

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(FAMILY DIVISION)

FL No. 48 of 2005

IN THE MARRIAGE OF:

DR. TANSEEM RAMENDHAR (formerly ARMOGAN) APPLICANT

AND

DR. VIDYA ARMOGAN RESPONDENT

Before the Honourable Justice William J. Chandler, Judge of the High Court

**2013: 22 August
2 September**

Appearances:

Beverly Lady Walrond Q.C. of Law Chambers for the Applicant

Mr. Dale Marshall Q.C. and Mrs. Tammy Bryan of Messrs George Walton Payne & Co. in association with Dr. Lenda Blackman of Elnor Chambers for the Respondent

DECISION

BACKGROUND

[1] The parties to this action were married on 12 August 2000. The Respondent is an accomplished orthodontist in Barbados and the Applicant, who has reverted to her maiden name of Ramendhar, is a medical doctor who recently completed her membership of the Royal College of Obstetricians

and Gynaecologists (“MRCOG”). On 3 May 2007 Inniss J granted orders under *section 27* of the *Family Law Act, Cap. 214* of the Laws of Barbados (“*Family Law Act*”).

[2] At that time, the only child of the parties Saffiya Yasmin Ramendhar Armogan (“the child”) was in the care and control of the Applicant. Issues surfaced concerning the child’s paternity and the Respondent requested a DNA test. That request was subsequently abandoned. Paternity was acknowledged and the Respondent’s name was added to the child’s birth certificate under the *Vital Statistics Registration Act, Cap. 192A*. Previous to this the child’s surname was Ramendhar, that of her mother. The child’s present surname therefore is a combination of both parents’ surnames. Orders under *section 42* of the *Family Law Act* were granted on 30 August 2007. The matter came before this Court on 14 January 2009 (“the 2009 Order”) where it was ordered, *inter alia*, that:

- (a) the Applicant be at liberty to remove the minor child born on the 18th day of June, 2004 from this jurisdiction to reside with her in Dublin, Ireland for a period of four years during her course of residency and studies for Membership in the Royal College of Obstetrics and Gynaecology;
- (b) each year during such residency, the minor child be returned to her father Dr. Vidya Armogan for the full Easter holidays, the first half of the said child’s summer holiday and for Christmas holiday in alternate years starting with Christmas holidays 2009;
- (c) the said Dr. Vidya Armogan do have reasonable access to the said child during any visit that he may make to Ireland upon giving to the Applicant not less than 2 weeks’ notice of his intention to so visit;

- (d) the said Dr. Vidya Armogan do pay the child's travel and other expenses relating to such access periods and that the cost of a return ticket for the caregiver of the said child to accompany the said child to Barbados; and
- (e) the Applicant do bear the cost of accommodation and any other expenses for any such caregiver travelling with the child to Barbados.

[3] The Applicant and minor child subsequently relocated to Ireland. The Respondent has visited the child in Ireland, and has had access to the child in Barbados in accordance with the above order. The purpose of this order was to facilitate the Applicant to travel to Ireland in order to qualify for the MRCOG designation.

THE PRESENT APPLICATIONS

- [4] There are two applications before the Court:
1. The Applicant's application, filed 8 July 2013, for orders that:
 - (a) she be at liberty to have the minor child reside with her in Dublin, Ireland;
 - (b) the provisions for access of the said minor child to her father Dr. Vidya Armogan outlined in the Court Order dated 14 January 2009 be continued with the addition that the Respondent shall have access to the minor child during any October break in any year that the minor child is not scheduled to spend Christmas with the Respondent under the Order of the Court;
 - (c) the Order of this Court in respect of the maintenance of the said child do stand until further Order of the Court or altered by the agreement of the parties;
 - (d) such further or other relief as to the Court may seem necessary and/or just.

2. The Respondent's application, made in his affidavit filed 11 July 2013, is for orders that:

- (a) the Respondent have care and control of the minor child who will reside in Barbados;
- (b) the Applicant have access to the minor child during the Easter holidays, half of the Summer holidays and alternate Christmas holidays; and
- (c) the Applicant pay the cost of the minor child travelling from Barbados to Ireland to visit the Applicant.

THE ISSUES

The Preliminary Issue

[5] During hearing of Dr. Ramendhar's application on 22 August 2013, the Respondent also made an application for an order that the child be assessed by a child psychologist so as to determine the likely impact of granting or refusing Dr. Ramendhar's application on the welfare of the child. I ordered that the parties file written submissions on this point by 23 August 2013. I also ordered that the Respondent file written submissions in response to Dr. Ramendhar's application by 27 August 2013.

The Major Issue

[6] The major issue is whether the Applicant should be permitted to have the minor child reside with her in Dublin, Ireland whilst maintaining the provisions for access and maintenance in the 2009 Order, or alternatively, whether, the Respondent should have care and control of the child vested in him and obtain the requested costs orders as outlined in the Respondent's application above.

THE EVIDENCE

[7] It is prudent for this Court to highlight that, in their affidavits, both parties have resurrected issues that surfaced, and were dealt with by the Court, before the parties divorced. These issues concern, *inter alia*,: (i) the Respondent's name not being listed on the child's birth certificate; (ii) the alleged physical and mental abuse inflicted by the Applicant upon the child; (iii) the Respondent's allegations of fraud committed by the Applicant; (iv) allegations of the Applicant's extra-marital affair; (v) the paternity of the child; (vi) the alleged dominance of the Respondent on the Applicant during the marriage; and (vii) the Respondent's alleged pornographic addiction. I will only refer to these matters where they impact on the welfare of the child.

The Applicant's Evidence

[8] The Applicant supported her application by sworn affidavits filed on 1 July, 24 July and 23 August 2013 respectively. She deposed that the minor child had resided with her since birth and that she had nurtured and provided for her during that time. As a result, removal of the child from her care would be a "terrible emotional setback" for the child.

[9] She deposed that her decision to remain in Ireland with the minor child, and pursue and develop her career there, is not unreasonable and that she should not be prevented from doing so to suit the requirements and wants of the Respondent, from whom she was now divorced. She successfully completed

the MRCOG, had commenced an M.sc in Healthcare Management and wished to further specialise in Invitro Fertilisation (“IVF”). Analogously, she disputed that the minor child is being “dragged” behind her career as the Respondent alleged.

[10] Dr. Ramendhar deposed to her Stamp 4 status in Ireland. She said that this enabled her to work without a permit and that, after one more year of residence in Ireland, she and the child would be eligible for Irish citizenship. She also deposed that she had previously asked the Respondent to assist her in obtaining European Union (“EU”) citizenship for the child, but he had refused to do so.

[11] She disputed that she was unable to be the best caregiver for the child and stated that she was able to effectively manage her work, studies and priorities as a mother. She refuted the Respondent’s claims that she was selfish with her time and that the child would be negatively affected by the time she spent with her live-in helper whose first language was not English.

[12] Dr. Ramendhar stated that the minor child was well settled in Ireland, was happy in her environment, has many friends and is performing well at school. She made reference to the minor child’s school report annexed to the Respondent’s affidavit of 8 August 2013 as **Exhibit VA11**, her January 2012 report, June 2013 report annexed to her second affidavit of 24 July 2013 as **Exhibit TR8**, and a letter from the principal of her school which attested to the minor child’s personality and school life (**Exhibit TR16**).

She said that these reports paint a picture of the child being intelligent, well-mannered and respectful.

