CACV 45/2020
[2020] HKCA 317

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO 45 OF 2020

(ON APPEAL FROM HCMP NO 2284 OF 2019)

IN THE MATTER OF an application under the Child Abduction and Custody Ordinance, Cap 512 ("the Ordinance") and Order 121 of the Rules of the High Court (Cap 4, sub leg A) in respect of a child namely B, a girl, born on 29 September 2017

BETWEEN

BMC	Applicant
and	
BGC formerly known as WCY	Respondent

Before: Hon Kwan VP, Cheung JA and Yuen JA in Court
Date of Hearing: 29 April 2020 (remote hearing)
Date of Judgment: 11 May 2020

J U D G M E N T

Hon Kwan VP:

Introduction

1. This is an appeal brought by the father of a girl "B" aged two and a half years against the judgment of B Chu J on 17 January 2020 ("the Judgment"). I shall refer to the father and mother as F and M. F issued an application on 12 December 2019 under the Child Abduction and Custody Ordinance, Cap 512 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention"), for the return of B to the United States of America. His application was dismissed because the judge was not satisfied that immediately prior to 8 October 2019 (being the date of wrongful retention of B in Hong Kong as alleged by F), the habitual residence of B was the USA. The judge held that B's habitual residence has all along remained in Hong Kong.

2. In this appeal, F appeared by Ms Anita Yip, SC and Ms Lily Yu, and M appeared by Mr Jeremy Chan. The Department of Justice sent Ms Hin Kwok and Mr Felix Man as observers to the hearing.

3. F served his notice of appeal on M on 13 February 2020 at a time when proceedings in court were adjourned generally due to public health considerations. F's solicitors wrote to the Duty Judge of the High Court on 13 and 28 February 2020 seeking a hearing of the appeal as soon as practicable. F filed his notice of appeal on 9 March and on 18 March

2020, his solicitors wrote to the Registrar of Civil Appeals seeking an expedited hearing within 21 days from the service of the notice of appeal on 13 February (the 21-day period as mentioned had expired by the time of this letter) and citing Practice Direction 3 of the Supreme Court of the UK.

4. I wish to mention this because the manner in which F's legal representatives went about seeking an expedited hearing was wrong.

5. On 19 March, Lam VP drew the attention of F's solicitors to the Practice Direction of the High Court of Hong Kong, PD 4.1 Section D, which deals specifically with urgent appeals and urgent interlocutory applications. F's solicitors were told that their non-compliance with paragraphs 24 to 31 caused delay in proceeding with this appeal and the request for expedited hearing would not be entertained until the relevant paragraphs in Section D have been complied with.

6. Upon F's solicitors complying with PD 4.1 Section D, the court directed an expedited hearing and further directions were given on 27 March and 1 April regarding the estimated length of hearing, the lodging of the appeal bundles and submissions, the hearing of this appeal by video

conferencing facilities[1], and a hearing date was fixed in consultation with counsel's diaries.

7. This appeal seeks to challenge the judge's finding that B's habitual residence has not changed from Hong Kong to the USA, which is a factual issue. If it is not established that the retention of B in Hong Kong on 8 October 2019 was wrongful (because her habitual residence has remained in Hong Kong all along), F's application for the return of B to the USA must fail. These proceedings do not determine where B should live in the long term. That determination would be made by the court which has jurisdiction to decide on further matters relating to B.

Background

8. The background matters relating to this family of three are set out in the Judgment at §§4 to 39, 48 to 82, 84 to 88, 90 to 91, 93 to 96, and 100. For present purpose, they may be related as follows.

9. F was born and raised in California, USA and he holds a USA passport. He is 47 years old. He moved to Asia after obtaining a university degree in East Asian Language and Culture and an MBA in International Business. He had worked in Asia for 18 years, of which seven and a half years was in Japan and six years in Shanghai. In February 2015,

[1] F, who is residing in the USA, was unable to procure the equipment or visit an external video conferencing site that meets the technical specifications of the Court's video conferencing facilities. He was permitted to view a live broadcast of the remote hearing by way of Skype or other software set up between him and his solicitors upon the undertaking that he and his solicitors will not make any recording of the remote hearing.

while working in Shanghai, F received a job offer to work for a company in Hong Kong as a sales director. He accepted it and worked in Hong Kong for about four and a half years.

10. M was born, raised and educated in Hong Kong. She is a permanent resident in Hong Kong holding an HKSAR passport. She is 38 years old. She attended university in Hong Kong and obtained a Master of Finance. She had never lived overseas even though she had travelled to many countries. At the time when the parties met online in June 2015, she was employed as an associate investor by a financial company in Hong Kong.

11. The parties started dating not long after they met in person in December 2015, and their relationship developed quickly. They were engaged in June 2016. M's job with the financial company was terminated in October 2016. According to M, she did not look for jobs immediately as she and F were planning for their wedding.

12. The parties travelled to California to meet F's family in December 2016. In January 2017, they registered their marriage in Hong Kong and held their wedding ceremony in Phuket, Thailand. In or around April 2017, M discovered she was four months pregnant.

13. B was born in Hong Kong on 29 September 2017. B is now two and a half years old. She holds both an HKSAR passport and a USA passport.

14. Prior to B's birth and in June 2017, F submitted the "Green Card" application for M for permanent residence in the USA. The Form I-130 (Petition for Alien Relative) was dated 4 September 2017. M had to sign the Form I-130A (Supplemental Information for Spouse Beneficiary), which she did on about 4 September 2017.

15. According to F, M wanted to relocate to the USA with him after the birth of their child and he submitted the application at M's request as the process could take up to two years.

