

**IN THE SUPREME COURT OF PAKISTAN**  
**(APPELLATE JURISDICTION).**

**PRESENT:**

**MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ**  
**MR. JUSTICE MIAN SHAKIRULLAH JAN**  
**MR. JUSTICE SAIYED SAEED ASHHAD**

**CIVIL PETITION NO. 1079 OF 2006**

(On appeal from the judgment dated 29.11.2006  
passed by the Lahore High Court, Lahore in  
W.P. No. 9730 of 2006).

Sajjad Ahmad Rana  
Versus.  
Ms. Louise Anne Fairely etc.

Petitioner.  
Respondents.

For the petitioner: Malik Muhammad Qayyum, ASC with  
Mr. Shaukat Ali Mehr, ASC  
Mr. Ashard Ali Chaudhry, AOR.

For the Respondents: Ms. Naheeda Mehboob Elahi, ASC.  
Mr. Mehr Khan Malik, AOR

Date of hearing: 08.12.2006.

**ORDER.**

After hearing the learned counsel for the petitioner as well as the  
Caveator, we direct that pending decision of the petition, status-quo shall be  
maintained and the minor shall not be removed <sup>from</sup> ~~for~~ the Territory of Pakistan.  
Adjourned for 2<sup>nd</sup> week of January, 2007.

Islamabad, the  
08.12.2006.  
MAZ

*[Signature]*  
12/12

**IN THE SUPREME COURT OF PAKISTAN**  
**(APPELLATE JURISDICTION)**

**PRESENT:**

**Mr. Justice Iftikhar Muhammad Chaudhry, CJ.**  
**Mr. Justice Mian Shakirullah Jan**  
**Mr. Justice Saiyed Saeed Ashhad**

**Civil Petition No.1079 of 2006**

Sajjad Ahmad Rana

...Petitioner

**Versus**

Ms. Louise Anne Fairley etc.

...Respondents

For the petitioner:

Malik Muhammad Qayyum, ASC  
Mr. Shaukat Ali Mehr, ASC  
Mr. Arshad Ali Chaudhry, AOR

For the respondents:

Mrs. Naheeda Mehboob Elahi, ASC  
Mr. Mehr Khan Malik, AOR

Date of hearing:

10.1.2007

**ORDER**

For want of time, case is adjourned to **17<sup>th</sup> January, 2007.**  
Learned counsel for the parties, however, stated that there are chances to effect compromise between them. Both the parties are directed to put up conditions of the compromise respectively in writing before the Court on the next date of hearing. In the meantime Ms.Misbah Irum Rana (minor) will be allowed to have telephone call with her mother at any time, during the pendency of the petition.

Islamabad, the  
10<sup>th</sup> January, 2007  
Nisar/\*



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**IN THE SUPREME COURT OF PAKISTAN**  
**(APPELLATE JURISDICTION).**

**PRESENT:**

**MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ**

**MR. JUSTICE MIAN SHAKIRULLAH JAN**

**MR. JUSTICE SAIYED SAEED ASHHAD**

LA. No. 631 of 2007

**CIVIL PETITION NO. 1079 OF 2006.**

(On appeal from the judgment of the Lahore High Court  
Lahore dated 29.11.2006 passed in W.P. No. 9730 of 2006)

Sajjad Ahmad Rana etc.

Petitioners

Versus.

Ms. Louise Anne Fairley etc.

Respondents

For the petitioners:

Malik Muhammad Qayyum, ASC  
Dr. Rana M. Shamim, ASC  
Mr. Shaukat Ali Mehr, ASC  
Mr. Arshad Ali Chaudhry, AOR with  
Petitioners (Sajjad Ahmed Rana and Misbah Irum Rana)

For respondent No.1:

Ms. Naheeda Mehboob Elahi, ASC  
Mr. Mehr Khan Malik, AOR

For respondent No.2:

Ch. Khadim Hussain Qaiser, Addl. A.G.

Respondent No.3:

Nemo.

Date of hearing:

17 & 18.01.2007.

**ORDER.**

**IFTIKHAR MUAHMMAD CHAUDHRY, CJ:-** This petition has been filed under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 against the judgment of Lahore High Court, dated 29<sup>th</sup> November, 2006 in Writ Petition No. 9730 of 2006 instituted by Ms. Louise Ann Fairely daughter of Violet Robertson against petitioner Sajjad Ahmed Rana son of Mushtaq Ahmed Rana and two others.