- [13] She disputed the Respondent's claims that she has inefficiently managed the travel arrangements for the minor child. She deposed that, on multiple occasions, her parents have utilised their own funds to travel to Ireland so they could accompany the minor child to Barbados to facilitate the Respondent's rights of access. She claimed that the issue in relation to travel surrounded the facilitation of a guardian to accompany the minor child to Barbados and remain there throughout the duration of the access period. This, she said, caused her great expense as she provided the accommodation, transportation and other incidentals for the guardian.
- [14] She deposed that Dr. Armogan always had access to the child's school schedule and had maintained direct contact with the school. Therefore, she said, he was fully cognisant of the child's holiday periods and school times.
- [15] In response to the Respondent's contentions that the Applicant refused to change the name of the child on school documentation, the Applicant said in her evidence-in-chief, that she had instructed the school to make such changes. She further stated that since she gave those instructions, the school reports had been issued with some inconsistency, as they would sometimes bear her surname only and, at other times, bear both her surname as well as that of the Respondent. This, she contended, was no fault of her own.

- [16] She stated that the child should also remain in her care and control as she is nearing the age of puberty.
- [17] Dr. Ramendhar also deposed that the Respondent appeared to be engaging the child in negative conversations about her and that this would have a negative effect on the child. This is evidenced, she stated, by the content of the Respondent's affidavits, particularly paragraph 18 of the Respondent's 8 August 2013 affidavit.
- [18] Dr. Ramendhar denied that she had ever deprived the child of any presents sent by the Respondent. Instead, she contended that, on occasions, she had bought gifts for the child in his name. In response to the allegations that in 2007 she refused to accept delivery of the child's Christmas gift, she deposed that she was away in India with the child at the time of delivery and, therefore, the gift was returned.
- [19] She also denied that she attempted to limit the Respondent's contact with the child. She deposed that the child speaks to her father via use of her Ipad and that, as well as that device, there is also a landline and her cell phone with which to contact the child.
- [20] She deposed that she had applied for a post in obstetrics and gynaecology at the Queen Elizabeth Hospital ("QEHL") in Barbados and received a reply that there were no posts available. The correspondence was attached to her affidavit filed 1 July 2013 as **Exhibit TR4**. She is currently working and

studying in Ireland and, in 2012, had purchased a house there with the help of a mortgage.

The Respondent's Evidence

- [21] On 12 July and 8 August 2013 the Respondent filed affidavits in response to Dr. Ramendhar's application.
- [22] The gist of Dr. Armogan's affidavit evidence is that the care and control of the minor child should be vested in him within the jurisdiction of Barbados, as the child will have better life experiences here. He deposed that the child would be able to take advantage of the Caribbean weather and culture and would develop and be exposed to her West Indian heritage. He contended that she would be surrounded by family, namely himself, her paternal grandparents, paternal uncles, her maternal aunt and his partner Susan Heath. Therefore, aside from being in his presence, the child will be surrounded with positive male role models and a close knit family unit, both of which, he contended, were lacking in Ireland.
- [23] He deposed that the child had claimed that the Applicant spends little time with her and had complained that the Applicant is selfish. He expressed his concern that the child spent a considerable amount of time with the Applicant's live in help who hardly speaks English.
- [24] He did not dispute that the child had performed and continues to perform well at school in Ireland, but deposed to his belief that the child has not reached her full potential and would thrive in Barbados which, in his

opinion, has a better educational system than that of Ireland. He believed that the child would adapt well and quickly to the Barbadian educational system and referred the Court to the Lockerbie College performance review (**Exhibit TR15**).

[25] He deposed to his optimism for the child's future and claimed that she could have the benefit of both his Canadian and EU citizenship, whilst maintaining Barbados as her home. He stated that he had previously offered to obtain EU citizenship for the child, but the Applicant declined his offer.

[26] Dr. Armogan deposed that he had incurred considerable expense in facilitating his travel and other expenses to spend time with the minor child in Ireland, or to return her to Barbados. He deposed that the Applicant often made last minute travel arrangements for the child, which resulted in him paying higher airfares and that, on occasion, he had to make alternative arrangements when the Applicant failed to provide someone to accompany the child on the journey. This, he said, had monetary, physical and emotional effects on him, and also affected his business.

[27] He deposed that the Applicant "abused the spirit of the Order" by taking the minor child out of school for at least two weeks a year to go on vacations. He contended that the Applicant attempted to diminish his relationship with the child by failing to inform him of additional trips or of occasions when the child would be out of the jurisdiction of Ireland.

[28] Dr. Armogan deposed that he did not oppose the Applicant pursuing her studies, but was opposed to her “dragging” the child behind her to do so, when he can provide a stable, love-filled home environment in Barbados. He claimed that the Applicant had no intention of returning to Barbados with the minor child and that this was evidenced by her starting an M.Sc. without the permission of the Court which would finish fifteen months after the time period allotted to her to complete her studies under the 2009 Order. He also contended that Dr. Ramendhar’s enrolment in the M.Sc. also evidenced that her application for a post at the QEH and subsequent rejection was a mere “smoke and mirror” and confirmation that she had no intention of returning to Barbados.

[29] Furthermore, he said, with the Applicant’s professional skills and specialities, she would not be hindered from entering the private sector. He made mention of private medical facilities in Barbados, and also stated that the Applicant could also establish her own practice here.

[30] He also opined that the Applicant’s recent purchase of a house in Ireland and her commitment to a thirty year mortgage there also evidenced her decision not to return to Barbados.

[31] He further deposed that the child should be placed in his care and control to prevent her from being tainted by the Applicant’s alleged racial prejudices. He claimed that he was made aware of the Applicant’s alleged racism during their marriage and contended that the minor child’s actions have evidenced

that she, too, had begun to form prejudices against people of colour. He contended that the child's current environment is "morally corrupt" and argued that the child would be surrounded by people of all races and social and religious dispositions if she lived in Barbados. This, he said, is in the best interests of the child.

[32] Dr. Armogan deposed that the Applicant had inflicted psychological and physical abuse on the child. He claimed that the Applicant prevented the child from utilising any gifts he provided. He also instanced an occasion where the Applicant, he said, refused to accept delivery of the child's Christmas gift and referred the Court to **Exhibits VA7** and **VA8** which showed the package as posted and returned.

[33] He also deposed that the child complained of being beaten by the Applicant upon complaining that she missed him and that she was beaten and punished upon crying for more than one day in this regard.

[34] He contended that he has little contact with the child. He reiterated that the Court was previously made aware of the limited communication, mainly because the Applicant did not answer her mobile phone. He claimed that he was only able to contact the child approximately every two weeks and further deposed that he was unable to communicate with the child when she is out of Ireland. He claimed that, last year (2012), he was unable to contact the child on Father's Day and for her birthday and that the child was traumatised by those incidents. He has tried to facilitate communication and

has bought the child an Ipad for these purposes. However, he said, the Applicant utilises the device for her studies and takes it with her when she is on call or overseas, again hampering his contact.

[35] Dr. Armogan also deposed to the fact that the child's school records have not been updated to reflect the addition of his surname. The child's name, he said, should read Saffiya Yasmin Ramendhar Armogan. Upon contacting the school for an explanation, he was informed that the Applicant's permission was required and was not forthcoming.

