a husband then steps could be taken at immigration to examine the validity of such a marriage and if appropriate arrange the return of that individual to Bangladesh but allow Sabina to enter the United Kingdom.

[8] In addition to Sabina and Tamim, Shannon has three other children. The father of those children is John. The children are Patrick, Eileen (16) and Laura (13).

[9] In 2006 Her Honour Judge Loughran heard divorce proceedings relating to the marriage of Shakib and Shannon. She ordered an investigation under Article 56 of the Children (Northern Ireland) Order 1995. At that stage Sabina and Tamim were living with Shannon. This investigation led to interim care orders in respect of Sabina and Tamim and also Eileen and Laura on 12 October 2007. The following is a list of the concerns which Social Services had at that stage with the family:

- (a) Poor school attendance.
- (b) Non attendance at health appointments.
- (c) Mental health of Shannon i.e. depression and anxiety and the impact of this on her ability to care for the children.
- (d) Patrick's misuse of drugs and alcohol while in the home.
- (e) Patrick's volatile behaviour.
- (f) The family's interaction with each other which was noted as abusive.
- (g) Concerns were raised as to Laura and how she appeared to be the target for all of the family.

[10] On 12 October 2007 Sabina and Tamim were placed in the care of Shakib. That placement has been very successful and Shakib has provided a high level of care. The lives of Sabina and Tamim have been transformed.

[11] On 3 July 2008 Her Honour Judge Loughran made a number of orders as follows:

- (a) Residence orders were made in favour of Shakib in respect of Sabina and Tamim.
- (b) There is a contact order in place in favour of Shannon.
- (c) A prohibited steps order preventing the removal of the children from the jurisdiction until they achieved the age of 16.
- (d) A supervision order in favour of the Trust. That order being limited in duration until 3 July 2009.

[12] The supervision order is due to expire on 3 July 2009. I have during the course of hearing this case given a preliminary view that the Trust should give consideration to applying to renew the supervision order. I gave that indication because Shannon is reassured by the Trust's supervision. I perceive there to be a need for the Trust to be involved in managing and supervising

contact to ensure that no emotional harm is caused to the children. Shakib intends to remarry and the children will need assistance in accepting a stepmother into their family who cannot speak English. Finally Shakib does not consider the degree of Social Services involvement to be intrusive or destructive of family life, but rather welcomes it.

[13] A supervision order would also secure the Trust's future involvement in any application concerning the prohibited steps order. Any travel to Bangladesh should receive consideration by the High Court. A residence order only prevents removal from the jurisdiction for a period in excess of 28 days. In any event it does not prevent removal where the parties consent. As a general proposition where a court makes a residence order and one of the spouses has strong ties with a foreign country consideration should be given to a prohibited steps order being made by the court making the residence order. Such an order was made in this case.

[14] Sabina and Tamim have settled down in their placement with Shakib. Their school attendance is now perfectly acceptable. They are doing well at school. I have heard evidence from the social worker that Shakib has been providing good care for his children and that they are happy in his care and responding to him. I accept that evidence.

[15] Shakib does not enjoy good health. He developed a kidney condition and has been unable to work since 2001. He previously worked in restaurants. He is presently in receipt of the following benefits namely:

- (a) £100.39 per week income support.
- (b) £ 30.00 per week child benefit.
- (c) £ 50.00 per week child tax credit.
- (d) £ 40.00 per week social fund.
- (e) £ 90.00 per week disability living allowance

That is a total of £249.00 per week. In addition he receives housing benefit and assistance with the payment of rent on his rented accommodation.

[16] Shakib had a kidney transplant in 2006. The kidney donor was his brother who came from Bangladesh. Shakib is on drugs to prevent rejection of his kidney. He attends hospital once a year. He attends his general practitioner. If the applicant did not take his medication there is a great risk that he would reject his kidney and go back to renal failure. As he says if he cannot get his medication he could die. That medication is free in the United Kingdom. He would have to pay for it and any other treatment he needs in Bangladesh. I consider that this provides a very strong incentive for Shakib to return to Northern Ireland with his children. I do not consider that he would be able to afford such medication in Bangladesh nor do I consider that his family would be able to pay for the medication. His father is a farmer and has

a stationery store. Shannon when giving evidence did not paint a picture of a wealthy family able to support Shakib's medical needs.

[17] Shakib intends to marry Shefali. This is an arranged marriage. Ms Shefali is a Bangladeshi national. Shakib met her on one occasion 10 years ago. The marriage arrangements have been made by Shakib's father. Shakib has been in twice weekly telephone contact with Shefali since in or about February of this year.