2. Precisely stating the facts of the case are that the petitioner being a Pakistani Citizen by birth contracted marriage with respondent No.1 on 22<sup>nd</sup> January, 1986 in U.K. From the said wedlock, 04 children were born including Misbah Irum Rana (Molly Campbell) on 16<sup>th</sup> July, 1994 in U.K. The union of petitioner and respondent No.1 could not continued as she was divorced by Blackburn County Court on 18<sup>th</sup> October, 2001. Statedly Misbah Irum Rana continue to live in the U.K. with her father. However, visiting rights were given to respondent No.1 during weekends and holidays under an arrangement between the parties. It is stated that petitioner Sajjad Ahmed Rana alongwith Misbah Irum Rana and other children came to

live in Pakistan in 2003. And from 2003 to onward, the children continued to visit their mother off and on. It so happened that when Misbah Irum Rana had gone to spent holidays in the month of June, 2005, her mother, respondent No.1 filed a petition in the Sessions Court of Scotland and succeeded in obtaining order on 29<sup>th</sup> June, 2005 followed by another order dated 15<sup>th</sup> November, 2005. In the meantime, Misbah Irum Rana traveled alongwith her family members including petitioners, one sister and one brother to Pakistan where she stayed with her father. The respondent No.1 started alleging against the petitioner that he has forcibly removed Misbah Irum Rana to Pakistan, therefore, she filed proceedings compelling to petitioner to bring back Misbah Irum Rana to Scotland. In continuation of these efforts on her behalf, a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 read with section 491 Cr.P.C in the nature of Habeas Corpus was filed before the Lahore High Court, Lahore for recovery of Misbah Irum Rana. In the writ petition following prayer was made:-

*"It is therefore, most respectfully prayed that writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973 read with section 491 Cr.P.C in the nature of Habeas Corpus may kindly be accepted and custody of minor Misbah Ahmed Rana by respondent No.1 and 2 be declared as illegal and improper, Minor be recovered from their illegal and improper custody and placed in Neutral Custody or with British High Commission in Islamabad and an order that her custody be restored/returned to petitioner and she returned to country of her habitual place of residence be passed."*

3. Petitioner contested the petition on a number of grounds including the one that after divorce between the petitioner and her, she is living with a person without matrimonial relations and out of their such union, a female child has born. Therefore, she is disqualified for the custody of Misbah Irum Rana, besides she is not in unlawful custody of the petitioner who being her father and natural Guardian, is entitled to retain her custody. A learned Judge of the Lahore High Court vide impugned judgment allowed the petition and passed the following order:-

*"Therefore, this petition is allowed, 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; respondent No.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."*

Against the above order, instant petition has been filed.

4. Learned counsel for both the parties addressed arguments at a considerable length in support of their respective contentions. Reference to a number of documents was also made by them to strengthen their view point.

5. Malik Muhammad Qayyum, ASC appearing for petitioner argued that as far as the petition under Article 199 is concerned, it was not competent under the law and the learned High Court had taken departure from the settled principles while deciding the question relating to custody of minor Misbah Irum Rana and ignored the supreme consideration i.e., the welfare of the child which is necessarily required to be considered by the Court called upon to decide the issue of custody of a minor. According to him admittedly in the instant case, Misbah Irum Rana had attained the puberty, therefore, she is mature and her say is very important in the case and according to him, it is also borne out from the record that she was examined by the learned Judge of the Lahore High Court in Chamber where she declined to join her mother for the reasons mentioned hereinabove.

6. On the other Ms. Naheeda Mehboob Elahi, learned ASC for the respondent vehemently contended that as the respondent Misbah Irum Rana was habitual to live in Scotland where she was born, brought up and she was getting education and she was brought to Pakistan despite injunctive orders operating against the petitioner, therefore, it would be in the interest of justice and welfare of Misbah Irum Rana to go back to Scotland.