[36] The Respondent stated that he had taken the child to St. Gabriel's School where, he alleged, she had been accepted as a student prior to her leaving for Ireland. He showed her around the school and both he and the child met the head teacher. This, he said, was a requirement to the child being enrolled in September 2013. He also took the child to Lockerbie College situate at Brittons Cross Road, St. Michael Barbados for an evaluation of her academic ability in preparation for her relocation to Barbados. These results were exhibited to the affidavit of the Applicant as **Exhibit TR16**.

THE APPLICANT'S SUBMISSIONS

[37] Counsel for the Applicant, Beverley Lady Walrond Q.C. (hereafter referred to as Lady Walrond), submitted that it is in the best interests of the child to remain with the Applicant in Ireland. She submitted that the child has only ever been in the long-term care of the Applicant and that it would be an

“unnecessary risk” to alter the child’s care and control on the arguments of the Respondent that the child would do better in his care in Barbados.

[38] Counsel submitted that the *locus classicus* in this area of the law is the case of *Poel v Poel* [1970] 1WLR 1469. Counsel summarised that applicable law emanating from the decision.

[39] To bolster her submissions Counsel also referred the Court to the case *Payne v Payne* (2001) FLR 1052 (“*Payne*”) where Thorpe LJ quoted certain dicta of Ormrod LJ in the appeal case of *Chamberlain v de la Mare* (1983) 4 FLR 434.

[40] Counsel also referred to the case *Nash v Nash* [1973] 2 ALL ER 704, the headnote of which reads:

“It was a very strong thing for the court to make an order which would prevent a parent granted custody (care and control) of a child following her chosen career and in the circumstances it would be quite wrong for the court to debar the mother from taking up her appointment on account of fears of the father.”

[41] Counsel contended that Ormrod LJ explained that the rationale of the court in *Poel* and *Nash* was, not that the court had weighed the interest of the adults against the interests of the child, but rather that the courts had weighed the effect on the child of imposing unreasonable restraints on the adults.

[42] Against the background of these cases, Lady Walrond submitted that there is no compelling reason for the Court to “interfere with the reasonable decision” of the Applicant to remain in Ireland. If the Court finds that her

plans are reasonable and not incompatible with the child's welfare, then the Court is required to give effect to the principle as stated in *Nash* where Davies LJ said:

“I emphasize once more that when one parent has been given custody, it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody.”

[43] Counsel further submitted that the cases cited above establish that the Court should take into account the bitterness which could ensue if the primary caregiver is prohibited from following her reasonable plans for her life. She referred to the judgment of Ormrod LJ in *Payne*, where he considered the unreported case of *Moodey v Field*. Ormrod LJ said at **paragraph 20**:

“The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is still going to be responsible for the children, is, as I have said, the almost inevitable bitterness which such an interference by the court is likely to produce. Consequently, in ordinary sensible human terms the court should not do something which is, prima facie, unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach.”

[44] Lady Walrond maintained that the child is happy, healthy, settled and had only ever been in the long term care of her mother. She submitted that it would be an unnecessary risk for this child's care and control to be changed to satisfy the Respondent's belief that she would do better with him and in his care in Barbados. Initially, he proposed that the child should live and spend alternative weeks with each parent during her childhood. The

Applicant does not believe that either proposition would be in the best interest of the child and asked the Court to so hold.

[45] Furthermore, she said, the child is interacting with the Respondent during access periods. She claimed that the Respondent's profession had enabled him to visit the child in Ireland, as well as take her abroad. He can continue to interact with the child should Dr. Ramendhar's application be granted.

[46] Counsel also asked the Court to consider the Respondent's recent "manipulative behaviour". She gave the example of his taking the minor child to the Lockerbie College without the Applicant's knowledge or permission, and his request for a report to be used in these proceedings. She requested that the Court take note of the contents of the report. She also asked the Court to consider that he took the child to St. Gabriel's School, with a view to enrolling her there in September 2013, also without the Applicant's knowledge or consent.

THE RESPONDENT'S SUBMISSIONS

[47] Counsel for the Respondent filed his submissions on the substantive point on 28 August 2013. He commenced his submissions by referring the Court to *section 43(1)(a)* of the *Family Law Act* which states that in proceedings in respect of the guardianship or custody of, or access to, children of a marriage or union, the court shall regard the welfare of the children as the first and paramount consideration. The Respondent submitted that whilst the parent with care and control has a right to determine where he or she lives, this

right is fettered by the welfare of the child. Counsel referred the court to ***Holmes v Holmes* (1988) FLC 91-918, at 76, 663 (“Holmes”)** where the Full Court of Australia said:

“The basic principle is clear. In any case under the Family Law Act involving children, the ultimate determinant is the welfare of those children. The wishes or desires of one or both of the parents may of necessity have to give way to that.”

[48] Counsel made further reference to ***Holmes*** and the court’s determination on the factors to be considered when one parent is seeking to reside out of the principal jurisdiction with the minor child. In applying the principle of “best interests of the child”, Counsel submitted that the court weighed certain factors (set out in ***Holmes***), which he outlined and which are produced at paragraph [101] below.

[49] Counsel submitted that, in ***Holmes***, the Court noted that, in cases where the applicant has been the long term custodian of the child, the considerations referred to in ***Poel***, namely that the unhappiness of the parent may adversely affect the child, would be significant. Therefore, in situations where the custody is working well, the court should not lightly interfere with such reasonable way of life as is selected by the custodial parent.

[50] However, Counsel submitted that, despite the ruling in ***Poel***, an application of **section 43(1)(a)** of the ***Family Law Act*** coupled with the ruling in ***Holmes*** evidenced that the wishes or desires of a parent may be circumvented by the court to ensure the welfare of the child. He argued that

the court must intervene in a custodial parent's plans if it is not satisfied that those plans are in the child's best interest. It was also submitted that, whereas *Poel* "places significant emphasis on the effect of the custodial parent, the unhappiness of the parent having access may also adversely affect the child."

[51] Counsel asked the Court not to apply the presumption referred to in *Poel* "abstractly", but to consider all the factors which may have an impact on the welfare of the minor child.

[52] Counsel also submitted that *Payne* deals with the effect of legislation which is not relevant in Barbados. He referred to the case *Proverbs v Proverbs*, **Civil Appeal No.7 of 2001 (date of decision 28 May 2002)**, where the Court of Appeal was asked to give guidance on the relevant case law to be followed in applications under the *Family Law Act*. Counsel referred the Court to **paragraph 79** and contended that the Court of Appeal "...observed at paragraph 79 that our FLA is almost an exact replica of the Australian Family Law Act 1975 prior to amendment, and that after having regard to local cases, trial judges should look to Australian cases for guidance."

[53] He therefore argued that, at the time *Holmes* was decided, the Australian Family Law Act was identical to the *Family Law Act*, and that, in any event, the court in *Holmes* considered and contextualised the English position as stated in *Poel*. Therefore, he submitted, *Holmes* is the more direct and appropriate authority for this jurisdiction.

- [54] Counsel submitted that Dr. Ramendhar's application was made in bad faith. He argued that it was evident, from as long ago as June 2012, that the Applicant never had any intention of returning to Barbados. He referred to the Applicant's admission that in or around June 2012 she applied for a two-year Master's programme, the finish date of which fell beyond the timelines set by the 2009 Order. He also invited the Court to consider the Applicant's purchase of a house in Ireland, financed by a 30 year mortgage. Counsel urged that, on account of those facts, the Court must infer that the Applicant never intended to return to Barbados and, that if she did, she changed her intention sometime before June 2012, and certainly before she received the rejection letter from the QEH.
- [55] He also contended that the Applicant only evinced her intention to remain in Ireland after she received correspondence dated 17 June 2013 from Messrs. George Walton Payne & Co., Attorneys-at-law for the Respondent, Before that response, the Applicant allowed the Respondent to believe that the child would be returning to Barbados permanently in 2013.
- [56] Therefore, Counsel submitted, the application was made in bad faith and, according with the guidance formulated in *Holmes*, should be dismissed.
- [57] Counsel also submitted that, should the Court find that the application was *bona fide*, the Court must ask whether it can be "reasonably satisfied that the Applicant will comply with orders for access and other orders made to

ensure the continuance of the relationship between the minor child and the Respondent?”