[18] Shakib has two aunts who live in London together with a nephew and a niece. The brother who donated his kidney now lives in the Republic of Ireland. Shakib has no property in Northern Ireland except a car worth approximately £4,500 on which there are outstanding hire purchase monies. He rents accommodation. He has no job. The rest of his family is in Bangladesh. Shakib has no property of his own in Bangladesh. If he went to Bangladesh permanently he would not have benefits or free health care.

[19] Sabina and Tamim wish to go to Bangladesh. They wish to see their extended family. They wish to learn about the culture. They also wish to be a part of their father's family and that family will after his remarriage include Shefali. To be involved in the wedding and to see the circumstances of Shefali in her own country is important for them.

[20] I have received an expert report from Sarah Hussein, advocate in the Supreme Court of Bangladesh, as to the law of Bangladesh and the steps that could be taken to enforce in Bangladesh the return of Sabina and Tamim if, in breach of a court order in Northern Ireland, the applicant did not return them to Northern Ireland. I attach as a schedule to this judgment a copy of those advices anonymised. I summarise by concluding that there is no possibility of mirror orders in both jurisdictions. That I am proceeding on the basis that the only effective safeguards that could be put in place are those in this jurisdiction. In those circumstances a considerable degree of care is needed.

[21] I should say something about my assessment of Shakib. He has obtained the trust of the social worker involved in the supervision order. His general practitioner appears to accept his genuineness. I had the opportunity of assessing his responses in the witness box. I consider that he is genuine when he says that he will bring the children back to Northern Ireland and that he respects their Christian and Irish heritage. He was measured and calm. I had some concerns as to the methods by which he gained his present immigration status but I conclude that in respect of his children he understands their best interests. That he is intent on pursuing a course consistent with their growing up in Northern Ireland with the knowledge of their Bangladeshi culture. I reject entirely Shannon's allegations that he is evil. In contrast I found her evidence motivated by deep seated animosity. There was no recognition of any good in respect of Shakib. Her responses were intemperate

and I have serious reservations about her motivation in relation to this application. There was no consideration on her part as to how to assist the children to come to terms with a new member of their household. There appeared to me to be no recognition of Shakib's desire for a life partner. I appreciate the bitterness this failed marriage has generated. I do hope that Shannon can appreciate the children's needs and the positives that she can contribute in the future. I would hope that she would be able to build on those positives with the assistance of Social Services. The disputes between the parents should not interfere with or threaten the children or the children's placement.

[22] I will illustrate with one example my concerns as to the reliability of Shannon's evidence. In her statement at paragraph 7 she said:

"I accept that I did travel to Bangladesh with the applicant and our children in January 2002 for a period of 4 weeks. This was not an enjoyable experience for me or the children. During the 4 weeks the children and I were left in the family home all day . . . We did not speak the language and were not aware of the culture. For 4 weeks we remained in the house, were not taken out during this time at all and indeed only saw the applicant at night. I also contracted malaria and was very ill for a period of my time in Bangladesh".

[23] When she gave evidence to me she stated to me that one of the children, Eileen really enjoyed that visit. That was not what is contained in her statement. In addition her view that this was not an enjoyable experience for her or for the children is contradicted by the evidence of the social worker who reported that she had been told by Eileen that she enjoyed the trip and that Laura never expressed any concerns about it. Indeed the first concerns expressed about that trip to Social Services by the applicant was in the statement from which I have read dated 14 May 2009. I just do not accept that if there had been any such concerns Shannon would not have told Social Services at an earlier stage. This part of her statement is also inconsistent with her permitting Tamim to go to Bangladesh in 2004. If she was concerned about isolation of Tamim through language barriers and lack of involvement I am quite content that she would have expressed those views forcibly at the time.

Legal Principles

[24] In determining this application my paramount consideration is the welfare of Sabina and Tamim. I apply the welfare checklist in Article 3(3) of the Children (Northern Ireland) Order 1995. I have been referred to and seek to apply a line of authorities in relation to the temporary removal of children from

the jurisdiction. Those authorities include *Re K* [1999] 2 Family Law Reports 1094, *Re A* [1999] 2 Family Law Reports 1, *Re T* [1999] 1 Family Law Reports 262, *Re A* (Temporary removal from the jurisdiction) [2005] 1 Family Law Reports 639, *Re L* (Removal from the jurisdiction - holiday) [2001] 1 Family Law Reports 241.

[25] The Article 8 rights of all the family members are engaged. The conclusions I have reached bear in mind the right to family life of the mother, the father and the children.