16. M admitted that she and F had discussed the possibility of moving to the USA and F raised this again after she became pregnant. Her evidence was that F told her to apply for the Green Card first and to consider later, as the application would take a few years to process. M said her involvement in the application would be minimal with F doing all the procedural preparations. According to M, she had made it absolutely clear to F that she did not want to move to the USA so soon mainly because her support system was in Hong Kong. M explained that she wanted their child to spend more time with her parents as M's mother was not in good health, and that if B were to leave her maternal grandparents for a long time when she was still an infant, there would be no chance for her to form a close bond with them or even remember their faces. Her evidence was that after B was born, she had told F countless times that she did not intend to relocate to the USA, at least not until B was much older.

17. According to WeChat messages from F to M on 8 May 2017, F told M that his employer was asking him to manage the Hong Kong team and it seemed that F was then asking for an assistant so that more of his time would be freed up. F had also indicated to M that he had told his employer they might want to move to the USA in another year or more. There was nothing in M's response that she had indicated any disagreement with what F had told his employer, in relation to the parties wanting to move to the USA in another year or more.

18. Although it would appear that M had intended to seek another job and had attended multiple job interviews after the wedding, there was no dispute that upon F's agreement to support her and her parents financially (they were retired and M could not support them without a job), M became a full time housewife and later a full time mother to B.

19. In June 2017, the parties went to the USA to attend the celebration of the 80th birthday of F's father. In December 2017, they went with B for a four week Christmas vacation to visit F's family in the USA and on that occasion B was baptised with F's older brother and sister appointed as her godparents. It was F's evidence (supported by the evidence of various family members of his in the USA) that on each occasion there were discussions about the family moving to the USA in order to bring up the baby there.

20. The judge found it probable that M did discuss with F prior to B's birth about moving to the USA in a year or more, and had agreed for F to proceed to apply for the Green Card for her. That said, although there was mention of moving to the USA in one or one and a half years, the judge did not find there was sufficient evidence that M had agreed or committed to any definite time frame for any move[2].

21. It was F's allegation that M was suffering from post-partum depression, which she denied, and M alleged that F had displayed symptoms of obsessive-compulsive disorder, which he denied. According to M, since December 2017 and November 2018, she had been seeing a social worker and psychologist respectively for advice on their marital problems, but, on her own admission, she had stopped seeing the psychologist in around June 2019.

22. Since B was about 11 months old, i.e. in August 2018, M had enrolled her in a playgroup for 12 classes until October 2018. M also enrolled B for ten classes at a child psychological development association in April 2019 and also music lessons beginning from March 2019.

23. In December 2018, F was informed by his supervisor that he would no longer be managing the Hong Kong sales team and that another sales manager was going to take over from January 2019 onwards. F felt that his employer was pushing him out of his role, and he had told M this. As the parties

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[2] Judgment, §58

were going to the USA for four weeks to celebrate Christmas with his family, according to F, they took the opportunity to start looking for homes in Brentwood, California together, assisted by F's sister-in-law, who is a licensed realtor. According to F, they both had an enjoyable time in the USA and were feeling positive about the intended move. But according to M, F's sister-in-law merely showed them properties around Brentwood without any particular purpose and M had never said she wanted to reside in Brentwood.

24. The judge found it would appear that soon after the birth of B or by the end of 2017, M started to have second thoughts, or at least had become ambivalent, about any move to the USA[3].

25. On 12 April 2019, F was notified by his employer that his role in Hong Kong was being made redundant and that his Hong Kong work visa would expire on 30 June 2019. F was informed there was a role available to him in the USA and he was strongly encouraged by his employer to accept it in order to develop the USA market. M had denied that F's employer was pushing him out of his job and she referred to a message she sent to her family on 13 April 2019 in which she told her family it was F who wanted to move to the USA and that he applied for the transfer over a year ago. But the judge found no sufficient evidence it was F who had sought an internal transfer as alleged by M[4].

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[3] Judgment, §64

[4] Judgment, §61

26. F accepted that when he told M about his redundancy notice and that his work visa in Hong Kong was going to expire imminently, M was not happy and was initially taken aback by their need to relocate so soon. She had asked F whether he would be willing to provide her with an apartment in Hong Kong so that she and B could live in Hong Kong for a few months at a time after the relocation. F however told M that he would not be able to afford both an apartment in Hong Kong and in California and also he did not want to be apart from B for such a long period of time. He however indicated that M and B could travel to Hong Kong around three or four times a year to spend time with M's parents for two to three weeks each time. F accepted that M had strong reservations to the imminent relocation, and he had messaged M's father for assistance.

27. It was F's case that notwithstanding her initial reservations, M eventually agreed to relocate to California and flight tickets were purchased for the family to depart on 30 June 2019, and that M had also asked him to proceed with her Green Card application.

28. According to F, there were these preparations for the relocation:

(1) M took steps to move forward with her Green Card application and went to the Hong Kong Police to obtain her record of no criminal conviction on 27 May 2019.

(2) The purchase of return flight tickets for M and B to come back to Hong Kong was due to US immigration law requiring non-citizens to have an exit ticket, and solely for the purpose of enabling M to come back to Hong Kong to complete the steps for her Green Card application and it was intended that the stay of M and B in Hong Kong would be only for a few weeks and that they would return upon the completion of the Green Card process.

(3) The parties vacated their rented home in Wanchai and surrendered the lease thereof, sold and/or gifted all the big items which they would not bring to the USA and packed all their belongings for shipment to the USA.

(4) In the meantime, the parties also jointly looked for potential apartments in the USA.

(5) There was a farewell party with M's friends and she received farewell gifts.

(6) There was also a farewell party with M's family members on 21 June 2019 whereby M's relatives discussed M's future life in the USA.

(7) On Father's Day in 2019, M also expressed her gratitude to her father on Facebook.

(8) On the date of departure, there was farewell by the family members at the airport in Hong Kong. M also appeared to be happy when the family finally left the home in Hong Kong and after they had boarded the flight.