[58] In this regard, Counsel asked the Court to consider that the Applicant has engaged in several acts which evince her intention to disassociate the minor child from the Respondent and frustrate the Respondent’s access. He provided the following examples:

1. The Applicant’s failure to register the child with the Respondent’s surname at her school in Ireland. The Applicant initially attributed this failure to the fact that the child’s birth certificate had not yet been changed upon initial registration of the child in 2008. However, he said, it was later proved that the birth certificate had been amended in July 2007. The Court must therefore infer that the Applicant deliberately chose not to register the child as “Ramendhar Armogan”. Counsel asked the Court to disregard the Applicant’s assertions that she requested the name change (see paragraph [35] above) and to accept the Respondent’s submission that the Applicant prevented the change by withholding her permission from the school.
2. The child’s requests that the Respondent keep any gifts he provides in Barbados and Canada as they are

confiscated on her return to Ireland, as well as the circumstances surrounding the posting and subsequent return of one of the child's Christmas gifts (outlined at paragraph [32] above).

3. The Applicant's last minute and inefficient travel arrangements for the minor child.

[59] Counsel urged that, in light of the evidence adduced, the Applicant intended for some time to remain in Ireland, the Court "must treat as dubious any recent actions by the Applicant on which she relies to show that she has facilitated the Respondent's access or relationship..." with the minor child.

[60] He submitted that the burden of proof is on the Applicant to show that she will comply with any further orders of court. He argued that, in assessing whether this burden has been discharged, the Court is required to take into account the nature of the application pursuant to *section 133(2)* of the *Evidence Act, Cap. 121*. For the purposes of this decision I now reproduce *sections 133(1)* and *(2)* of the *Evidence Act*:

Section 133(1): In a civil proceeding, a court shall find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2): In determining whether it is satisfied as mentioned in subsection (1), the matters that the court shall take into account include the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the matters alleged.

- [61] Counsel contended that the nature of the Respondent's application is that, if the orders sought are granted, the Court will be unable to enforce the orders should the Applicant refuse to submit to the jurisdiction of this Court.
- [62] Counsel urged that, in light of the factors mentioned in paragraph [58] above, the Court ought not to be satisfied that the Applicant will comply with any orders made to ensure the continuance of the relationship between the Respondent and the minor child. Pursuant to the directions given in *Holmes* this factor must weigh against the success of Dr. Ramendhar's application.
- [63] Counsel submitted that the Court must be cognisant of the general effects on the welfare of the minor child in granting or refusing Dr. Ramendhar's application.
- [64] He further submitted that, whilst the Applicant had deposed that the minor child is happy and settled in Ireland and that uprooting her at this stage would not be in her best interests, the Applicant had also deposed to the possibility that she and the child may relocate after a further period of five years. Therefore, he said, there is no guarantee that the child will not be uprooted if Dr. Ramendhar's application is granted. In any event, he said, the Applicant's contention must be weighed against the benefits of the child returning to Barbados in order to determine what is in her best interest.
- [65] Counsel also asked the Court to consider the Applicant's work and study commitments. Notwithstanding the Applicant's assertions that she makes

time to spend with the child, he asked the Court to find that the reality of her commitments has a significant impact on the length and quality of time she spends with the child.

[66] In comparison, if Dr. Ramendhar's application was refused, the child would be housed in an environment where she will have the support of her father, who testified that he works only four days per week, and of other family members mentioned at paragraph [22] above. Counsel referred to paragraph 12 of the Respondent's 12 July 2013 affidavit, which stated that the Respondent is celebrated for his outstanding abilities in dealing with children. He also referred to paragraph 28 of the 24 July 2013 affidavit, in which the Respondent deposed that his partner Susan Heath is an excellent caregiver and that she has been involved in the minor child's life from the beginning. Counsel also referred to paragraph 44 of the Applicant's 24 July 2013 affidavit where the Applicant deposed that she does not dispute that the Respondent and his partner love and look after the child when she is in Barbados.

[67] He bolstered his submission by reference to paragraph 30 of the of the Respondent's 24 July 2013 affidavit where he deposed to several examples of how the child's confidence had been boosted as a result of spending time with himself and his family including fearlessly utilising the family swimming pool, "looking for snakes with her cousins in Guyana and her new attitude towards shopping and trying new outfits." Counsel submitted

that, should the child return to Barbados, she would have far greater emotional support through frequent contact with her family on both her maternal and paternal sides and a better opportunity to build relationships with the males in her life. He further submitted that that support system will help the child to quickly adjust to her new surroundings.

[68] In response to the Applicant's concerns regarding the minor child having a female caregiver as she approaches puberty, Counsel submitted that the Respondent's partner would be a suitable female caregiver and that the child has a maternal aunt, who is also a qualified doctor, who resides less than minutes from the Respondent.

[69] Counsel again urged the Court to apply the principles in *Poel* and submitted that the current circumstances had given rise to a situation where the plans of the Applicant, as the custodial parent, though ideal for her own life, are clearly not in the best interest of the child. In applying *section 43(1)(a)* of the *Family Law Act*, and in pursuance of the best interests of the minor child, the appropriate decision for the Court would be to dismiss Dr. Ramendhar's application and grant care and control to the Respondent.

[70] The relevant extracts from the decisions cited by both counsel are reproduced in this decision.

THE LAW

[71] The applicable law with respect to the issues raised in these applications is *section 43(1)* of the *Family Law Act*, which embodies the principle that the

Court must have as its foremost consideration the welfare and best interests of the child. *Section 43(1)* provides that:

- Section 43(1):*** In proceedings in respect of the guardianship or custody of, or access to, children of a marriage or union,
- (a) the court shall regard the welfare of the children as the first and paramount consideration;
 - (b) the court shall not make an order under this Part contrary to the wishes of a child who has attained the age of 16 years unless the court is satisfied that, having regard to special circumstances, it is necessary to do so; and
 - (c) the court may, subject to paragraphs (a) and (b), make such order in respect of those matters as it thinks fit, including an order until further order.

[72] The parties are not at odds on the jurisprudence governing this area of law, but are diametrically opposed as to how the legal principles ought to be applied to the facts of the case. At this juncture, I will deal with Mr. Marshall's submission with respect to the applicability or non-applicability of English decisions to matters involving the provisions of the *Family Law Act* before embarking upon a discussion on the case law. I agree with, and am bound by, the observations of the Court of Appeal of Barbados in *Proverbs*. At **Paragraph 79** of the decision **Simmons CJ** noted that:

“Counsel have invited us to give guidance on the relevant case law to be followed in applications under the Family Law Act of Barbados. They agree that trial judges should first look to local cases for guidance and then to Australian cases since our Act is

almost an exact replica of the Australian 1975 Act prior to its subsequent amendment.”