Conclusion

[26] I accept that Shakib is genuine when he states that he will return the children to Northern Ireland and will comply with the court order and his undertakings. I do so for the following reasons:

- (a) I have already indicated that he appeared to me to be a genuine witness.
- (b) Shakib needs long term treatment for his kidney condition. I accept that in practical terms that is only financially available for him in Northern Ireland. If he does not receive his medication he risks death.
- (c) Shakib's medical condition also provides another strong incentive to him to return. He is in receipt of benefits in Northern Ireland including disability living allowance. His ability to work is certainly severely curtailed through exercise intolerance. There are no benefits in Bangladesh. His future ability to work in Bangladesh would be open to serious doubt. His medical condition and its affects on his ability to work provides a strong financial incentive to him to return to Northern Ireland.
- (d) He accepts that the children's future would be jeopardised by remaining in Bangladesh in that they have grown up in a western Christian tradition. I consider that he was genuine in appreciating the emotional and educational harm that would be caused to them by a move to Bangladesh.
- (e) Shakib had an opportunity in November 2008 to abscond with the children if he had chosen to do so. He was given permission to take Sabina and Tamim to London and he went there with his and their passports. He has demonstrated in the past that he can be trusted.
- (f) In 2004 Shakib took Tamim to Bangladesh with the consent of Shannon and returned with him to Northern Ireland.

[27] In conclusion I consider that Shakib will return the children to Northern Ireland.

[28] I then turn to consider the magnitude of the risk if in fact he did not do so. I consider that the magnitude of that risk is great. Great harm would be caused to Sabina and Tamim if they were not returned to Northern Ireland. They would lose all contact with their mother, with their environment and with their present culture. Irreparable harm would be caused to them.

[29] Sabina and Tamim's welfare also involves them being a part of a secure family unit in Northern Ireland. The wedding which is to take place in Bangladesh offers them a role in welcoming a new member into that family unit. There is a clear benefit to them from this and also in meeting their extended family and being aware of their father's and their father's family culture and background.

[30] The applicant's wish to have Sabina and Tamim at his wedding is also relevant in so far as his ability to care for them depends on him feeling that they are a close part of his family group.

[31] There will be a disruption to contact with Shannon and their half siblings if the children go to Bangladesh. It is clear that contact is important to the welfare of the children. It is also clear that Shannon's contact has to be worked on to maintain and improve its quality and quantity. The effect of disruption to contact is not to be underestimated in the circumstances of this case. I also consider that a component of their welfare is that the children should have an opportunity to develop and cement friendships and routines in their home environment in Northern Ireland. In assessing the effects of any disruption to contact with Shannon I take into account that contact was disrupted for two months during September and October 2008 due to mental illness on the part of Shannon but thereafter contact resumed without upset. There is no question of a contact routine being lost if the children go to Bangladesh for 2 months. I am also convinced that Shannon dearly loves both of her children and that she will be resolute in attending contacts when they return to Northern Ireland. I take into account that there is the opportunity for indirect contact between Shannon and the children whilst they are in Bangladesh by telephone though the frequency of such telephone contact should certainly not be as suggested by Shannon as twice a day which I consider would potentially be disruptive.

[32] In arriving at a decision in relation to welfare I have taken into account and as I have indicated dismiss in the circumstances of this case, any risk of an arranged marriage for Sabina.

[33] In conclusion I consider that it is appropriate to grant leave in this case for a trip to Bangladesh provided sufficient safeguards are put in place I consider that the trip should be for six weeks rather than for two months.

[34] I turn to consider safeguards. There have to be safeguards in place commensurate with the risk and the magnitude of the risk. The applicant has agreed to all the safeguards which I will now set out. I will at the conclusion of this judgment give consideration with the assistance of counsel to the detailed drafting that will be required.

1. The court order will provide for the return of the children to Northern Ireland by a fixed date.
2. The applicant is to provide undertakings to the court. In broad terms those undertakings will include the following:
 - (a) To return the children to Northern Ireland by the fixed date.
 - (b) To lodge in the Office of Care and Protection photocopies of his Irish passport and of his children's passports.
 - (c) To lodge in the Office of Care and Protection within 48 hours of the children returning to Northern Ireland their passports.
 - (d) To lodge in the Office of Care and Protection two weeks before he and the children travel to Bangladesh photocopies of their return air tickets with those photocopies being endorsed by his solicitor as being true and authentic copies of originals which have been shown to him or her together with proof of payment and a letter from his travel agent to the effect that the money is non refundable on the return ticket.
 - (e) To lodge with a solicitor in Bangladesh his and his children's passports within 48 hours of their arrival in Bangladesh.
 - (f) To provide to the court in the form of a schedule –
 - (i) The full names, addresses and telephone numbers of his parents in Bangladesh.
 - (ii) The full names, addresses and any telephone number of each of his brothers in Bangladesh.
 - (iii) The full name, address and any telephone number of Shefali.