29. M's case was that there was no common intention to move to the USA as alleged by F and F was fully aware of her reluctance to move to the USA or even to leave Hong Kong on 30 June 2019. She alleged that F had done a number of things to mislead her into believing that the Green Card application was necessary for her to travel between the USA and Hong Kong without being questioned by the Immigration, and that eventually she went to obtain her record of no criminal conviction after F was agreeable to rent an apartment in Hong Kong. Further, the termination of the lease of their apartment in Wanchai was done by F without informing her in advance, and she had actively looked for an apartment in Stanley for her and B to live in Hong Kong, and to be near her parents.

30. According to M, when the movers went to their apartment to pack their belongings on 27 June 2019, out of the 12 boxes of her belongings and B's belongings, only three boxes consisted of her clothing and that of B, and the remaining four boxes were toys, and that she had kept more than ten bags of B's and her belongings at her parents' apartment for their use when they returned to Hong Kong.

31. M denied attending any farewell party with her friends on 6 June 2019, and said that there was only a social gathering on 14 May 2019 when her friends brought gifts for B, which were not meant to be farewell gifts. The dinner on 21 June 2019 organised by M's family was only a farewell party for

F, since her family members knew that F was leaving but she had not agreed to fly to the USA.

32. What was not disputed was that between 12 April 2019 and immediately prior to leaving Hong Kong on 30 June 2019, F and M had engaged in numerous discussions on their respective intentions and future plans.

33. In M's chats with F on 9 May 2019, she had said: "As I have been telling since [B] is born, I will not move to [US] now. My parents are old now and their health getting worse and dad is going on process of checking cancers. I do not want to leave them now"; "And [I'm] not going to [US] now as stated many time"; and "I think best for her [B] is in [HK]. I have been telling you for over 1.5 years. That's not a news. If you need a year to find job in [HK] and its more than 1.5 years now, you found it now. Its your choice to move to [US]. You are the one who request to work in [US] to your company."

34. On 15 May 2019, M raised with F the question of finances, requesting some money for her own saving on a monthly basis, or for her name to be added to F's bank account, which was referred to by F as "family account". F's response was: "Yes, that is something I would be 100% open to if you are ready to take on the duties of being a wife as described above. Are you ready to be wife? Keep our family together? Finish the process to get a green card? Move to US?" M replied with: "I have right to choose

where I stay. And if I stay [HK] then is it ok?" and "If I stay [HK] then will you pay living cost for me and baby?" F tried to reason with M but it was clear from his further responses that he was only prepared to agree to what M proposed over finances if she were to move to the USA.

35. On 21 May 2019, M received an offer for B to attend prenursery class at a kindergarten for the academic year of 2019 to 2020 starting in September 2019. M said she had paid the deposit fees (with funds from F's bank account) so that B could attend regular classes when she and B returned to Hong Kong. As F had told her that the medical check-up and consulate interview would not take more than a few months to schedule, she believed that she and B would return to Hong Kong some time around late August 2019. In fact, M said she paid the remaining deposit fees on 8 July 2019 to the kindergarten whilst she was still in the USA. Further, the unused classes of B at the child psychological development association and the music lessons at the end of June 2019 were never cancelled. F said M paid the fees to the kindergarten and the other institutes without his knowledge and consent.

36. On 24 May, M made inquiries with a property agent about renting a flat in Stanley and viewed some flats on 3 June and had mentioned to the agent that the lease could start from 1 July 2019. When M suggested to F about renting an apartment at a monthly rent of HK$10,000, F said that renting an AirBnB apartment for four weeks, say at three

trips a year to Hong Kong, would cost less. However, M responded on 10 June 2019 that she wanted to be in Hong Kong for a few months each time. It would appear that even on 26 June 2019, M was still trying to convince F to rent a flat for her in Hong Kong as she was asking the agent whether the flat she viewed was still available. M gave evidence that as her sister had confirmed she would be moving out with her children from their parents' apartment, M knew that she and B would have a stable and permanent place to stay in Hong Kong when they returned.

37. As for F's attempts to look for an apartment in the USA, M said in her chat to him on 20 June: "While you are searching apartment, i want to state it again that [B] and i will stay in [HK] but we are happy to visit u in [USA]."

38. The chats on 26 June showed that until that time, the parties still had not reached any agreement on relocation to the USA. M said: "Since i want to stay in [HK] and you want to move to [US]. As per last time we talked near the big fountain park that i will stay [HK] and happy to visit you in [USA] if you want. Then you asked me to decide buying 30 jun ticket first as travel for leisure first and then i agreed to fly on 30 jun as travel. I want you to understand and agree that baby and i will come back [HK] when i wish." There was a long response from F. Among other things, he said: "We don't need to be in the US forever. But why not try it for a few years. You may like it a lot when you are making 2 or 3 times more money than you can in HK and live in a

better place. Try it before you refuse it. Keep an open mind. And most important keep our family together." It is fair to say by F's response, there was no clear indication from him whether he agreed that M was travelling on 30 June 2019 to the USA for leisure, and whether he agreed that she and B could return to Hong Kong when she wished.

39. There was an episode on 28 June 2019, when F wrote and signed a note in these terms ("the Note"):

> "I, [name of F], Father of [name of B], and husband of [name of M], acknowledge that [M] and [B] are coming with me on June 30, 2019 to the USA on a tourist visa as a holiday to see family and look for apartment in USA. I fully authorize my wife to travel back to Hong Kong with our daughter and in my absence once we have set the interview date in Hong Kong US Embassy for a green card which we believe could be in just a few weeks time or as much as a few months time – unclear now. I will not restrict my wife and baby to return to Hong Kong when they wish to do so, relocate to Hong Kong any time she wants."

