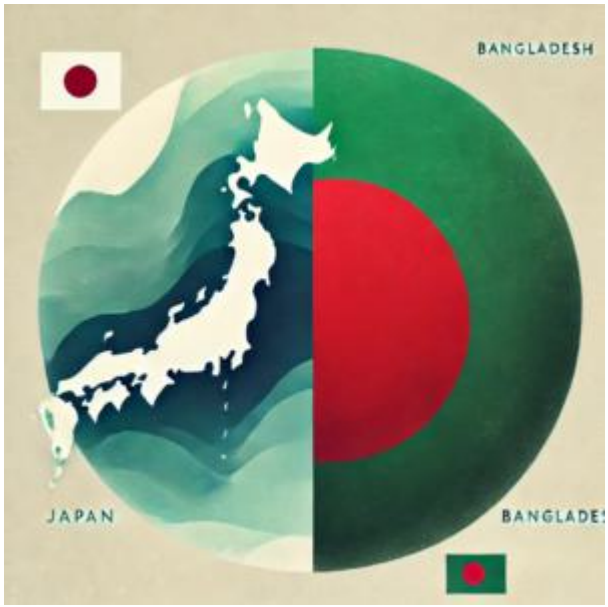
Caught Between Legal Boundaries: Child Custody Disputes Across Japan and Bangladesh

I would like to express my sincere gratitude to MD Sanwar HOSSAIN, *LLB (Hons) Wolverhampton University, MSS (Dhaka University), PgDiP (Northumbria University), Barrister at law (Hon'ble Society of Lincoln's Inn),* Advocate (Appellate Division) Supreme Court of Bangladesh and Managing Partner, S Hossain & Associates law office, for bringing the Bangladesh courts' decisions to my attention.



I. Introduction

The breakdown of an international marriage often leads to complex cross-border disputes, especially when children are involved. Tensions can intensify if one parent decides to take the children to their home country, often without the consent of the other parent.

In such cases, when the countries involved are signatories to the HCCH 1980 Child Abduction Convention, the Convention's mechanisms are designed to facilitate the prompt return of children to their country of habitual residence. This

framework aims to prevent unilateral relocations that could have lasting impacts on the child's stability. However, when one or both countries are not parties to the Convention, resolving such cases becomes significantly more challenging. In such cases, national courts are compelled to address competing custody claims, assess allegations of wrongful removal, and determine whether they have jurisdiction to hear the case, all while balancing, often quite differently, the best interests of the children involved.

The case presented here is just one of many unreported cases where a romance relationship turns sour, leading to lengthy and contentious legal battles across jurisdictions. This note will focus on the Bangladeshi court's treatment of the case, as it offers useful insights into the court's approach to handling such complex cross-border disputes.

II. The Case

1. Underlying Facts

X, a Bangladeshi citizen who also appears to have also a US citizenship, and Y, a Japanese citizen, met each other in Japan where they got married in 2008 according to the forms prescribed under Japanese law. Their marriage resulted in the birth of three daughters. From 2020, tensions between X and Y began to intensify, mainly due to financial disagreements. By late December 2020, a family dispute arose, after which (on 18 January 2021) Y informed X of her intention to divorce and ask him to leave their home.

On 21 January 2021, while the two elder daughters were on their way home from school, X intercepted them and took them to live with him at a separate residence. On 28 January 2021, Y initiated legal proceedings against X in the Tokyo Family Court, seeking custody of the children and an order to hand over the two daughters. On 18 February 2021, while Japanese courts were addressing the custody claim, X left Japan with the two children, after obtaining new passports for them. Since then, the daughters have been living and studying in Bangladesh.

2. Legal Battle

a) In Japan

As noted earlier, on January 28, 2021, Y initiated legal proceedings regarding custody of the children and sought an order for their handover. On 31 May 2021, the Tokyo Family Court issued a decree in favor of Y (*Hanrei Taimuzu*, No. 1496 (2022) p. 247, *Hanrei Jiho* No. 2519 (2022) p.60). The court reached its conclusion after assuming international jurisdiction on the grounds that the children's domicile was in Japan (Article 3-15, Article 3-8 of the Domestic Relations Case Procedure Act), and designating Japanese law as the applicable law to the case under the relevant choice of law rules (Article 32 of the Act on General Rules for Application of Laws). The court also refused to take into account an interim custody order issued by Bangladeshi courts (see below), given its non-final and conclusive nature.

b) In Bangladesh

i) Custody dispute before the Family Court

On 28 February 2021, shortly after arrived in Bangladesh, X filed a lawsuit seeking sole custody before the competent family court in Bangladesh. On the same day, X obtained from that court an interim order on custody and restrained the taking of the children out of Bangladesh.

ii) *Habeas Corpus* Petition

In July 2021, Y travelled to Bangladesh, leaving her youngest daughter with the custody of her family members. Encountering difficulties in accessing her daughters, Y filed a *habeas corpus* petition, seeking a determination on whether the children were being unlawfully held in custody. Y argued, *inter alia*, that Japanese courts have proper jurisdiction over the custody claim and that their decision should be given effect.