7. We would not like to enter into factual controversy and legal questions raised by both the learned counsel, which are essentially of very substantial nature. However, in some other appropriate case, this Court would pronounce an authoritative judgment thereupon because of the fact that during the course of arguments, partys' counsel agreed to dispose of the matter in terms of a compromise which they have reduced into writing under instructions of the parties and stated that the matter be disposed of finally in terms thereof. It would be appropriate to reproduce hereinbelow the contents of compromise/agreement in extenso:-

- a) *That Louise Ann Fairly respondent No.1 agrees to withdraws her petition under section 491 Cr.P.C read with Article 199 of the Constitution bearing No. 9730/2006 filed before the High Court of Lahore, let this be set aside.*
- b) *That petitioners agree that Louise Ann Fairly (respondent No.1) may visit Misbah Irum Rana when ever she so desires for what ever period at their expense in Lahore, Pakistan and complete*

entire travel expenditure and stay expense shall be borne by petitioner No.1.

- c) That petitioner No.1 has no objection whatsoever if Misbah Irum Rana is called by her mother on telephone or Internet (any time).
- d) That petitioner No.1 and his other children would have no objection if the Minor Misbah Irum Rana desires to travel to Scotland to meet her mother.
- e) That respondent No.1 surrenders her full right to custody of Misbah Irum Rana in favour of petitioner and both the parties will withdraw their cases in this respect from the jurisdiction in Scotland and from the jurisdiction in Pakistan. Further both the parties agree that they will not claim any costs whatsoever from the other party for the litigation filed at their instance before any Court.

It is, therefore, requested that matter be disposed of as per compromise proposal agreed by the contesting parties.

Sd/-  
Naheeda Mehboob Elahi  
Advocate Supreme Court of Pakistan  
Petitioner No.1.  
Counsel for respondent No.1

Sd/-  
Khadam Hussain Qaiser  
Additional Advocate General  
Petitioner No.2.  
Punjab  
Counsel for Respondent No.2.

Sd/-  
Malik Muhammad Qayyum  
Advocate Supreme Court of  
Pakistan

For petitioner No.1 & 2

Sd/-  
Dr. Rana M. Shamim  
Advocate Supreme Court  
For Petitioner No.1 & 2.

Sd/-  
Kanwar Iqbal Ahmed, ASC

Sd/-  
Pervaiz Tanoli, ASC"

8. At this juncture, we may point out that in terms of clause (d) of the above compromise, petitioner, his counsel as well as Misbah Irum Rana stated that whenever she would desire to travel to Scotland to meet her mother, she would be free to do so, however, she stated that presently she had no intention to visit to her mother. Although we have heard the case at length and could have disposed of on merits but we considered that it would be in the interest/welfare of Misbah Irum Rana that matter should be settled between the parties

amicably instead of encouraging litigation between the parties in respect of her custody

(Hazanat). Thus we dispose it of in the following terms:-

- i) *The contents of the compromise/agreement shall be read as integral part of this judgment.*
- ii) *As a consequence of compromise between the parties, the impugned judgment dated 29.11.2006 is set-aside. Resultantly, Constitution Petition Bearing No. 9730 of 2006 filed by the respondent before the High Court of Lahore, is dismissed holding that any observations made therein in respect of the factual controversy or on the law point shall cease to have any effect and will not be quoted as precedent.*
- iii) *The respondent No.1 shall be free to visit Misbah Irum Rana and before travelling to Pakistan, she would intimate to the Registrar of this Court about her travelling plan and stay in Lahore. On receipt of such request, the Registrar shall work out the travelling expenditures in the Pound Sterling and petitioner shall be directed to deposit the same with the Registrar within a period of ten days of the intimation by Respondent No.1 and on deposit of the amount, respondent No.1 shall be duly intimated at the cost of the petitioner and the amount incurred by her in purchasing the tickets and staying in the Hotel shall be reimbursed to her against a valid receipt in Pakistan. Petitioner, however, shall have no excuse for not depositing the amount or causing delay, failing which he shall be dealt with for contempt of the Order of this Court.*
- iv) *As respondent No.1 is foreigner, therefore, the Registrar shall also sent a letter to the Inspector General of Police, Punjab for providing her full protection/security during her arrival, departure and stay in Pakistan and the I.G.P. shall send a report of the measures so taken for her security to the Registrar of this Court.*

Petition is converted into appeal and stands disposed of in the above terms with a note of thanks to the learned counsel for the parties for assisting the Court in disposal of the matter.