40. Upon receipt of the Note on 28 June, M sent these chats to F: "This is to confirm that you just sign an agreement to have your authorize for [B] and I can relocate in [HK] anytime we want"; "I agree to go to [USA] with our baby is only on a temporary vacation. I just got your agreement that i can go back and live in Hong Kong with our baby for anytime I want in the future and valid for every time I visit [USA] with my baby in the future"; and "If no response from you then this means you have no objection on that". There was no written response from F.

41. M sent a copy of the Note to her family WhatsApp group, stating that F had signed a note that she and B could return at any time to live at home for a long period[5]. Her father asked her to leave a copy of the Note in Hong Kong.

42. F messaged his step-brother K that day regarding his signing the Note, stating that M "blackmail" him saying that she would not go if he did not sign an agreement and he wrote out what she wanted after a long argument and another big fight.

43. It was M's case that F finally promised her verbally on 28 June 2019 she could return and stay in Hong Kong permanently with B whenever she wished. As M was worried that he would fail to keep his promises, she asked F to write out and sign the Note.

44. It was F's case that M suddenly asked him to write out the Note on 28 June 2019 to say he would not restrict her and B from coming back to Hong Kong to visit any time. As M was adamant, even though he felt being unfairly treated and he was under duress, he signed it very reluctantly to pacify M, and M insisted he should add a further assurance to her in the Note by confirming that she could relocate to Hong Kong any time she wanted.

45. The judge found that whether F was reluctant to sign the Note or not or whether he was under any duress, it must be

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5 In Chinese: "可隨時回家長住"

clear to him that M was not willing to relocate to USA permanently at the time, that she had only agreed to leave on 30 June 2019 to go to the USA for a holiday, and that she wanted a written assurance that he would not restrict her and B returning to Hong Kong any time she wished to do so. The judge took the view that this was clearly M's frame of mind when she and B left for the USA on 30 June 2019[6].

46. The parties stayed at the home of F's brother for the first two weeks of their arrival in the USA, whilst F was looking for an apartment. On 5 July 2019, the parties jointly signed a 12-month lease and a 12-month renter's insurance. M said she co-signed the lease as tenant as she was told by F's brother it was a legal requirement for all tenants over 18 to sign the lease otherwise she would be breaching the law and also that if she wanted to live outside the USA for one to two years, this would avoid questions being raised by the US Immigration. M said she had also called the Management Office which verified what F had said about the legal requirement. However, M said she was not informed by F that there was a choice of a shorter lease than 12 months.

47. F said it was on 6 July 2019 they moved into the apartment in Dublin, California, but according to M they formally moved in only on 13 July 2019. In the process, unfortunately, F broke his foot.

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6 Judgment, §82

48. According to F, due to his broken foot, there was some tension between the parties for the first two months in the USA. However, according to F, M and B integrated well into the social and family environment in the USA and they were happy. F relied on the following to demonstrate that M and B had settled into their lives in the USA: (1) the parties purchased a number of big items to build up their home in the USA for the family's long-term stay there; (2) the family had integrated well in the community in the USA; (3) there were numerous gatherings with F's family; (4) the family participated in a number of local activities, including attending a local Cantonese-speaking Church on Sundays; (5) M learning driving; (6) the family visiting a local theme park and other places and M and B attending two business trips with F.

49. On the other hand, M's evidence was that she had not settled in the USA at all:

(1) The apartment was chosen by F which she did not like at all, as it was very dim and there was no breeze with the windows all facing north. M produced her chats with F at the time, which showed that F had failed to take into account her preferences when choosing the apartment.

(2) Her conduct in shopping together with F for furniture particularly furniture to protect B's safety did not mean that she planned to move to the USA permanently, as it was absolutely necessary to purchase child-safety furniture for B. Further, getting a new bed was because F's old bed was 20

years old and B was suffering from serious skin allergy due to dust mites and in any event, F was going to live in the apartment.

(3) As F was working from home from 7:30 am to 9 pm on his computer, her daily routine was extremely dull. In one of her chats to her family on 10 July 2019, she had said she was staying at home every day with B as she was not able to drive, and she was so bored that she had a headache. She went to the supermarket once in the morning and once in the afternoon and she had been to the supermarket for hundreds of times.

(4) She only went to the local Church for three times instead of every Sunday as alleged by F, and she attended Church for her mental wellbeing.

(5) She only started to learn driving on 18 August 2019 for less than five times in a parking lot for about 15 minutes each and it was F who was teaching her.

(6) She could not adapt to the food in the USA and she had complained about the food in her chats to her family. Further, B was not able to adapt to the weather and food in the USA either and fell ill after one week of arrival in the USA and had a high fever.

(7) The parties did not sign up for any playgroups for B or had any discussion on B starting pre-school in the USA.

(8) She did not open any bank accounts in the USA. She had not cancelled any of her bank accounts or credit cards held with

HSBC in Hong Kong, nor her mobile phone plans in Hong Kong and she had been paying her mobile phone monthly plans for July and August 2019 through her Hong Kong bank account.

50. The parties had also made various allegations against each other including violence/aggressiveness and/or mental issues. It is quite clear that after their arrival in the USA, there were marital issues between them and in particular financial issues. M had sent a chat to her family on 3 August 2019 complaining that F refused to pay her more than US$200 per month as pocket money. M said she had asked him to open a joint account, but according to M, he refused to do so until M started working and crediting her own income into the joint account.

51. M had also sent a chat to F on 7 August 2019 to ask him for a full time mother allowance, indicating that US$200 a month was too little but this was clearly rejected by F who said he was doing everything for her and listing out everything he said he was doing/paying and that he had said if she wanted more than US$200 per month, the parties could make a list of housework for her to do and if she did it, she could earn more from him. In response, M said she would cook all her own food and B's food and she would wash all their own clothes and asked F not to cook for them and not to touch their clothes. M later sent another chat on 21 August 2019 and complained that F still had not given her any allowance.