[73] The crux of that decision focused on the application of *section 57* of the *Family Law Act*. That being said, Counsel for the Respondent was correct in arguing that *Proverbs* provides guidance on the preference of the application of Australian law over English law in family cases in Barbados. **Simmons CJ** referred to *Franklin v Franklin (Franklin)*, **No. 24D of 1982 (date of decision, 1 September 1983)** and said at **paragraph 86**:

“A little more than a year after the commencement of the Family Law Act, Douglas CJ, offered sage words of advice in *Franklin*. He observed:

“In dealing with cases under the Family Law Act, English cases can provide little guidance because the Act closely follows Australian legislation which represents a new departure requiring a different approach from that required by the repealed Matrimonial Causes Act.”

[74] These words are applicable where there is divergence between the interpretation of the English law and the Australian law. Where there is coincidence, there is no difference in the interpretation and application of the legal principles. An analysis of some of the Australian cases shows that Australian courts have, at times, looked to English law (the source of their law and that of other Commonwealth jurisdictions) for guidance. In *Family Law, 5th Ed. 2007 (“Family Law”)*, by Anthony Dickey, in dealing with the best interests principle, the author said at **page 338**:

“In light of what has just been said, it is instructive to look at the current approach of the English courts to contact by

apparent with his or her child. There contact with parents is regarded as a right of the child which should not be denied unless it is in the best interest of the child that there be no contact. Lord Oliver of Aylmerton made this point, when giving the principal judgment of the House of Lords in *Re K.D. (a minor)*, as follows:

“As a general proposition a natural parent has a claim to access to his or her child to which the court will pay regard and it would not I think be inappropriate to describe such a claim as a ‘right’. Equally, a normal assumption is ... that a child will benefit from continued contact with his natural parent. But both the ‘right’ and the assumption will always be displaced if the interests of the child indicate otherwise.”

[75] It does not appear to me that there is a divergence between our law, English law and Australian law in relation to the principle that the welfare of the child is of paramount importance. In *Family Law*, Dickey extracts the principles from the relevant case law and opined under the heading “*Particular circumstances that may lead courts to conclude that contact is not in the best interests of a child*”:

“Cases indicate that the following circumstances may lead to a court to conclude that contact by a parent or other person with a child is not in the best interests of the child:

- Where there is such tension or hostility between the parent with the care of the child, or his or her partner, on the one hand, and the person seeking contact on the other, that is likely to be exacerbated by contact, with resulting detrimental effects on the child. The courts have, however, held that they will not lightly allow such hostility to affect the question of contact with a child, at least by a parent.
- Where contact would cause the parent with the day-to-day care of the child considerable anxiety, and this is likely to affect the child adversely. This consequence must,

however, be shown to exist by clear evidence on point, and not simply the result of speculation.

- Where contact by a particular person is likely to undermine the relationship between the child and the parent who is responsible for the child's day-to-day care.”

[76] Dickey also referred to the Full Court of Australia's ruling in ***Re W* [2004] FLC 93-192** where the court said at **79,217** “The termination of a worthwhile relationship between the parent and child ought in most cases be the course of last resort.”

[77] Having said that, I must add that I consider the decision in ***Holmes***, referred to by Mr. Marshall, to be in line with the decisions in ***Poel*** and ***Payne*** on the issue of those considerations which a court takes into account in determining what is in the best interests of the child and I have taken those principles into account in analysing the evidence and arriving at my conclusions.

SUBMISSIONS ON THE PRELIMINARY ISSUE

[78] I now deal with the preliminary issue, since, if the Respondent was to succeed on this issue a further adjournment of the matter would be required in order to consider the report, any cross-examination thereon and, therefore, to factor the results into the Court's decision.

The Respondent's Submissions

[79] Counsel for the Respondent filed his submissions on 23 August 2013. He submitted that, pursuant to **section 43 (1)(a)** of the ***Family Law Act*** the Court is required to regard the welfare of the child as the first and paramount

consideration in determining Dr. Ramendhar's application. He argued that the impact of the refusal or grant of that application falls within the specialised area of child psychology and contended that: "In order therefore for this Court to determine this Application on the most reliable evidence available to it, we submit that an order should be made for the minor child to be assessed by a child psychologist."

[80] It was submitted that a psychologist's report, taken in conjunction with the affidavit and oral evidence of both parties, will enable the Court to make an order which is in the best interests of the minor child.

[81] Counsel maintained that, despite the Applicant's contention that the minor child is happy "it does not follow that denying Saffiya the opportunity to return to Barbados as she had expected is in her best interest, or that it would not affect her negatively. Again, that question is best answered by a person who is trained to understand the mind, behaviour and needs of children."

[82] Counsel asked the Court to note that the minor child had not seen a psychologist in over four years and that whilst she had visited several psychologists at a very young age, "...it has not been contended at any stage that those previous assessments negatively affected the minor child. In fact, the Applicant herself has previously requested that the minor child be assessed by a child psychologist to aid in the determination of whether she should be allowed to go on a short vacation out of the jurisdiction with her father."

[83] Mr. Marshall submitted that the Applicant herself has acknowledged the importance of an independent evaluation by an expert. Therefore, there is no reason to oppose assessment at this stage.

The Applicant's Submissions

[84] Lady Walrond, in her submissions also filed on 23 August 2013, submitted that, there was no reason, on the evidence, for the minor child to be referred to a psychologist and that the Respondent's request was merely a time delaying tactic as there was no "appreciable benefit to be gained therefrom".

[85] The Court, she said, should not grant such a request unless there is a compelling reason so to do founded upon evidence. She relied on the cases ***Epperson v Dampney (1977) FLC 90-061*** and ***Lynch v Lynch 8 FLR 433*** in support of this contention. She submitted that, in these circumstances, there is no evidence to suggest a need for a psychological evaluation. She argued that the evidential matrix before the Court shows that the minor child is healthy, happy and doing well in the care of the Applicant. In support of this submission she made reference to the child's school reports marked **Exhibit VA11** and the report of the Lockerbie College marked **Exhibit TR16**, a report, Lady Walrond argued, the Respondent requested for use in these Court proceedings, but failed to utilise when it failed to suit his purposes.

[86] She further argued that the minor child has no physical, presenting mental or psychological problems or education deficits. In light of this, and the

submissions advanced above, she questioned what problems the psychologist was to fix or give advice on.

- [87] She submitted that no psychologist can inform the Court what would happen if the minor child is to be removed from the Applicant's care to the care of the Respondent. Any advice would be pure speculation. Counsel referred the Court to the following passage in *Raby and Raby (1976) FLC 90-104*, at **page 75,483** (erroneously cited as *P v P (1964) 5 FLR 452*) as approved in *Lamache v Lamache (1977) FLC 90-272*, where the court said:

“Predicting the future is an inexact science. Predicting the outcome of human relationships is fraught with uncertainty. Neither legal nor psychological skills and insights are as yet sufficiently developed to enable predictions to be made with reasonable certainty.”

Therefore, she submitted, a reference to a child psychologist on the premise of determining whether the minor child will be happy residing in a jurisdiction, and with persons with whom she has never resided, is not a proper rationale for such a reference.

- [88] She argued that it could not be expected that a psychologist could convey the child's wishes to the Court. She pointed the Court to the *Australian Family Law and Practice, Vol. 1, page 13,151* where the authors, in discussing the ruling in *Reynolds v Reynolds (1973) 47 ALJR 499* said at **paragraph 15-164**:

“In some cases, the statements of a child to one of the parties or to other witnesses may be given on affidavit evidence, where, for example, the wishes of the child are not in dispute or where

the other party prefers the method of offering the child's evidence to calling the child and so does not object to the evidence in that form. However, the use of child psychologists or psychiatrists as a means of getting before the court simply a hearsay account of the child's wishes is not advisable".