- (g) To immediately respond whilst in Bangladesh to any enquiry that the court directs should be made to him in relation to the children.
- (h) That his present solicitor's address should remain as his address for service of any document whilst he is in Bangladesh even if those solicitors no longer act for him and in that event he will arrange for all documents sent to his solicitor to be forwarded to him in Bangladesh.
- (i) That he will permit reasonable indirect contact between Shannon and the children whilst they are in Bangladesh.
- (j) That whilst in Bangladesh he will not discuss or permit anyone else to discuss a marriage for Sabina.

3. The applicant, his father in Bangladesh, his paternal aunt in London and one of his brothers in Bangladesh will enter into solemn declarations on the Koran guaranteeing the safe and due return of the children to Northern Ireland. These declarations to be before an appropriate Iman. These declarations are to be made at least two weeks before the children travel to Bangladesh.

4. The title documents to the father's farm and house are to be deposited with a solicitor in Bangladesh as security for the safe and due return of the children to Northern Ireland. This deposit is to be confirmed in writing by the solicitor to the Office of Care and Protection at least two weeks before the children travel to Bangladesh.

5. The applicant is to deposit in the Office of Care and Protection at least two weeks before he leaves for Bangladesh the registration book for his motor vehicle and he is to leave the keys with his solicitors.

[35] The permission to leave is dependent on these safeguards, absent any of which, the permission is withdrawn and further submissions will have to be made to this court.

[36] I direct the Trust to provide a report to the court in relation to the children in September 2009.

[37] I grant the parties liberty to apply.

Appendix (see paragraph [20])

**EXPERT REPORT OF SARA HOSSAIN
ADVOCATE, SUPREME COURT OF BANGLADESH**

[1] I am an Advocate of the Supreme Court of Bangladesh, and a Senior Associate at the law firm of Dr. Kamal Hossain and Associates. I was enrolled as a lawyer with the Bangladesh Bar Council in 1990, after being called to the Bar from Middle Temple in 1989. I was admitted to practice before the High Court Division of the Supreme Court of Bangladesh in 1992 and before the Appellate Division, our apex court, in 2008. I practice mainly in the area of constitutional law, and also advise on family law matters, including disputes regarding child custody, child abduction and forced marriage.

[2] I understand that I have been instructed, further to the directions of Justice Stephens, by the parents of Sabina and Tamim to provide an expert report entirely independent of all parties in this matter with respect to certain issues arising “in circumstances where the children are subject to court orders in the UK requiring that they be returned within a specified timescale and a male parent fails to return the children within that timescale or at all”. These issues are set out in the instructions contained in an attachment to an email dated 8.5.2009 from . . . of . . . solicitors, who represents the mother in these proceedings.

[3] I have received a further email dated 22.5.2009 from . . . confirming the instructions, and requesting that my expert report be forwarded on 25.5.2009 directly to . . ., as junior counsel in this matter.

[4] During a telephone discussion with . . . on 25.5.2009 I confirmed that the expert report would be forwarded directly to her on 26.5.2009 and I also requested and obtained certain background information regarding the marital status and religious affiliation of the parties as well as the religious affiliation of the children as set out below.

FACTS

[5] The facts in the context of which my report has been prepared, and as set out in the said email dated 22.5.2009, and further gathered from my telephone discussion of 25.5.2009 with . . . are as follows: The Applicant, Shakib, is the father of the subject children. He was born in Bangladesh; he has been resident in Northern Ireland for approximately 13 years and has lived in the UK for 14 years. He is a European Union citizen and the holder

of an Irish passport. The Respondent, Shannon, is the mother of the subject children. She was born in Northern Ireland and is a British Citizen. Both the subject children were born in Northern Ireland and are British Citizens.

[6] The Applicant and the Respondent were married in a civil marriage in the UK or Northern Ireland. They were recently divorced also under civil law and in the UK or Northern Ireland. The Applicant is a Muslim and the Respondent and the children profess Christianity (Roman Catholicism); the children have been christened and one of them, Tamim, has recently taken his communion.

[7] The Applicant, Shakib, has a Residence Order in respect of the children. The First Respondent, Shannon, has contact with the children for a 2 hour period once a week.

[8] The Applicant is also under a Supervision Order and a Prohibited Steps Order, as a result of which he may not remove the children from the jurisdiction without the consent of the Respondent, Shannon and the 2nd named Respondent, Southern Health and Social Services Trust, save by application to the Court. The Applicant has brought the current application before the Court for leave to remove the child from the jurisdiction for the purpose of taking them to Bangladesh for a period of two months for his marriage. The Respondent mother is concerned that should the Applicant be allowed to leave the jurisdiction with the children he will not return.