52. On 18 July 2019, the parties received an email confirming M's interview with the USA Embassy in Hong Kong on 16 August 2019. F said M wanted to delay this and he helped her to seek a delay and later the appointments were re-fixed to 10 September 2019. F then arranged to purchase flight tickets for M and B to depart from the USA on 27 August 2019 and to arrive in Hong Kong on 28 August 2019, for M to have time to attend the required medical examination prior to the interview. There were no return flights booked for M and B but F explained that this was due to the fact that time needed for processing the Green Card application was not known, and that the purchase of return flight tickets was withheld based on the advice on the US immigration website in case there were delays. However, it was F's case that there was clearly a common understanding between him and M that M should return to the USA with B once the Green Card was issued.

53. M and B left the USA on 27 August 2019. They were in the USA for 59 days from 30 June 2019 to 27 August 2019. The parties had travelled during this period, namely from 23 to 28 July 2019, when M and B accompanied F to Buffalo for a work trip and later visited the Niagara Falls, and between 14 to 18 August 2019, when M and B accompanied F on a work trip to Los Angeles and visited F's cousin and his family in Los Angeles. M and B were in the Dublin apartment for a total of 35 days.

54. It was not disputed that the Green Card was issued to M on 27 September 2019 but she did not inform F. By 3 October 2019, F said he found it strange that M still had not received the Green Card and he contacted the USA Embassy. On 8 October 2019, the Embassy responded to his queries, confirming that M had been sent her passport and Green Card on 27 September 2019 by way of SF Express. He immediately emailed M and asked her when she wanted to return to the USA as he needed to purchase flight tickets.

55. On 12 October 2019, M sent this message to F: "Same as i said from video call. Will not visit [USA] so soon. Will be in [Hong Kong] longer and did not agree to move to [USA]." Her message on 24 October was: "We don't know when to visit you. Will let u know if i decided. So no need keep asking. And [USA] is not home. Didn't agree to move". On 27 November, she sent these messages to F: "I did not want to move [USA] and [USA] never home and you know it. You ask me to ship stuff because you say i will have no space in [HK] anyway. Never create home in [USA] together, never agree to live in [USA]. I have told you a thousand time. You insist say [USA] is home a thousand time doesn't change the fact" and "I will not move or go to [USA]. You need to provide shelter in [HK] and living cost in [HK] asap and you need to pay back the living cost since you stop providing money. We need to agree on all the terms because we meet. …".

56. It was F's case that M's attitude towards him changed completely and that she started to ignore his questions as to when she would be returning to the USA with B and was demanding money from him as a condition. F said M did not provide him with any explanation as to why she had suddenly changed her mind. By late October 2019, M would hang up the phone without answering F's questions about B.

57. F said as he was desperate for M to return to the USA with B, he tried to reach out to her family for help. He sent WhatsApp messages to her father and sister but to no avail. F's sisters also sent private messages to M to encourage her to return to the USA.

58. In the end, F purchased a ticket to travel to Hong Kong and arrived on 30 November 2019, and he also purchased flight tickets for him, M and B, to fly back to the USA together on 7 December 2019.

59. It was F's evidence that M refused to see him on 1 December 2019 as arranged by him, and in the end, only her father met with him and his friend ("T"). M's father explained to F that M refused to see him. For the next few days, T helped F to try to contact M, and eventually it was not until 5 December 2019 that M agreed to meet F together with her father, along with T and T's wife. During the meeting, M indicated that she would only allow F access to B at a supervised community centre.

60. F did have access to B on 5 and 6 December 2019, albeit in the community centre. On 6 December, F said he had asked M gently whether she would be willing to return with B to the USA with him the following day as he had already purchased tickets. According to F, M was undecided and he had begged her to return to the USA with B. However, on 7 December 2019, when he called M, M told him that she and B would not be returning to the USA with him that day.

61. The originating summons herein was issued by F on 12 December 2019. His case was that he had never given his consent to B to remain in Hong Kong permanently or indefinitely. He had only agreed to M and B to return to Hong Kong temporarily for the sole purpose of obtaining the Green Card and that the return to Hong Kong was intended and agreed between the parties to be on a temporary basis and that M would return with B to USA a few weeks before B's 2nd birthday or as soon as the Green Card was obtained. The date of wrongful retention was 8 October 2019 when F found out that the Green Card had been issued to M, and when F sent an email to her asking when she would be able to return to the USA with B, M's attitude changed[7].

62. M's main reason for opposing F's application was that she only agreed to her and B accompanying F to the USA at the end of June 2019 for a temporary visit and that her intention had been consistent throughout, namely she would not move to the USA with B permanently, and that B's habitual

[7] Judgment, §§38, 39

residence remained in Hong Kong. Her case was that the trip to the USA was a holiday and at most, for her and B to try out living in the USA, and that it was for them to explore within that period of time if B and she would like the life in the USA and that she and B could return to Hong Kong any time she wished. M relied on the Note, in which F had acknowledged that the visit was a holiday and that M and B would be free to come back to Hong Kong any time when M wished to do so. She denied F's allegation that the Note was signed under any pressure or duress as alleged by him.

The judge's findings

63. The judge identified these four issues for resolution[8]:

(1) Was B habitually residing in the USA within the meaning of the Convention immediately before the alleged wrongful retention by M?

(2) For determining (1) above, what was the purpose of the parties going to the USA on 30 June 2019?

(3) Did M's conduct constitute a wrongful retention of B within the meaning of the Convention?

(4) Should the Court refuse the order sought by F on the ground that F had consented to the alleged wrongful retention pursuant to Article 13(a) of the Convention?