DISCUSSION

- [89] It is without doubt that in all matters relating to children, the welfare of the child is the first and paramount consideration of the court. That is provided for in *Section 43(1)(a)* of the *Family Law Act*.
- [90] Whilst it is for the Court to make any decisions with respect to the welfare of the child, there may be occasions where a Court might find it desirable to engage the services of a professional psychologist to obtain an informed evaluation of the conduct or proposed conduct of the parents upon the welfare of the child. It is not the psychologist who makes the decision, but it is his expert opinion which a Court may or may not adopt in making its conclusions. There must, however, be a real need for such a report. The Respondent has requested such a report. The Applicant is opposed to it.
- [91] The Respondent's application is posited upon his views that the child would be better off living with him and interacting with his family and that of the Applicant in Barbados. He expresses his concern for the alleged racial prejudices of the Applicant against persons of a certain pigmentation, which he discerned when the Applicant expressed her disgust upon seeing sexual acts being performed by people of colour whilst he and the Applicant were watching pornographic movies. Questions raised by the child concerning

the darkness of the Respondent's skin compared the Applicant's and the child's relationships with other children in Ireland also informed his opinion. He also raised the issue of the Applicant's alleged classism.

[92] The Applicant has submitted that there is no evidence that any psychological report is required to enable the Court to dispose of the issues at hand.

[93] The child has been seen by psychologists in the past when the issues of its custody, care and control were being adjudicated before this Court. In one such report, commissioned by the Court from Reverend Dr. Marcus Lashley of Synapse Psychological Services in 2008 when the child was scheduled to travel with her father, Dr. Lashley informed this Court as follows:

“Sir, I cannot ethically conclude without expressing my extreme displeasure ... and horror at how this child has been sent to needless and persistent psychological evaluation purely as a part of legal manoeuvring. It is disgusting, repugnant, and ultimately damaging to the child...”

[94] He suggested that the couple again be mandated to work out their issues immediately with a competent family therapist, with penalties for failure to comply being clearly stated.

[95] Five years have elapsed since that report. From the affidavit evidence of both sides it is clear that the child is doing well. Nowhere in the evidence has either party suggested that this child has presented any behavioural or psychological issues which require addressing by way of psychological intervention. All the evidence suggests that she is well adjusted, save and except those matters raised by the Respondent which I will address in

dealing with the major issue. The Respondent has already made the child aware of the purpose of the Lockerbie College evaluation without the Applicant's knowledge. Her intelligence is beyond dispute. I am of the opinion that it would be unwise to order an evaluation where the child might be exposed to the continuing contention between her parents. I am of the view, and hold, that no benefits are to be gained from ordering a psychological report on this child.

[96] Having gone through the affidavits, and having seen and heard the Applicant and Respondent give their evidence in chief and being cross-examined, the evidence is enough to enable me to decide what is in the best interest of this child and, by extension, to dispose of the major issue in this case without the intervention of a psychologist. I do believe, and so find, that it is not in the best interests of the child to be further evaluated by a psychologist. Consequently, I reject the Respondent's application.

The Major Issue

The Applicable Law

[97] As previously said, the applicable law is to be found in ***Section 43(1)*** of the ***Family Law Act***, as previously set out at paragraph [71] above. ***Sections 43(4)*** and ***(7)*** are also relevant and provide as follows:

Section 43(4): Where the court makes an order for joint custody of a child of a marriage or of a union, or declines to make an order for the sole custody of the child, it may make orders as to access, or such other orders as it thinks fit.

Section 43(7): The court may discharge or vary an order under this section, or may suspend any part of the order, and may revive the operation of any part so suspended.

[98] This matter involves an application to vary the 2009 Order in relation to custody, care and control to allow the child to continue to reside overseas with its mother. **Section 43(7)** is, therefore, applicable.

[99] The Court is of the opinion that the decisions *Poel*, *Payne* and *Holmes* illustrate the practical approach of the Court in determining the issue of the welfare of the child in particular circumstances, and provide an insight into how this matter ought to be approached. Their authority is persuasive only, since every case must be decided on its own peculiar facts. The headnote of *Poel* reads:

“...on an application for leave to take the child out of the jurisdiction the primary consideration being the welfare of the child and whether it would be in the child's best interests to grant the application, regard had to be had to the welfare of the parent who had custody, since if he or she became unhappy it might adversely affect the child, and, therefore, there should be no interference with any reasonable mode of life selected by the parent having custody unless it was absolutely essential...”

[100] In *Payne*, Thorpe LJ quoted approvingly the following statement of Ormrod LJ in the appeal case of *Chamberlain v de la Mare* (1983) 4 FLR 434:

“The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is going to be responsible for the children, is, as I have said, the almost inevitable bitterness which such an interference by the court is likely to produce. Consequently, in ordinary sensible human terms the

court should not do something which is, prima facie, unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach.”

[101] In *Holmes*, the Full Court of the Family Court of Australia comprising Fogarty, Bell and Baker JJ, noted that it is often useful to consider the following aspects relied upon by Counsel for the Respondent:

- “1. **Is the Application to remove the child made bona fide?**
2. **If it is bona fide, can the Court be reasonably satisfied that the custodian will comply with orders for access and other orders made to ensure the continuance of the relationship between the children and the non-custodian? If the Court is not satisfied** about this, this would be a weighty, although not decisive, matter against the success of the application.
3. **The general effect upon the welfare of the children in granting or refusing the application.** Such a consideration would include reference to the effect on the children of deprivation of, or diminution of access and general association with the non-custodian and his family, and any disadvantages to the welfare of the children in the proposed new environment in isolation or in comparison with the previous environment.”

The Full Court continued:

“In this context the genuine wishes of an unchallenged custodian is an important consideration. That is so partly because the unhappiness of the custodian is likely to impinge upon the happiness and welfare of members of that person's household, and partly for reasons that are expressed in a number of cases including the well-known passage in the judgment of Sachs LJ in *P v P* [1970] 3 All ER 659 at 662:

When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not

lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as Winn LJ has pointed out, produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well, in due course, reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results.

Those sentiments were re-echoed by Asche J in *Kuebler*, supra, at FLC 77,205 where his Honour said:

I consider, therefore, that her Honour properly appreciated the bond between the child and the husband. On the other hand, of course, the fact was that the mother had been found to be the appropriate custodian after a contested case in which the characters of the parties and their capacity as custodians had been tested in examination and in cross-examination. There is no doubt, as Miss Nelson points out, that to take the child out of the jurisdiction, particularly a child of four, will have a substantial effect on the relationship between the child and the father. On the other hand, the right of the mother to control her own destiny, provided that she properly appreciates the welfare of the child in so doing, has been recognised by such cases as *In the Marriage of Craven* (1976) 1 Fam LR 11,276 ; [1976] FLC 90-049 and *P v P* [1970] 3 All ER at 659.

It was necessary for her Honour to come to a balance about this and to decide, having regard to the welfare of the child, what was the most appropriate course.”

[102] The importance of this extract, not quoted by Counsel for the Respondent, is to illustrate that there is no divergence between the English and Australian approaches to the law in this area and also to reinforce the point that Australian Courts take English decisions into account in their judgments. It

also reinforces the point that the welfare of the child must be seen in the practical context of the factual matrix in which the child and its parents find themselves following the dissolution of their marriage. Each case is unique and must be decided upon its own peculiar facts.