ISSUES

[9] In the context of the above facts and on examination of the applicable law in Bangladesh, in particular the Guardians and Wards Act 1890 and the Code of Civil Procedure 1908, my opinion is as follows:

In UK courts the welfare of the child is paramount to any decision affecting the children. Please provide guidance in relation to the position of Bangladesh.

[10] Under Bangladesh law, the principle of welfare of the child is a paramount concern in any court decision regarding guardianship and custody of children (under the Guardians and Wards Act 1890, or “the G&W Act”). (The principle may also be invoked in cases of habitual neglect or ill-treatment of a child by a parent (under the Children Act 1974); however this area of law is not discussed here as the advice sought is in the context of determining the custody of children).

[11] Ordinarily, disputes as to guardianship and custody are decided by a Family Court applying the G&W Act. Exceptionally, decisions regarding custody, may be made in an application for *habeas corpus* before the High

Court Division, Supreme Court of Bangladesh, in exercise either of its special original jurisdiction under Article 102 of the Constitution or under its criminal miscellaneous jurisdiction under Section 491 of the Code of Criminal Procedure of 1898.

[12] A Family Court may make orders for appointing or declaring a guardian of the person of a child (Section 7, G&W Act read with Section 3 of the Family Courts Ordinance 1985) or for custody of a minor child (Section 25, G&W Act). Any person wishing to be appointed as the guardian of the child, or a relative of the child may make such an application (Section 8, G&W Act). The Applicant must however be a citizen of Bangladesh (Section 7, 1890 Act).

[13] Section 17 of the G&W Act provides guidance as to matters considered by a Court in appointing a guardian for a minor:

*Section 17 Guardians and Wards Act . (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, **be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the child.***

*(2) In considering what will be for the welfare of the minor, the court shall have regard to the **age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations** of the proposed guardian with the minor or his property.*

*(3) If the minor is old enough to form an **intelligent preference**, the Court may consider that preference.*

*(4) [***]*

(5) The Court shall not appoint or declare any person to be a guardian against his will. [emphasis added]

[14] It may be noted that in considering whether to appoint a guardian, the Court will be guided by what appears to be in the welfare of the minor, ***consistent with the law to which the minor is subject*** (Section 17(1) of the 1890 Act). In Bangladesh, a range of personal laws determine rights within the family, including in relation to guardianship and custody of children. Thus, the Court in making any decision on guardianship or custody, may not be guided exclusively by the principle of welfare, but may instead interpret this principle consistently with the provisions of the applicable personal law for Christians, Hindus or Muslims.

[15] Recent reported decisions of the superior courts appear to indicate a consistent trend to invoke the principle of welfare over the applicable

personal law. The apex court, the Appellate Division of the Supreme Court of Bangladesh has expressly held that “It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party.” (*Abdul Jalil v Sharon Laily Begum Jalil* (1998) 50 DLR (AD) 55). In several decisions, the Supreme Court and High Court Division of the Supreme Court of Bangladesh have passed orders awarding custody of a minor child to a mother invoking the principle of welfare as against the presumption that under Muslim law as applicable in Bangladesh, the mother is prima facie entitled to custody of a child up to the age of 7 in the case of a boy (*Md. Abu Baker Siddiqui vs. S.M.A Baker* 38 DLR 1986 (AD) 106; *Zahida Ahmed Liza v Syed Nooruddin Ahmed*, Writ Petition No 1344 of 2009 (unreported)).

[16] In the present context, Sabina and Tamim , are an almost 9 year old girl and an 8 year old boy respectively. They are British citizens, but are also entitled to be treated as Bangladesh citizens by descent, as they are born to a Bangladeshi father (Section 5 Citizenship Act 1951). Any decision regarding custody of such children, whether made by the Family Court or the High Court, is likely to be based upon application of the welfare principle. The Court may also consider any personal law to which the children are subject, thus either Canon Law if the children are considered to be Roman Catholics, or Muslim law, if they are considered to be Muslims. Other factors which the court may take into consideration in applying the welfare principle include, among others, the children’s age, their own preferences, if they are able to express an intelligent preference, and also the relations of each parent with the child.

What standing or weight, if any, do UK court orders (relating to children) have in Bangladesh?