The High Court Division of the Supreme Court of Bangladesh (hereafter, 'the High Court') considered that, the children welfare and well-being should be paramount and must be assessed independently by Bangladeshi courts, regardless of any foreign judgment. After reviewing the overall circumstances of

the case, and hearing the children, the High Court ruled that daughters remain in X's custody, while granting Y visitation rights (Writ Petition No. 6592 of 2021 of 21 November 2021. A summary of the decision is provided by S Khair and M Ekramul Haque, "State Practice of Asian Countries in International Law – Bangladesh" (2021) 27 *Asian Yearbook of International Law* 146).

Dissatisfied with the order, Y appealed to the Appellate Division of the Supreme Court of Bangladesh (hereafter 'The Appellate Division'). After examining relevant international and domestic laws and precedents, The Appellate Division reiterated that the children's best interest should be given primary consideration. It concluded that the appropriate forum to resolve the custody dispute is the Family Court, where proceedings were already pending. The Appellate Division ultimately decided to overturn the High Court's decision, placing the children in Y's custody, while granting X visitation rights until the Family Court issued its final verdict (Civil Petition for Leave to Appeal No. 233 of 2022 of 13 February 2022. A summary of the case is provided by S Khair and M Ekramul Haque, "State Practice of Asian Countries in International Law – Bangladesh" (2022) 28 *Asian Yearbook of International Law* 195).

iii) Continuation of the Proceedings before the Family Court

The proceedings resumed before the Family Court. On 29 January 2023, the first-instance court dismissed X's claim on the ground that the Bangladeshi courts lacked jurisdiction since the custody issue had already been decided in Japan, country of the family's last residence. The court also emphasized that children's welfare would be better ensured with the mother (Dhaka in Family Suit No. 247 of 2021 dated 29 January 2023). The decision was confirmed in appeal on similar terms (Family Appeal No. 22 of 2023 dated 12 July 2023). Dissatisfied, X appealed to the High Court.

iv) Ruling of the High Court

Before the High Court, X challenged the lower courts' conclusions. X's key arguments included the following:

(i) The parties had been litigating in Bangladesh for a long time, thus justifying the jurisdiction of the Bangladeshi courts over the dispute

(ii) The lower courts actively engaged in discussing the merits of the case, including the welfare of the children, and parental suitability, therefore, dismissing the claim on jurisdictional ground was illogical,

(iii) The decision rendered in Japan was not binding on the Bangladeshi courts

(iv) The Japanese decree cannot be given effect as it did not grant X any visitation right

In her response, Y argued that the lower courts correctly dismissed the case. Y's arguments include – among others – the following point:

(i) The cause of action *in casu* arose in Japan, where the children were born and raised. In addition, they had never visited Bangladesh before

(ii) All the parties resided in Japan before the dispute arose

(iii) Since Japanese court had already decided the custody issue, Bangladeshi courts lacked jurisdiction.

(iv) The lower courts thoroughly examined the case, placing emphasis on the children's welfare and well-being. In addition, all questions of welfare and custody should be addressed at the child's habitual residence

In its decision (Civil Revision No. 3298 of 2023 dated 13 February 2024), the High Court ruled that Bangladeshi courts have jurisdiction over the matter on the ground that:

(i) Although the children were born and primarily raised in Japan, the custody dispute partially arose in Bangladesh where X and the children were residing, at the time when the suit was filed, and continue to reside since then.

(ii) the jurisdiction of the Bangladeshi courts could not be ousted by the decision of Japanese court, given that – as an independent country – the courts are

empowered to exercise jurisdiction under domestic law. Such an issue should have been seriously considered with due regard to Bangladesh's sovereignty, rule of law and the legal aspects of the country.

Regarding the custody determination, the High Court emphasized the importance of carefully considering and balancing various aspects of the case, with a particular focus on the welfare and well-being of the children as the paramount principle. The Court considered that, as a matter of law in Bangladesh, custody should always be granted to the mother, as this is in line with the welfare of the children. The Court also stressed the importance of placing particular emphasis on the opinion of the children and giving precedence to their mental state and intention. Based on such considerations, the Court decided to divide the custody between the parents: custody of the child who wished to stay with the father was granted to X, while custody of the child who wished to return to Japan was granted to Y. The Court also urged the parties to ensure full visitation rights through amicable arrangement based on the principle of reciprocity.