Islamabad, the  
18.01.2007.  
APPROVED FOR REPORTING.  
MAZ

*MAZ*  
7/2/07

**IN THE SUPREME OF PAKISTAN**

(Appellate Jurisdiction)

10

Now CA 631/2007.

CPLA No. 1079 /2006

1. Sajjad Ahmed Rana son/o Mushtaq Ahmed Rana.
2. ~~Misbah Iram Ahmed Rana minor daughter of Sajjad Ahmed Rana, through Sajjad Ahmed Rana, her father and natural guardian.~~

All residents of House No.31/32, Multan Road, Chauburji (Green Building), Lahore.

.....Petitioners

Versus

1. Mst. Louise Anne Fairley daughter of Violet Robertson, resident of 12 Clachan Biorach, tong, Isle of Lewis, HS2 OJD, Scotland, U.K through her Special Attorney Khawaja Zahid Naseem son of Khawaja Naseem, resident of House No.45, Aslam Shaheed Road, Lalazar, Rawalpindi.
2. Station House officer, Police Station Litton Road, Lahore,
3. Tehmina Sajjad Rana daughter of Sajjad Ahmed Rana resident of House No.31/32, Multan Road, Chauburji (Green Building), Lahore.

....RESPONDENTS

1 + 3  
Presented today. P.P. check  
12-06-06

M. Karim, 1500

The Petition is in Order.  
7.12.06

Filed today on 7-12-06  
By Arshad Ali Ch. AOL  
with 03 paper Books.  
Institution Officer

07-12-06

M. Karim (11)

7/12/06

M. Z. Karim, 1500



PETITION UNDER ARTICLE 185 (3) OF THE  
CONSTITUTION OF ISLAMIC REPUBLIC OF  
PAKISTAN, 1973 SEEKING LEAVE TO APPEAL  
AGAINST THE JUDGMENT OF THE LAHORE  
HIGH COURT, LAHORE DATED 29<sup>TH</sup>  
NOVEMBER, 2006 PASSED IN WRIT PETITION  
NO.9730- OF 2006.

Respectfully Sheweth:

Following points of law arise for determination by this honourable Court:

QUESTIONS OF LAW

- I. Whether the learned Judge of the High Court was not in error in observing that he was not called upon to decide the question of welfare of the minor which according to the learned Judge could only be decided by the Scottish Court? It is respectfully submitted that under all laws and cannon of justice so far as the custody of the minor, even interim in nature, is concerned, the same cannot be decided without taking into consideration the welfare of the minor which is

always the dominant rather than the only consideration?

- II. Whether while granting custody of the minor to the mother the learned Judge could have ignored the principles of Muslim Personal Law, Shariat Application Act, The Enforcement of Shariah Act, 1991 and Articles 2 and 2-A of the Constitution of Islamic Republic of Pakistan, 1973?
- III. Whether a petition of Habeas Corpus under Section 491 of the Criminal Procedure Code is maintainable through an Attorney and whether the same can be adjudicated in the total absence of the petitioner in person?
- IV. Whether a petition under Section 491 of the Code of Criminal Procedure read with Article 199 (1) (b) (i) of the Constitution of Islamic Republic of Pakistan, 1973 was at all maintainable against the father and natural guardian?
- V. Whether the learned Judge of the Lahore High Court had rightly observed that the question of custody of the minor could only be decided by the Courts in Scotland of which the minor was "habitual residence"?

It is respectfully submitted that on admitted facts the minors are living with her father at Lahore since 2003 and, as such, the learned Judge has acted illegally in holding that the question of custody of the minor cannot be decided by the Courts in Pakistan.

- VI. Whether the mere fact that an order regulating the interim custody of the minor had been passed by the Scottish Court could lead to the conclusion that the custody of the minor was unlawful or without lawful authority notwithstanding that the minor was a citizen of Pakistan and a Muslim?
- VII. Whether the custody of the minor Muslim girl who had attained the age of puberty could be handed over to the mother who had not only forsaken Islam but also living with a man (Kenny Campbell) in Scotland without any regular marriage and out of which union a child had also born?
- VIII. Whether the learned Judge of the High Court was correct in not giving effect to the wishes of the minor who had not only attained the age of discretion but also puberty? It is respectfully submitted that the learned Judge of the High Court has failed to notice that in cases relating to custody of the minors the

rights of the parents inter se are not of much importance and significance and on the other hand it is welfare of the minor which determines the question of custody.