[17] There are no reported decisions in which orders of UK courts relating to children have been sought to be directly enforced in the courts of Bangladesh. However, there are two decisions of the superior courts in which orders of foreign courts regarding custody (albeit ex parte orders) were cited and considered by the Court in making a determination regarding custody of minor children in the course of proceedings in the nature of habeas corpus. In both cases, however, the Court merely referred to the UK court order, and proceeded to conduct a full hearing of the proceedings in the nature of habeas corpus applying the principle of welfare as the paramount consideration (*Abdul Jalil v Sharon Laily Begum Jalil* (1998) 50 DLR (AD) 55 and *Zahida Ahmed Liza v Syed Nooruddin Ahmed* Writ Petition No. 1344 of 2009). In the former case, the matter proceeded on appeal to the Supreme Court. In the latter, the High Court directed the Family Court to dispose of the matter, and the proceedings are still pending.

Whether there is any protocol for the recognition of UK court orders concerning children.

[18] There is no protocol for the recognition of UK court orders concerning children.

Whether Bangladeshi courts have the power and/or authority to order the return of the children to the UK/ Under what legal provisions would a Bangladeshi court make an order to return children to the UK

[19] In Bangladesh, the return of children to the UK may be ordered by the Supreme Court or the subordinate civil or criminal courts. The powers of each of these is discussed in turn.

[20] The High Court: The High Court Division of the Supreme Court of Bangladesh has powers to hear proceedings in the nature of habeas corpus, either under Article 102 of the Constitution or under Section 491 of the Code of Criminal Procedure 1898.

[21] Under Article 102(1) of the Constitution, the High Court may make any orders on the application of an aggrieved person '*as may be appropriate for the enforcement of fundamental rights*' and under Article 102(2)(b) it may make any orders, on the application of any person, '*directing that a person in custody is being held before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner*'. Under these provisions, the High Court has heard applications for recovery of custody of minor children where there are allegations that they have been removed wrongfully from the custody of one parent.

[22] The High Court also has the power to issue directions in the nature of habeas corpus where necessary under Section 491 of the Code of Criminal Procedure (CrPC)

Section 491.(1) The High Court Division may, whenever it thinks fit, direct:-

(b) that a person illegally or improperly detained in public or private custody with such limits be set at liberty;

[23] To date, the High Court has not made any orders directing the return of children to the UK or any other foreign jurisdiction in the course of habeas corpus proceedings under either Article 102 of the Constitution or Section 491 of the CrPC. It has however made a recent order directing that an adult woman allegedly held in illegal detention by her own family be permitted to return to the UK, and specifically directed that court officers and police

officers accompany her to the British High Commission from where she could return directly to the UK, where there was a court order from the High Court of Justice of England and Wales under the Forced Marriage (Civil Protection) Act requesting judicial authorities to cooperate in the return of the detained person (*Dr. Shipra Chowdhury v Joynal Abedin* Writ Petition No. 7977 of 2008 (unreported)). This order could be of assistance in seeking similar orders in relation to children, where there is a judgment and order of a foreign court in place directing the return of children to the foreign jurisdiction, particularly where that order has been issued on the basis of agreement of the parties, or in contested proceedings.

[24] Civil Courts: The civil courts may exercise their powers under sections 13 and 14 of the Code of Civil Procedure (“the CPC”) for enforcement of a foreign judgment for return of the children to UK. Under section 13 of the CPC, a foreign judgment is conclusive as to any matter adjudicated upon between the parties except in the following circumstances:

1. it has not been pronounced by a court of competent jurisdiction;
2. it has not been given on the merits of the case;
3. it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Bangladesh in cases in which such law is applicable;
4. the proceedings in which the judgment was obtained are opposed to natural justice;
5. it has been obtained by fraud;
6. it sustains a claim founded on a breach of any law in force in Bangladesh

[25] Section 14 of the CPC states that the Courts of Bangladesh would presume a judgment to have been pronounced by a Court of competent jurisdiction upon production of a certified copy of the judgment unless the contrary is proved. The Respondent would have to institute a suit in Bangladesh in order to enforce the order obtained in the UK for return of the children by filing a plaint.

[26] A suit for enforcement of a judgment and order of the UK court would be commenced in the Court of the Joint District Judge, which is the court of first instance under Section 13 and 14 of the CPC. After filing the plaint for execution of the foreign judgment, the following steps would need to be completed before the suit is ready for trial:

1. a date would be fixed for return of service of the plaint on the defendant;
2. the defendant would be required to enter appearance in the suit and to file a written statement (defence) against the plaint or seek an adjournment for filing written statement;

3. if the defendant seeks adjournment, he would need to appear and file a written statement (defence) against the plaint and written objection against any application for attachment before judgment on the next date fixed by the Court;
4. interlocutory applications, e.g. application for rejection of plaint for non disclosure of cause of action, would be heard and orders passed;
5. a date would be fixed by Court for exploring possibilities of resolution of dispute through mediation;
6. in the event that mediation does not result in an amicable resolution of the dispute, the Court would fix a date for framing issues of the suit and on the date so fixed, issues would be framed;
7. the next date fixed by court would be for taking steps under section 30 of the CPC, for passing orders in respect of discovery, delivery of interrogatories, etc.
8. on the next date, the Court would settle a date for commencement of hearing of the suit.