[103] This Court is concerned to determine what is in the best interests of this child in the factual matrix of this case. The acrimony and bitterness which existed between these parties prior to the child's departure to Ireland with the Applicant was a source of concern for this Court. The reason is patently clear. Their differences would impact negatively upon the child's welfare. There was considerable opposition from the Respondent to the child's travelling with its mother at the time of the 2009 Order. On a previous occasion the Applicant opposed the child's travelling with the Respondent to attend his brother's wedding in Canada.

[104] This matter is not an easy one. It is clear to this Court that the minor child is well loved by both her parents and that both parties, in their individualistic ways, desire what is best for their child. It is also clear to the Court that the parents, despite the passage of time and the promotion of their daughter's best interests, are unable to surmount their difficulties of the past and chart a course for their child's future. Despite those unfortunate circumstances, the best interests of the minor child and her welfare continues to be the paramount factor for the Court.

[105] An objective analysis of the evidence and oral testimony of the Applicant and Respondent leads me to the following findings of fact:

1. Since the 2009 Order and the child's relocation to Ireland with its mother, the acrimony between the parties lessened. This is revealed by the civility of the correspondence passing between them, even though they may have been opposed on some issues;
2. The Respondent has had access to the child notwithstanding that he alleges that the Applicant has not been complying with the spirit of the 2009 Order;
3. In spite of the challenges, both financial and geographical, the Respondent has been able to see the child, at times, outside the access periods prescribed by the 2009 Order;
4. The child has been able, through the access, to foster a relationship with both parents and their extended families;
5. The child has been performing well at school in Ireland and all indications are that she has a bright future ahead of her;
6. The past allegations of infidelity, fraudulent conduct and controlling behaviour seem not to have surfaced during

the Applicant's absence abroad. They only resurfaced since the filing of this application on the Applicant's return to Barbados;

7. Both parties appear to be in a financial position to travel between Ireland and Barbados in order for access to be facilitated notwithstanding that, at times, such travel and accommodation arrangements may prove expensive.

[106] I have had regard to the several submissions of the parties. It is clear to me that, having purchased a home in Ireland and taken out a 30 year mortgage on it, the Applicant had decided to have a permanent presence in Ireland. She states that she would abide by any order the Court may make regarding the residence of the child. This was disputed by the Respondent. I accept the Applicant's evidence on this matter. She has returned the child to this jurisdiction and has sought a variation of the 2009 Order as to legitimise her prospective plans for study and residence and for permanent relocation of the child, if the Court so approves them.

[107] She has applied to the QEH for employment and none has been forthcoming. The Respondent suggests that she can enter private practice. She says it would be irresponsible for her to do so since she is inexperienced and would not have access to hospital facilities. She is currently working in Ireland and has better prospects for furthering her education and career there.

[108] It cannot be said that the Applicant has not tried to find employment within this jurisdiction. There is merit in her reasons for not seeking to enter into private practice. It is for the Court to decide whether her position on this issue is reasonable or not.

[109] I am of the view, and hold, that her position is a reasonable one. I also hold that her application was made in good faith.

[110] I am also of the opinion that the Applicant's decision to permanently relocate to Ireland is not the sole determinant as to whether it is in the best interests of the child to be in Ireland with her. That is the Court's ultimate decision having regard to all the circumstances of the case.

[111] With respect to the Respondent's allegation that the child was taken out of school for periods of time, the Applicant has explained that her sister was gravely ill and, as a result, six weeks of schooling were lost when she and the child travelled to Toronto to be with her. I heard and saw both parties on this issue and find that this was communicated to the Respondent and he agreed to the child travelling to Toronto with the Applicant for that purpose. Indeed, such is admitted by the Respondent in his affidavit of 8 August 2013.

[112] He also gave other examples of the child attending the Applicant's sister's wedding and her attending a cruise with the Applicant in 2009. The attending of a wedding is an important family occasion and the Respondent himself was given permission by this Court to take the child to his brother's

wedding in Toronto. In paragraph 2 of his affidavit filed 21 July 2008 in support of the application he said:

“My brother Narendra Armogan will be getting married in Toronto, Ontario. The marriage will be celebrated by four ceremonies as my brother is a Christian and his bride is Hindu. On Friday 22nd August, a ring ceremony will be held. On Saturday August 23rd, there will be the Mehndi. On Sunday August 24th, there will be the Sikh ceremony and on Friday August 29th there will be a Christian ceremony at an Anglican Church. This is an extremely important event for my family and I would like the child of the marriage to be a part of it...

...I therefore think that this trip will provide an excellent opportunity for me not only to bond further with the child of the marriage but also for her to bond with her uncles and grandparents and meet and bond with other relatives.”

[113] It must be remembered that this child enjoys a mixed heritage of Christian and Hindu religions and cultures. The Respondent stressed that important fact in his affidavit in support of his application filed 10 July 2008 in which he sought permission to take the child out of the jurisdiction for the said wedding, which permission was granted. In the circumstances it cannot be said that the time lost from school in attending the wedding was unreasonable. I also consider that the decision to travel to Canada to be with the child's aunt (the Respondent's sister) during her illness and the consequential loss of school time not to have been unreasonable.

[114] The correspondence passing between the parties also indicates that the Respondent acknowledged that, at times, it was convenient for the child to finish the school term ahead of the school's set schedule so as to

accommodate travel arrangements for the child's access to him. For example, in his email to the Applicant dated 6 March 2012 (**Exhibit TR6**), the Respondent said:

“I had a conversation with Arvind and we were trying to work out the best way for Saffiya to get here for Easter

...If your mom changes her BA ticket for a later date (maybe to the end of summer) she can buy a ticket with Air Canada to go up on the 15th with Saffiya (overnight in TO [Toronto]) and if she is going to stay until June 30th to bring her back down the fare is US \$1627...

...This way Saffiya will get to overnight in TO both ways to see our families there. It will mean being out of school for a few days earlier and back to school on Wednesday instead of Monday. These fares seem to be the most economical fares at this time.

Let me know what you think so we can move forward.”

[115] This letter also indicates the lengths to which the parties have sought compromise in relation to costs of airfare, arrangements for persons to accompany the child so as to facilitate access and agreements that certain travel arrangements would result in the child being out of school. Both parties have stressed the need for the child to continue to foster close relationships with both families.

[116] The filing of Dr. Ramendhar's application has led to further deterioration of the parties' relationship. The Respondent took the child to St. Gabriel's school seeking to have her enrolled there for the September 2013 school year. Prior to this, he had her evaluated at the Lockerbie College and

requested a report detailing her performance. All of this was done without reference to the Applicant and certainly without her consent. These actions are a unilateral usurpation of what are usually custodial issues.

[117] The Lockerbie College report was not exhibited by the Respondent. The Applicant obtained the said report and exhibited it to her third affidavit dated 19 August 2013, as **Exhibit TR15**. The report shows that the child performed well in both the English and Mathematics components of the assessment. The background revealed that the Respondent informed the vice-principal of the school during the week ending 5 July 2013, that the Applicant had intentions of bringing the child back to Barbados to sit the Barbados Secondary School Entrance Exam (commonly known as the “11 Plus Examination”) but his concern was that she would be too far behind by that time and it would be too late to help the child gain entrance to a good school.