III. Comments

The case, along with the manner in which it was handled by Japanese and Bangladeshi courts raise several important legal and practical questions. Among these, the following can be highlighted.

1. Relevance of the 1980 HCCH Convention

First, the case highlights the significance of the 1980 HCCH Convention in addressing cross-border unlawful relocation of children. Had Bangladesh been a contracting state, the resolution of the case would have been more straightforward, potentially avoiding the prolonged and conflicting litigation that ensued in both jurisdictions. In this respect, one particularly noteworthy aspect deserves to be mentioned. When submitting the writ petition before the High Court, Y argued that, despite the fact Bangladesh not being not a contracting state, the 1980 HCCH Convention could still be applicable. In support of her argument, Y relied on an earlier High Court decision, in which the 1980 HCCH Convention was recognized as being "part of international customary law"

(*RMMRU v Bangladesh and others* (2020) 72 DLR 420). The High Court, however, did not address this issue.

2. Treatment of the Case in Japan and Bangladesh

Second, the contrasting approaches taken by the Japanese courts and the Bangladeshi courts in addressing the custody dispute are striking. In Japan, the courts followed a more classical, structured approach, beginning first by determining whether Japanese courts had international jurisdiction, then determining the applicable law before proceeding to assess the merits of the case. This methodical manner to approach the case was facilitated by the fact that Japan has comprehensively codified its private international law. The existence of a clear applicable legal framework with renders the resolution of such cases a matter of straightforward interpretation and application of the relevant legal provisions (for a brief overview, see my previous post here).

The situation in Bangladesh presents notable differences, as rules of private international law in the country remains fragmented and only partially codified (for an overview, see Mohammed Abdur Razzak, 'Conflict of Laws – State Practice of Bangladesh' *in* S. R. Garimella and S. Jolly (eds.), *Private International Law – South Asian States's Practice* (Springer, 2017) 265). An appropriate approach would have been for the High Court to consider whether the Japanese decree could be recognized and enforced in Bangladesh in accordance with the relevant legal provisions (for an overview, see Sanwar Hossain, 'Cross-Border Divorce Regime in Bangladesh' *in* Garimella and Jolly *op cit.* 102, Abdur Razzak, *op. cit.*, 281). The Court's approach in the first and second decision appears to conflate the principle of "comity of nations" with the children's welfare as a paramount consideration that need to be independently assessed by Bangladeshi courts, and the issue of recognition with that of jurisdiction

3. Absence of Islamic law influence

Finally, one of the remarkable aspects of the Bangladeshi court's decisions is the absence of any discernable influence of Islamic law on the assessment of custody, despite the repeated references in the decisions to the religion of the parties. X,

for instance, is described as a ‘religious’ person and ‘a pious Muslim’. The decisions also mention that X and Y’s marriage was celebrated according to Islamic tradition at a local mosque in Japan, following an earlier ceremony at a Shinto Shrine, and only after Y converted to Islam took a Muslim name.

In the High Court 2024 decision, Y is portrayed as an atheist who left Islam and who allegedly threatened X to raise the children in a ‘*Japanese culture where drinking alcohol, live together* (sic)*, eating pork are common*’. Before Bangladeshi Court, X did raise several Islamic principles related to child custody (notably the fact that, under Islamic law, custody should transfer to the father once the children reach a certain age), and emphasizing on his disagreement with Y who, according to him, ‘*refused to follow and respect the Islami life style* (sic)’.

Given the significant role of the Islamic principles play in the Bangladeshi legal system, especially in family law matters (for a general overview, see Ahmad Nasir Mohad Yusoff and AHM Shafiqul Islam, ‘The Legal System of Bangladesh: The Duality of Secular and Islamic Laws’ (2024) *International Journal of Academic Research in Business & Social Sciences* 14(11) 1965), one might expect that the considerations mentioned above would influence the courts’ decisions. For example, as a matter of general principle, the custody of children should not granted to someone who left Islam, particularly, when that person lives in a non-Muslim country (see e.g. the decision of the UAE Federal Supreme court of 10 April 2004 cited in Béligh Elbalti, ‘The Recognition and Enforcement of Foreign Filiation Judgments in Arab Countries’ *in* N. Yassari et al. (eds.), *Filiation and the Protection of Parentless Children* (T.M.C. Asser Press, 2019) 397).

Nonetheless, it is remarkable that none of these considerations were raised or taken into account by the judges, who addressed the case in an entirely objective manner. Even more striking, the High Court not only affirmed Y’s suitability as a custodian, but also reiterated its longstanding principle that child custody should generally be granted to mothers. This principle was applied in the present case without any apparent consideration of Y’s change of religion, giving no weight to her religious background or to the fact that she identifies as a non-Muslim who has left Islam.