- IX. Whether the order of the learned High Court is not vitiated on account of its failure to realize that if the custody of the minor is given to the mother and she is allowed to take the minor out of Pakistan, the petitioner No.1 who is the father and natural guardian cannot exercise his right of supervision over the custody and the child would at all times be lost to the petitioner No.1?
- X. Whether a Muslim girl could be forced to live against her wishes in a country having different culture and values and atmosphere not conducive to Islamic way of life?
- XI. Whether the learned Judge of the High Court could have directed that the custody of the minor be handed over to a representative of the British Embassy so that the minor can be taken out of the country to England?
- XII. Whether the so-called protocol arrived at between the Judiciaries of Pakistan and United Kingdom is

enforceable or has any validity in the absence of any law giving effect to such protocol?

XIII. Whether an order passed by foreign Court which was not final and conclusive can be given effect to by the Pakistani Courts especially the High Court in the exercise of its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 or Section 491 of the Code of Criminal Procedure?

XIV. Whether the learned Judge was correct in holding that the petitioner No.1 had surrendered to the jurisdiction of the Scottish Court?

XV. Whether by failing to give effect to the wishes of the minor the learned Judge has not acted contrary to Article 12 of the Convention on the Rights of Child?

### FACTS

1. The facts giving rise to the unfortunate dispute relates to the custody of the minor namely Misbah Ahmad Raana, aged 12½ years having born on 16<sup>th</sup> July, 1994, who has since attained the age of puberty. Petitioner No.1 is the father while respondent No.1 is the mother of the minor.

The marriage between the spouses has taken place in the year 1984. Out of this wedlock four children; two sons namely Omer and Adam and two daughters namely Tenmina and Misbah now aged 21 years, 16 years, 19 years and 12½ years respectively were born.

2. That unfortunately the spouses separated in 2000 when respondent No.1 left the house of the petitioner No.1 in Blackburn England leaving behind her four children who remained in the care and custody of the petitioner till 3<sup>rd</sup> of March, 2003 in Glasgow when the petitioner No.1 along with four children came to Pakistan for permanently residing there. It may be mentioned here that in the meanwhile the marriage has been dissolved through divorce pronounced on 18<sup>th</sup> of October, 2001.
3. That on 17<sup>th</sup> May, 2003 the petitioner No.1 took the children to England so that they can meet their mother. They came back after a month to Pakistan when the petitioner would up all his affairs in England. It may be mentioned that there was an informal arrangement between the parties by virtue of which the children were to continue living with the petitioner No.1 though the respondent No.1 was never denied visitation right.

4. That in June, 2005 the petitioner No.1 took the children to United Kingdom so that they could meet their mother. It was at that stage that the respondent No.1 with mala fide object tried to deprive the petitioner No.1 of the custody of the minor. In pursuance of her illegal designs the respondent No.1 instituted custody application in the Scottish Courts where she succeeded in obtaining interim custody at the back of the petitioner No.1.
5. That at this stage, the attention is drawn to the only substantive order dated 30.6.2006 made by the Sessions Court, Scotland after submission of the alleged written reply by the petitioner No.1 Sajjad. On the face of this order, no direction has been issued on the merits of the custody application filed by the respondent Fairley. Instead, an Advocate has been appointed to enquire into and report to the Court on the facts and circumstances relating to the care and up-bringing the child Misbah. Furthermore, a specific direction was issued to ascertain the view of Misbah Rana as regards the parent with whom she would like to remain permanently. It is submitted that this order cannot be construed as even a Residence Order. On the face thereof, its subject is confined to ascertaining the wishes of the child.

According to Article 12 of the Convention of the Rights of the Child, it is incumbent on the Signatory States i.e United Kingdom as well to ascertain the preference of a child of mature understanding in custody matters and to given effect to it so far as possible. This right of Misbah has been disregarded in the interim while making the Residence order.