[118] The report continues:

“Dr. Armogan requested that an assessment of Saffiya’s competencies be given to ascertain her academic ‘level’ in respect of her age. He stated that if Saffiya was ‘behind’, he could argue in Court that she should remain in Barbados from the present time.”

[119] The Respondent received verbal feedback on the child’s performance. Interestingly enough, the report, under the heading “Assessor’s Feedback and Conclusion”, notes as follows:

“Saffiya is an intelligent little girl, who shared with Miss. Nakhuda that she enjoys her school in Ireland.

Saffiya knew the circumstances of the assessment and her understanding of the rationale, as shared with Miss. Nakhuda, was that if she ‘did well’ she would return to Ireland, continue at her school and stay with her Mum.”

[120] The report shows that the child is functioning on par with her chronological peers (in Barbados). There are no apparent loopholes in knowledge or concerns for her academic foundation skills. Ms. Nakhuda stated her unfamiliarity with the Irish national curriculum and that she never expected to compare that system with the Barbados national curriculum. However, she opined, that:

“...it is her [Miss. Nakhuda’s] professional opinion that if Saffiya can come from an educational system, which may or may not be different or comparable to that in Barbados, and do as well as she did, this is testimony to Saffiya’s intellect, adaptability and the level of education she has received in Ireland.”

[121] It is a matter of common sense, as it is of inference, that the rationale communicated to this child regarding the assessment was communicated by the Respondent since the Applicant was unaware of the assessment. There had been no change in the child, academic or otherwise, since the date of that assessment. The only intervening circumstance is the present proceeding. The Respondent has not accounted for the shift in his rationale for the assessment which he communicated to the child. He said that the author of the report misinterpreted his reason for requesting the evaluation. I

do not accept this explanation. It is clear that he wanted the report to support his case. When it did not, he did not disclose it. The ‘best interest of the child’ principle requires responsible parents to disclose all matters which impact on the child’s welfare. Contrary to the Respondent’s hopes, it showed that the child is on par with its Barbadian counterparts.

[122] I now turn to the Applicant’s plans for further study and their relevance to the welfare of the child. The Applicant deposed that she had been accepted for an M.Sc. in Healthcare Management with the Royal College of Surgeons in Ireland. She also deposed that she wished to specialise in IVF and assisted reproduction techniques, and that she would be able to commence training in that field from 2014. The Respondent has submitted that the Applicant was “dragging” the child behind her career.

[123] The Respondent is a respected orthodontist in this jurisdiction, he has become a specialist in this field through higher study and pursuing courses in continuing education. The Applicant has demonstrated that she is capable of pursuing her education and specialisation, whilst at the same time, fulfilling her role as primary caregiver to the minor child. She has completed the MRCOG in Ireland, and indicated, under cross-examination, that she studied for the MRCOG and M.Sc. examinations simultaneously; took parts of those exams on successive days, and was able to pass them both. The child’s reports show that she is well settled, intelligent and articulate. This is

testimony of the Applicant's ability to fulfil her maternal role as well as her professional obligations with great success.

[124] The issue then becomes whether the Applicant's proposed continued studies might negatively impact upon the child's welfare? In this regard I will briefly dispose of the Respondent's argument that the Applicant's live-in housekeeper can barely speak English. The objective evidence in relation to the child's success is that, even assuming that allegation to be true, the child has excelled as well as the Applicant.

[125] I am of the opinion that the Applicant ought not to be restrained from fulfilling her potential and her career goals in the areas of hospital administration and fertility treatments. She ought to be afforded the same opportunities for career advancement as the Respondent. I am also of the opinion that, given her record as a parent and a professional, her future plans will not negatively impact upon the child's welfare. The answer to the question posed is, therefore, in the negative. In making this finding I have also taken into account that during her residency in Ireland the Applicant found the time to take the child overseas on safaris, to India, to museums in Paris, London and St. Petersburg, Russia, as well as on a Caribbean cruise. This demonstrates to me that the Applicant is also concerned to ensure the child's development socially and culturally.

Allegations of Racism and Classism

[126] These allegations were raised by the Respondent in his affidavit evidence and refuted by the Applicant in hers. I heard and saw both parties give oral evidence under examination-in-chief and cross-examination. The evidence adduced does not convince me, on a balance of probabilities, that the Applicant possesses and/or exhibits these tendencies. I, therefore, am of the opinion that there will be no negative impact upon the child's welfare should the Applicant continue to be her primary caregiver.

The Obtaining of an EU Passport for the Child

[127] The Applicant gave evidence, in her third affidavit filed 20 August 2013, that she is a holder of a residence permit in Ireland known as a "Stamp 4 status" which makes her eligible to work without a permit and to obtain a mortgage in order to purchase property in Ireland. She claimed the status was renewable every two years on payment of a fee. After having such status for four years, she would then be eligible for citizenship. Therefore, she said, she will be eligible for Irish citizenship in 2014, which will allow both herself and the child to obtain an EU passport. This will allow them to reside and work anywhere within the European Union and would entitle the child to free tertiary education or, at the very least, to pay fees at EU rates. The child would also have preference for university admission as well as jobs. This, she said, would enlarge the child's world. She annexed the

Stamp 4 permit as **Exhibit TR13** and a document explaining the status as **Exhibit TR14**.

[128] The Respondent also desires that the child should hold an EU passport since he himself holds one. He is also a Canadian citizen. The Court finds that both parents envisage that the child will have global opportunities given the prospects of having Canadian citizenship and European Union status. They differ on how it is to be achieved, whether through the Applicant or the Respondent. This is an issue of custody and ought to be decided jointly by the parents. It ought not to be a matter of speculation if the Respondent can presently provide the access to Canadian and European status for the child, rather than wait upon the possibility that the Applicant may be granted EU status. These matters are also subject to the laws governing eligibility for such status. This is yet another example of how these parties are unable to agree on the methodology of achieving what they both envisage for the future of their child. However, there is no application before the Court in this regard and the Court declines to make orders which are not sought.

[129] The Respondent submitted that if he is granted care and control, the child will have exposure to both sides of her family and to his partner Susan Heath. He also submitted that “while the educational system in Ireland is good for Ireland, it isn’t the same as ours in Barbados and bringing back Saffiya to Barbados gives her stability in her school...” All of the supposed advantages to the child cited by the Respondent as reasons for altering the

2009 Order, the child already has. The relationship between the child and her paternal and maternal families was fractured before she relocated to Ireland, principally because of the inability of her parents to resolve their issues amicably. I see no need to chance a reversal of these gains. It would be contrary to the best interests of this child. I hold that it is in the best interests of the child to remain with the Applicant in Ireland.

DISPOSAL

[130] In the circumstances, the Court orders that:

1. The Respondent's application that the child be evaluated by a psychologist is refused;
2. The Applicant be at liberty to have the minor child reside with her in Dublin, Ireland;
3. The provisions for access of the said minor child to her father Dr. Vidya Armogan as outlined in the Court Order dated 14 January 2009 be continued with the addition that the Respondent shall have access to the minor child during any October break in any year that the minor child is not scheduled to spend Christmas with the Respondent under the Order of the Court;
4. The Order of this Court in respect of the maintenance of the said child do stand; and

5. The Court denies the Respondent's application for a stay of execution and accepts the Applicant's undertaking to return the child to this jurisdiction as and when required by the Court.

[131] It is further ordered that the Respondent's application is dismissed and each party is to bear his or her own costs.

William J. Chandler
Judge of the High Court