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8 Judgment, §40

64. The judge considered Issue (2) first. In light of what she had found in relation to M's frame of mind when M and B left for the USA on 30 June 2019 borne out by the evidence recited above and the Note in particular, the judge found that the purpose of M going to the USA with B on 30 June was only for a temporary purpose, that this was known to F, and that there was no agreement or intention on M's part that she and B were to relocate to the USA permanently when they left Hong Kong on 30 June 2019[9].

65. It was not disputed that B's habitual residence was in Hong Kong prior to 30 June 2019[10]. The question was whether there was sufficient degree of integration and stability to find and hold that B's habitual residence had changed from Hong Kong to the USA by the time of the alleged wrongful retention in Hong Kong on 8 October 2019.

66. The judge took into account the evidence mentioned earlier concerning the stay of M and B in the USA from 30 June to 27 August 2019. She did not think co-signing a 12-month lease with F on 5 July 2019 would necessarily mean that M had acquired a necessary degree of stability, nor would going to buy furniture with F on that day, or ensuring that there were child safety equipment for B, as this would be absolutely necessary for B irrespective of her length of stay[11]. The judge also noted it was on 8 July 2019 that M

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9 Judgment, §83

10 Judgment, §42

11 Judgment, §98

paid the remaining deposit fees for the kindergarten in Hong Kong for B to start in September 2019.

67. The judge said pertinently at §101 of the Judgment:

> "A child can of course acquire "habitual residence" within a very short time and it is really the quality of the child's residence which is relevant. However, in the present case, there was no sufficient evidence that there was sufficient degree of integration by either M or B in a social and family environment. There was no sufficient evidence that [M] had built up a network with other young Cantonese-speaking families with young children of B's age, or that she or B had made any new friends at all. There was no evidence that [M] and B had attended any social activities with newly made friends. All [F] had mentioned were gatherings with his family members or his friends but according to [M], even those were infrequent and brief."

68. Having considered all the evidence presented, the judge concluded she was not satisfied that by 8 October 2019, the residence (if any) of M and B in the USA could be said to have acquired the necessary degree of stability to became habitual. In the judge's view, M's and B's habitual residence has all along remained in Hong Kong[12].

69. In light of the judge's decision on B's habitual residence, for Issue (3), M's conduct of retaining B in Hong Kong could not have constituted a "wrong retention" within Article 3 of the Convention[13].

70. The judge noted there was no need for her to consider Issue (4), but if there had been wrongful retention of B in Hong

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[12] Judgment, §104

[13] Judgment, §105

Kong, in her view, F had given his consent in the Note to M and B to return or relocate to Hong Kong anytime whenever M wished. So the judge would also have refused any return order on the ground that an objection under Article 13 (a) of the Convention has been made out. The judge saw "no sufficient evidence of any duress" and found as a fact that the Note followed the parties' oral discussions and was only sought by M to record F's earlier oral promise to her[14].

Relevant legal principles

71. The relevant principles regarding habitual residence have been summarised by Cheung JA in *JEK v LCYP* [2015] 4 HKLRD 798 at §7.7 and are as follows[15]:

(1) Habitual residence is a question of fact which should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

(2) The factual question is: has the residence of a particular person in a particular place acquired the necessary degree of stability to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so; nor does one fail to acquire one merely by not intending to do so.

(3) The concept corresponds to the place which reflects some degree of integration by the child in a social and family environment.

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14 Judgment, §106

15 They were set out in the Judgment at §44.

(4) The question is the quality of the child's residence, in which all sorts of factors may be relevant. Some of these are objective: how long is he there, what are his living conditions while there, is he at school or at work, and so on? But subjective factors are also relevant: what is the reason for his being there, and what is his perception about being there?

(5) There is no legal rule, akin to that in the law of domicile, that a child automatically takes the habitual residence of his parents.

(6) Although a child could lose his habitual residence without a parent's consent, nevertheless, it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence.

72. In the Judgment[16], the judge referred to Lok J's statements in *ME v CYM* [2017] 4 HKLRD 739 at §26:

> "In other words, the social and family environment of the child is still the main consideration in determining the question of habitual residence. In the case of a very young child where the mother is usually the main caregiver, the court should assess the mother's integration in her social and family environment

[16] At §45

such as the reason for the move and her geographic and family origins."

73. Lok J's statements were based on the *dicta* of the Court of Justice of European Union in *Mercredi v Chaffe* [2011] 1 FLR 1293, in particular these paragraphs:

> "[53] The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. …
>
> [54] As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.
>
> [55] That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case law, such as the reasons for the move by the child's mother to another member state, the languages known to the mother or again her geographic and family origins may become relevant."

74. Ms Yip submitted that the correct legal principle in determining a young child's habitual residence is to consider the social and family environment of both parents and that the judge erred in applying the statements of Lok J in *ME v CYM* as there is no discernible principle which stipulates a legal rule that in a case concerning a very young child, the father's integration into the social and family environment in the requesting state would be ignored or not considered[17].

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[17] Ground 1 of the Notice of Appeal

75. One should have regard to the context of the *dicta* in *Mercredi v Chaffe*, upon which Lok J's statements are founded. As is apparent from [55], the court was dealing with a situation where "the infant is in fact looked after by her mother". On the facts of that case, the parents had separated shortly after the birth of the child, the father did not have parental responsibility and the mother took the child to Réunion when she was two months old without informing the father. It was in that context that the remark was made about the necessity to assess the mother's integration in her social and family environment.