6. That Misbah Iram is a child of mature understanding. This has been found by the learned Single Judge himself. He has personally examined the child to ascertain her preferences in his chamber and has recorded that she refuses to live with her mother. On the other hand, she has expressed a decided preference to live in Pakistan with her father. However, the preference of the child has been totally ignored on the hypothesis that she is under the influence of her father who may have tutored her. This is unsustainable. It is an error of international law to send Misbah to U.K to let British Court undertake this exercise. Abdication of jurisdiction has taken place on the part of the learned Single Judge.
7. That in support of the assertion that Misbah Iram had abandoned the roof provided to her by respondent Fairley on her own volition, documents have been



adduced on the record by means of an application dated 7.11.2006. This may be seen. Thus, there is no basis, whatsoever, to sustain the finding that minor Misbah Iram was removed from the custody of respondent Fairley by petitioner No.1 through any deceitful manner. Quite to the contrary, she has herself abandoned the house on account of the intolerable conditions prevailing there. These circumstances have also been admitted by respondent Fairley in so many words.

8. That respondent Fairley is an unfit person to have the custody of minor Misbah who is a puberty in the eyes of Shariat. She has admitted to be living in stable adulterous relationship with one Mr. Kenneth Campbell. This person is not related to Misbah Rana within prohibited degree. Thus, Shariat prohibits Misbah Rana to be sent to live with her adulteress mother and a total non-Mahram. The admission made on this issue is reproduced from para 5 of her custody application in her own words:

“She is in a stable relationship with Mr. Kenny Campbell with whom she resides at the address in the instance. There accommodation is adequate in the short term.”

9. In addition to continuously living in adultery, respondent Fairley is now nursing a two months' old baby girl purportedly begotten by Mr. Kenneth Campbell. This is the reason she could not travel to Lahore to participate in the proceedings of the above-noted Writ Petition. Nevertheless, the impugned judgment has made arrangements to convey Misbah Rana out of Pakistan to live in a household presided by Mr. Kenneth Campbell.
10. On 22.11.2006, a Newspaper called "Daily Express" has carried a report by Brian Swanson to the effect that officers from Northern Constabulary had been called to the house in which respondent Fairley lives in the village of Tong near Stornoway-on-Lewis. At least two serious quarrels had taken place between the respondent and her boy-friend which necessitated police intervention. A copy of aforesaid Newspaper report has also been placed on the record of the above-noted writ petition.
11. That respondent Fairley is an apostate (Murtid). She had entered the fold of Islam on her own volition and having entered it once, has abandoned Islam. According to Shariat which has supremacy in Pakistan, respondent Fairley is not entitled to the custody of her Muslim child.

12. That, on the other hand, if respondent Fairley still claims to be a Muslim, she has rendered herself liable to Hadd under Shariat as she has confessed to have committed adultery. Thus, she is an unfit person to retain the custody of Misbah Rana, regardless of whether or not she still continues to remain a Muslim.
13. Islam is the State Religion of Pakistan. All laws and decision have to conform to the Injunctions of Islam. This is the mandate of Article 2 and 2-A read with Article 227 of the Constitution of Islamic Republic of Pakistan, 1973. These cannot be relegated to a subsidiary status on any consideration of Comity or Reciprocity between Judicial Systems. If adherence to Islam shall make Pakistan a parhia state as feared by the learned Single Judge, let this be so. In Pakistan, Shariat has to prevail, Comity or no Comity.
14. That Shariah is the Supreme Law in Pakistan. This is the mandate of Enforcement of Shariah Act, 1991 promulgated on 16<sup>th</sup> May, 1991, which still exists on the statute-book. In this view of the matter, no question arises of giving effect to any judgment or order of any Foreign Court which runs counter to the Injunctions of Islam. This shall violate Section 3 of the 1991 Act, *ibid.*

Impugned judgment is liable to be set aside on this single ground.