[27] Once the hearing commences, witnesses of both sides would be examined and upon conclusion of examination of witnesses, a judgment and a decree would be passed by Court.

[28] Even if the Respondent obtains a decree in their favour in the court of first instance, the Applicant may appeal against such a decree to the High Court Division of the Supreme Court of Bangladesh and from there, if leave is granted, to the Appellate Division of the Supreme Court of Bangladesh. As it is common practice in Bangladesh for defendants in a suit to delay the proceedings by filing various interlocutory applications, it is difficult to give a reasonable estimate of the time that such proceedings might take until final execution of the judgment. In the event that the suit filed by the Respondent is not contested by the Applicant, the Respondent may expect to conclude the proceedings within two years. After conclusion of these proceedings, the Respondent would need to initiate further proceedings for execution of the judgment and decree.

[29] However, in the event that the Applicant does contest the proceedings, it would be difficult to make any reasonable estimate of the length of the proceedings, and even more difficult to do so in cases where appeals are lodged before the superior courts. Although defendants in a suit of this nature can only raise limited pleas, i.e. those enumerated in section 13, as noted above, the Courts often fail to exercise their jurisdiction in compliance with the provisions of the CPC due to unfamiliarity with these types of proceedings and lack of experience.

How can such orders be enforced

[30] Once the Court passes a judgment in the suit, a separate execution proceeding would have to be instituted. In order to execute a judgment, the Respondent would be required to apply in writing to the Court which passed the decree in the suit or the Court to which the decree has subsequently been sent for execution. After the relevant Court admits the application, it will pass an order for execution of the decree according to the nature of the application. Section 51 of the CPC sets out different modes of execution of decrees and provides that the Court may order execution of the decree in the manner as the nature of the relief granted may require.

[31] A Family Court on conclusion of any petition for guardianship or custody of children, may pass orders directing the return of a child to the UK. However, such orders would be subject to appeal before the Court of the District Judge, and then the High Court Division and if leave is granted, the Appellate Division of the Supreme Court.

What sanctions can be imposed on a parent in breach of an order to return the children to the UK?

[32] If an order is made by a Bangladesh Court to return the children to the UK, and any parent is in breach of that order, s/he may be issued with notice to show cause as to why he should not be held in contempt of court, either *suo motu* by the Court, or on an application by other parties to the proceedings in which the order was made. If found in contempt, they may be liable to pay a fine or to imprisonment for such period as the Court directs.

Whether such orders can be made in advance of the children's travel to Bangladesh

[33] In practice, courts in Bangladesh would not issue such orders in advance of the children's travel to Bangladesh.

Are any such orders subject to appeal or amendment?

[34] An order passed by a Family Court to return a child to the UK would be subject to appeal before the District Court (Sections 17 and 24 of the Family Courts Ordinance), and further before the High Court Division of the Supreme Court and then to the Appellate Division.

[35] An order passed by a High Court would be subject to appeal, if leave is granted for this purpose, before the Appellate Division of the Supreme Court (Article 103, Constitution of Bangladesh). It may be subject to review, but only very exceptionally.

What Orders can the Court put in place in Bangladesh in advance of departure to secure the return of the child should a breach arise?

[36] As noted above, in practice the Courts in Bangladesh would not issue orders prior to any dispute having arisen.

What safe guards can be put into place in advance of departure to secure the return of the child should a breach arise?

[37] The Court in Northern Ireland could forward its orders in this matter to the Bangladesh High Commission or Consulate, to the Foreign and Commonwealth Office, and to the British High Commission in Bangladesh, requesting the cooperation of each of these bodies in the event of a breach and the failure of the Applicant to return the child to the UK. They could specifically request the cooperation of these authorities in producing the child before the British High Commission in order to interview the child or to facilitate its return to the UK (see orders passed in respect of an adult who was allegedly held in illegal detention by her own parents, *Dr. Shipra Chowdhury v Joyanal Abedin and others (Detenu: Dr. Humayra Abedin's)* Writ Petition No. 7977 of 2008 (unreported)).

[38] The Court may also consider including a request to the judicial authorities of Bangladesh to extend their cooperation in ensuring the return of the children to the UK.

[39] Copies of all relevant documentation relating to the children, including their birth certificates and passports could be made available to the Court and to the Respondents prior to the departure of the children.