76. I do not understand Lok J to be saying that where the child is dependent on both parents for his or her care, the court should only assess the mother's integration into the social and family environment and just ignore the father's position. That was not Lok J's approach in *ME v CYM,* in which there was no serious dispute that the mother was the child's primary caregiver. Lok J considered the father's position and remarked that the family's stay in the UK, where the father was from, was a "trial period for [the father] to find work which might eventually enable the family to settle". He took the view that the stay was for a temporary purpose, without a clear plan to move there permanently, it lacked the necessary degree of permanence and integration and this could not be altered by the subjective wishes of one particular parent (at §79). He went on to assess the mother's position and concluded that she had not integrated at all into the UK during her limited stay on a tourist visa (at §80). He

stated that in determining the habitual residence of the 11-month old infant, the court "needs to assess the character of the stay of her parents, the reason for the move and their geographic and family origins in particular that of the Mother" (at §81).

77. How much weight or importance should be attached to the degree of integration in the social and family environment of one parent must depend on the particular circumstances of the case. As in *ME v CYM*, I do not think it could be said that the judge had ignored F's integration in the social and family environment. Nor do I think there was any departure in the Judgment from the principles stated in *JEK v LCYP*.

78. I turn to the principles in dealing with conflicting evidence in the factual inquiry of habitual residence. In accordance with the summary nature in proceedings under the Convention, the parties had filed affidavit evidence and the judge gave directions on 18 December 2019 that no oral evidence shall be allowed unless with leave of the court. Neither F nor M had sought leave to adduce oral evidence or to cross-examine the other party at the hearing on 10 January 2020. As remarked by Butler-Sloss LJ in *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548 at 553, the admission of oral evidence in Convention cases should be allowed sparingly.

79. As to the approach where irreconcilable issues are raised in the affidavits filed, this was stated in *Re F (A Minor) (Child Abduction)* at 553:

> "If a judge faced with irreconcilable affidavit evidence and no oral evidence is available or, as in this case, there was no application to call it, how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision, this not requiring a determination. If the issue has to be faced on disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on either side, the applicant will have failed to establish his case."

80. That would appear to be the approach adopted by the judge in the Judgment. She did not find it necessary to resolve quite a number of factual disputes in the affidavits of the parties, because they are not germane to the decision. Nor did she reject categorically the sworn testimony of any deponent, as she recognised that rejecting sworn evidence on affidavit on contested issues of fact without hearing oral evidence should not be undertaken lightly. In a number of instances, she asked instead whether there was sufficient evidence to support the version deposed to[18]. That is an entirely appropriate way to deal with factual conflict in some instances. Where crucial factual disputes must be resolved, the judge had regard to the numerous contemporaneous

[18] As in §§58, 61, 64, 101, 106 of the Judgment

messages exchanged between the parties and their relatives to assist her in arriving at a determination.

81. On appeal, Ms Yip sought to raise many of the factual disputes emphasising the version given in F's affidavits (which was disputed by M) and contending that the judge had no basis not to accept F's evidence on oath, or had failed to consider or give weight to F's evidence. It is futile to raise such factual disputes again when they are not required for the proper determination of the central factual inquiry of habitual residence, all the more so when many of these factual disputes cannot properly be resolved on affidavit.

82. The last matter in the topic of legal principles relates to the appellate approach regarding challenges to findings of fact. I will endeavour to state the principles succinctly, as there is no dispute on this[19]. Three kinds of factual findings are involved in this instance: (1) findings of primary fact; (2) findings based on evaluation of facts; and (3) findings based on inferences.

83. For findings of primary fact, the appeal court must be satisfied that the trial judge has gone plainly wrong before it could interfere. There is a wide spectrum of the degree of reluctance for intervention. At one end is a straight conflict of primary fact between witnesses where credibility is crucial and the appeal court can hardly ever interfere. At the

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[19] The principles are set out in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] 1 WLR 577 at §§13 to 17; *ZJW v SY* [2017] HKFLR 612 at §§25 to 34; *Uni-Creation Investments Ltd v Secretary for Justice* [2018] 2 HKC 531 at §§30 to 34.

other end is where findings are made entirely or almost entirely on undisputed documents where no question of credibility of witnesses is involved and the appeal court is in as good a position as the trial judge to make the finding. But even in the latter kind of situation, it does not mean that the appeal court would embark on a *de novo* exercise of fact-finding on its own. The appellant still needs to show that the judge's finding is plainly wrong.

84. Where findings are based on evaluation of facts, they involve an assessment of a number of different factors which have to be weighed against each other. It is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and the appeal court should approach them in a similar way. In short, it would be most slow to disturb the judge's evaluation of evidence and findings of fact unless the evaluation was tainted by a misapprehension as to the facts, or that he took into account irrelevant matters, or that he failed to take into account relevant matters, or that the conclusion he reached in his evaluation was outside the generous ambit within which a reasonable disagreement is possible. And while the appeal court would be more ready to differ from the trial judge's evaluation of facts by reference to some legal standard such as negligence or obviousness, where the application of such a legal standard involves no question of principle but is simply a matter of degree, the appeal court should be very cautious in differing from the judge's evaluation.

85. Findings based on inferences can be made from primary facts or after a process of evaluation. If the former, the appeal court approaches an inference in the same way as it approaches an appeal against a finding of primary fact. If the latter, the court adopts the same approach as in relation to findings based on evaluation of facts.

86. Habitual residence is a question of fact the determination of which involves an assessment of a number of different factors which have to be weighed against each other. In considering whether integration in a social and family environment would have a sufficient degree of stability to establish habitual residence, it must be borne in mind that this is often a matter of degree upon which different judges can legitimately differ, so the appeal court should be very cautious in differing from the judge's evaluation and it ought not to interfere unless it is satisfied that the judge's finding lay outside the bounds within which reasonable disagreement is possible.

This appeal

87. The primary contentions of F on appeal may be summarised as follows:

(1) The judge erred in making the wrong finding of fact that M has been the primary carer of B since birth. She should have found that both parents were primary carers of B[20]. She fell into error in only approaching the degree of integration of

[20] Ground 2 of the Notice of Appeal

the child from M's perspective and relying on M's evidence only[21].