15. That quite apart from the Shariah and strictly on the legal plea, for all the reasons contained from clause (a) to (f) of Section 13 of the Code of Civil Procedure, even if order dated 30.6.2006 *ibid*, is to be treated as a Foreign Judgment, it is not conclusive for any matter to which is to be decided by Court in Pakistan.
16. That, in any case, no order passed by Scottish Court including the order dated 30.6.2006 *ibid*, is capable of being executed as a decree passed by any Court in U.K in terms of Section 44(a) of the Code of Civil Procedure.
17. That both the petitioner No.1 as well as his puberty daughter are citizens of Pakistan. They cannot be directed to be sent out of Pakistan against their will. Both of them have a fundamental right to remain in Pakistan as long as they want. The direction in the impugned judgment amounts to either Exile or Extradition. It is illegal to issue any such directions. It need to be nullified.
18. That on 18<sup>th</sup> September, 2006 respondent No.1 filed a petition under Section 491 of the Code of Criminal Procedure read with Article 199 of the Constitution of

Islamic Republic of Pakistan, 1973 with the following prayer:-

“It is therefore, most respectfully prayed that writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 read with Section 491 Cr.P.C in the nature of Habeas Corpus may kindly be accepted and custody of minor Misbah Ahmad Rana by respondents No. 1 and 2 be declared as illegal and improper, Minor be recovered from their illegal and improper custody and placed in Neutral Custody or with British High Commission in Islamabad and an order that her custody be restored/returned to petitioner and she returned to country of her habitual place of residence be passed.

Any other relief this honourable Court may deem fit and proper may also be passed.”

19. That the aforesaid petition came up for hearing before the learned Judge of the Lahore High Court, Lahore. The proceedings were contested by the petitioner No.1. However, the learned Judge vide orders passed on 29<sup>th</sup> November, 2006 was pleased to allow the petition

directing the respondents No. 1 and 2 to hand over the custody of the minor Misbah Iram Ahmad Raana to a senior female Officer of the British High Commission for sending the minor to Scotland. The detailed judgment has now been written and a copy has been made available to the petitioner.

20. That it is pertinent to point out that the order of the High Court proceeds on the assumption that some time prior to May, 2006 petitioner No.1 made a reply to the custody application filed by respondent No.1 Fairley through a Law Firm called Anderson Partnership in which certain admissions have been made as to the jurisdiction of the Scottish Court and the domicile of Misbah Iram as also the petitioner No.1. The custody of the minor has been directed to be transferred to the mother respondent No.1 Fairley on the twin grounds that Misbah Iram was an ordinary/habitual resident of Glasgow in Scotland and the petitioner No.1 had surrendered to the jurisdiction of the Scottish Courts. It has further been found that the conduct of the petitioner No.1 has been deceitful and even fraudulent because he did not make efforts to restore Misbah Rana to the custody of respondent No.1 Fairley even though she may

have abandoned the house of her mother on her own initiative. It has been held that the petitioner No.1 was under a legal duty to respect some interdict order of Scottish Court. As has been demonstrated above, no such specific Order exists.

21. That the petitioner No.1 filed an Intra Court Appeal (ICA No.348 of 2006) in the Lahore High Court, Lahore which came up for hearing before the learned Division Bench of the Lahore High Court on 04.12.2006 when the learned Judges were pleased to adjourn the case to 08.12.2006 at the request of the learned Counsel for the petitioners so as to enable him to satisfy the Court as regards the maintainability of the Intra Court Appeal.

22. That the petitioner is now advised that the aforesaid Intra Court Appeal is not competent and mistakenly filed in the Lahore High Court which will be withdrawn from the High Court on 8th December, 2006 and the petitioner is filing the Civil Petition for Leave to Appeal which is urgent in nature.

23. That for the reasons aforesaid as also for the points noted in the opening part of the petitioner, the petitioners pray for the grant of leave to appeal against the judgment

of the learned Lahore High Court, Lahore dated 29th of November, 2006 passed in Writ Petition No.9730-H of 2006, inter alia, on the follow

### GROUND S

- a) That a petition under Section 491 of the Code of Criminal Procedure read with Article 199 (1) (b) (i) of the Constitution of Islamic Republic of Pakistan, 1973 was not at all maintainable against the father and natural guardian.
- b) That the learned Judge of the High Court was in error in observing that he was not called upon to decide the question of welfare of the minor which according to the learned Judge could only be decided by the Scottish Court. It is respectfully submitted that under all laws and cannon of justice so far as the custody of the minor, even interim in nature, is concerned, the same cannot be decided without taking into consideration the welfare of the minor which is always the dominant rather than the only consideration.
- c) That while granting custody of the minor to the mother the learned Judge could not have ignored the principles of Muslim Personal Law, Shariat Application



Act, The Enforcement of Shariah Act, 1991 and Articles 2 and 2-A of the Constitution of Islamic Republic of Pakistan, 1973.