Police Powers in Bangladesh in respect of abducted children

[40] The Code of Criminal Procedure ('CrPC') and the Police Regulations of Bengal 1943 ('the PRB'), read together with the Penal Code 1898 and the Suppression of Violence against Women and Children (Special Provisions) Act 2000, govern police powers in respect of kidnapping or abduction of children. These powers include powers of inquiry, investigation and arrest in relation to any such complaint, as well as powers of recovery of such a child.

[41] Offences of Kidnapping/Abduction: These offences are defined in the Bangladesh Penal Code 1860 and the Nari O Shishu Nirjatan Daman (Bishesh Bidhan) Ain 2000 (The Suppression of Violence Against Women and Children (Special Provisions) Act 2000 - the "Violence against Women Act").

[42] The Bangladesh Penal Code 1860 defines the offences of kidnapping/abduction as follows:

- Section 361 "*Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of*

the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation: The words "lawful guardian" have been held by the Courts to include any person lawfully entrusted with the care or custody of such minor or other person.

Exception. This Section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose".

- *Section 362: Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.*

[43] In reported decisions of the Pakistan and Indian superior courts (which have persuasive value in Bangladesh) it has been held that allegations of kidnapping under Section 361 BPC, or its equivalent, cannot be made against a father having lawful custody (AIR 1938 Mad. 656 and AIR 1914 Lah. 32; PLD 1968 Lah. 97). There are no reported decisions regarding such allegations brought in a situation where a father is alleged to have abducted his own children in clear breach of orders of a foreign court.

[44] Section 7 of Violence Against Women and Children Act penalizes the kidnapping of any woman or child for immoral purposes, other than the trafficking in women, by a fine or imprisonment. However, in practice, the Police do not generally accept FIRs (First Information Reports) in relation to cases of custody order violations under this Act.

[45] Powers of Inquiry and Investigation: The police may make an inquiry or investigation based on an FIR (First Information Report) made by any person, relating to any cognizable offence (Section 154 CrPC).

[46] Powers of Arrest: The police have powers of arrest without warrant in case of any cognizable offence or in respect of any person against whom a reasonable complaint has been made or credible information has been received of having committed such an offence, or a reasonable suspicion exists of his having been concerned in commission of such an offence (Section 54 CrPC).

[47] A "cognizable offence" as defined in the CrPC is an offence for which a police officer may, in accordance with the second schedule (Schedule II of the CrPC) or under any law for the time being in force, arrest without warrant. Kidnapping and abduction are both cognizable offences. A "complaint" as

defined in the CrPC is an allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence.

[48] Powers of Search and Recovery: The Police may conduct a search for any person who is believed to be wrongfully confined on an order of a Magistrate, and if found, produce such person before the Magistrate (Section 100 of the CrPC).¹ In practice, Courts of Magistrates outside Dhaka may pass such orders on a simple application for a search warrant under Section 100. However, in Dhaka, the practice has developed that Courts of Magistrates will only pass such orders on an application made subsequent to a specific criminal case (for example of kidnapping).

[49] The Police may also carry out an investigation for the purpose of recovery of an abducted female, if so directed by the Magistrate and upon a complaint having been made to a Magistrate of the abduction or unlawful detention of inter alia a female child under sixteen and the Magistrate may then restore that child to her lawful guardian (Section 552 of the CrPC).² However, these powers are not used in practice.

[50] In this case, it may be possible for either the Respondent Mother or the Second Respondent to lodge an FIR with the police, or alternatively to file a complaint before a Magistrate, alleging that the Applicant Father is in breach of a foreign court order to return the children to the UK and has thereby committed the offence of kidnapping/abduction. In practice however, it should be noted that there are no reported examples of the police having accepted FIRs by a mother or any other person in relation to an allegation of kidnapping or abduction against a father.

[51] As mentioned earlier, generally disputes as to guardianship and custody are decided by a Family Court under the Family Courts Act. Exceptionally, an application for *habeas corpus* for custody of minors may also

¹ Section 100 CrPC: *If any Metropolitan Magistrate, Magistrate of the First class or an Executive Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.*

² Section 552 of the CrPC: *Upon complaint made to a Metropolitan Magistrate [or a Magistrate of the first class] or District Magistrate on oath of the abduction or unlawful detention of woman, or of a female child under the age of sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.*

be made before the High Court Division of the Supreme Court. The police may be directed by the High Court Division, in the course of proceedings in the nature of habeas corpus (see above) to produce any person before the Court.³

SARA HOSSAIN

ADVOCATE SUPREME COURT OF BANGLADESH

³ Article 112. *Action in aid of Supreme Court. All authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court.*