- d) That the learned Judge of the Lahore High Court had not rightly observed that the question of custody of the minor could only be decided by the Courts in Scotland of which the minor was "habitual residence". It is respectfully submitted that on admitted facts the minors are living with her father at Lahore since 2003 and, as such, the learned Judge has acted illegally in holding that the question of custody of the minor cannot be decided by the Courts in Pakistan.
- e) That a petition of Habeas Corpus under Section 491 of the Criminal Procedure Code is not maintainable through an Attorney and whether the same can be adjudicated in the total absence of the petitioner in person.
- f) That the mere fact that an order regulating the interim custody of the minor had not been passed by the Scottish Court could lead to the conclusion that the custody of the minor was unlawful or without lawful authority notwithstanding that the minor was a citizen of Pakistan and a Muslim.

- g) That the custody of the minor Muslim girl who had attained the age of puberty could not be handed over to the mother who had not only forsaken Islam but also living with a man (Kenny Campbell) in Scotland without any regular marriage and out of which union a child had also born.
- h) That the learned Judge of the High Court was not correct in not giving effect to the wishes of the minor who had not only attained the age of discretion but also puberty. It is respectfully submitted that the learned Judge of the High Court has failed to notice that in cases relating to custody of the minors the rights of the parents inter se are not of much importance and significance and on the other hand it is welfare of the minor which determines the question of custody.
- i) That the order of the learned High Court is vitiated on account of its failure to realize that if the custody of the minor is given to the mother and she is allowed to take the minor out of Pakistan, the petitioner No.1 who is the father and natural guardian cannot exercise his right of supervision over the custody and the child would at all times be lost to the petitioner No.1.

- j) That a Muslim girl could not be forced to live against her wishes in a country having different culture and values and atmosphere not conducive to Islamic way of life.
- k) That the learned Judge of the High Court could not have directed that the custody of the minor be handed over to a representative of the British Embassy so that the minor can be taken out of the country to England.
- l) That the so-called protocol arrived at between the Judiciaries of Pakistan and United Kingdom is not enforceable or has no validity in the absence of any law giving effect to such protocol.
- m) That an order passed by foreign Court which was not final and conclusive cannot be given effect to by the Pakistani Courts especially the High Court in the exercise of its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 or Section 491 of the Code of Criminal Procedure. All proceedings abroad are irrelevant given that the minor is Pakistani and is subject to Pakistani law whereunder her welfare is to be determined by Pakistani Court.

- n) That the learned Judge was not correct in holding that the petitioner No.1 had surrendered to the jurisdiction of the Scottish Court.
- o) That by failing to give effect to the wishes of the minor the learned Judge has acted contrary to Article 12 of the Convention on the Rights of Child.
- p) That it was not in dispute before the Lahore High Court that the minor was admitted in school in Lahore and had been living in Lahore since 2003. Resultantly, the Lahore High Court erred when it took this to be in issue and held that school record and passport had not been filed. The same are being filed herewith which clearly demonstrate residence in Pakistan. Furthermore, correspondence of the minor with friends are annexed herewith demonstrating the minor's willingness and indeed discussion with friends that she was willingly returning to Pakistan.

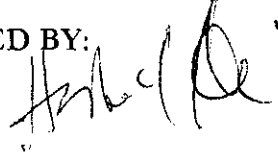
### **P R A Y E R**

Under these circumstances, it is respectfully prayed that Leave to Appeal may kindly be granted against the judgment dated 29<sup>th</sup> of November, 2006 of the learned Single Judge of

the Lahore High Court, Lahore passed in Writ Petition  
No.9730- of 2006.

DRAWN BY:

FILED BY:



(*in aid of*) **Muhammad Qayyum**)

*Advocate*

*Supreme Court of Pakistan*

**51-Justice Muhammad Akram  
Road, Lahore.**

Dated: \_\_\_\_\_ / 2006

Certificate:

*As per instructions of the petitioners, this is the first C.P.L.A. against the impugned  
judgment before this august Court.*

~~(*in aid of*)~~

*Advocate-on-Record*

*Supreme Court of Pakistan,  
Lahore.*

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