(2) The judge was wrong in finding that there was no common intention to relocate to the USA. She should have found that the purpose of the family's stay in the USA was for relocation[22].

(3) The judge was wrong in concluding that there was no sufficient evidence to find some degree of integration of B in the social and family environment in the USA, considering that the family as a whole had done its best to integrate within such a short period[23].

(4) The judge erred in concluding that F had given consent in the Note to M and had failed to assess F's case that he signed the Note under duress[24].

88. All the above contentions seek to challenge various findings of fact in the Judgment. They will be considered in the order set out above.

Discussion

89. It is pertinent to point out that on the affidavit evidence of F, it was his assertion that he, not M, had been the primary

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21 Ground 4 of the Notice of Appeal

22 Ground 3 of the Notice of Appeal

23 Ground 4 of the Notice of Appeal

24 Ground 5 of the Notice of Appeal

caregiver of B since her birth[25]. Before the judge, F never presented a case that both parents were primary carers, as Ms Yip has sought to do on appeal. As the judge had pointed out, there were some disputes as to who was the primary carer of B. The judge looked at the matter realistically, noting that F was working full time in Hong Kong after his paternity leave of four weeks and he had to go on business trips. After their arrival in the USA, F was mostly working at home. F broke his leg after a week and on his admission it was difficult for him to care for B. Having considered all the evidence, the judge came to the view it would be more probable than not that M had been the primary carer of B since her birth, although F had helped in B's care[26].

90. Ms Yip set out at great length F's evidence relating to how he had cared for B in an annex to the Notice of Appeal and quoted various messages from F to his family members, M and her father and M's messages to her family members, in which F lamented he had to do "mostly everything" and talked about the "sacrifice" he made for B. She submitted that the judge had failed to have regard to the evidence set out in that annex.

91. This is tantamount to asking the appeal court to embark on a *de novo* exercise of fact-finding on its own, and is inappropriate. The mere fact that the Judgment did not set

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25 1st affidavit of F filed on 16 December 2019, §§16 and 41; 3rd affidavit of F filed on 8 January 2020, §46

26 Judgment, §47

out *in extenso* the evidence F relied upon does not mean that the judge had not considered those matters. The judge was clearly alive to the dispute between the parties as to their respective roles in caring for B and, as mentioned in the Judgment, had "considered all the evidence" before making the finding, a finding based on the evaluation of facts. F's latest contention is that instead of finding M was the primary carer and he had helped in B's care, the judge should have found both were primary carers. This is clearly a matter of degree upon which different judges can legitimately differ. It cannot be said that the judge's evaluation is outside the generous ambit within which a reasonable disagreement is possible. There is no basis to disturb the finding of the judge that M had been the primary carer of B since birth and F had assisted in B's care.

92. This contention that both parents were primary carers was used as a springboard for the argument that the judge was in error in approaching the degree of integration of B from M's perspective alone. That is not a fair reading of the Judgment. In the narrative given above of the relevant background matters, F's position as to how the family had settled into their lives in the USA was set out in the Judgment as well as M's perception. It was not the case as contended by Ms Yip that having found M to be the primary carer, the judge just treated M's position as equal to or automatically representing B's position. The judge had looked at the living of the family in the USA from the perspective of both parents, was alive to the competing positions of each and had carefully

considered the evidence in deciding what weight to give to different factors.

93. In the end, Ms Yip was reduced to complaining about excessive weight that the judge had placed on M's lack of integration and M's back-up plan of enrolling B in kindergarten in Hong Kong without F's knowledge, and insufficient weight being placed on the evidence adduced by F. In evaluating the different matters that made up the competing positions of the parties, the judge was entitled to give more weight to some matters than others. The appeal court is not tasked with performing the weighing exercise afresh. There is no room for intervention in the absence of one or more of the grounds mentioned above according to the established principles.

94. The purpose for which the family left Hong Kong for the USA on 30 June 2019 is obviously important in assessing the quality of B's subsequent stay in the USA and whether this would constitute habitual residence. Ms Yip submitted whether there was joint parental intention to live permanently in the USA is not a decisive factor to find the habitual residence of B. She made much of her contention that the family's departure to the USA was clearly not for holiday as stated in the Note or for leisure as mentioned in M's message to F on 26 June, but was for the common intention of trying out living in the USA, taking M's case to its highest. Because of M agreeing to try out living in the USA, the purpose of the family's stay was for relocation, and

M's reservations on relocation is a red herring. Ms Yip went as far as to submit that once B set foot on American soil on 30 June 2019, B has changed her habitual residence from Hong Kong to the USA, and the family gave up their residence in Hong Kong the minute they left. She contended that the judge was wrong to place weight on the "non-decisive factors" of M and should just focus on what actually happened when the family arrived in the USA, and the substance and quality of their living there.

95. I do not agree with this submission. As Baroness Hale of Richmond DPSC has said in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 at §63:

> "The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another."

96. These cases cited by Ms Yip are good illustrations: *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548; *LM v HTS (Child Abduction: Habitual Residence)* [2002] 1 HKC 194; *BLW and BWL* [2007] 2 HKLRD 193; and *MJB v CWC (Hague Convention)* [2018] HKFLR 331.

97. In *Re F*, it was found that the family from England had acquired habitual residence in Australia within a month of their arrival, as when they left England their plan was to settle in Australia.

98. In *LM v HTS*, the family left Hong Kong for Germany with the intention of building a new life in Germany. Weight was given to the manifest intentions of the parties evidenced by their words and actions and no weight was given to the uncommunicated fears or private reservations subsequently alleged by the mother. It was held that the stay in Germany for four months was for a settled purpose on the part of the couple to take up residence there as part of the regular order of their lives for the time being and habitual residence in Germany was established.

99. In *BLW and BWL*, the children were brought to Hong Kong from their habitual residence in the USA by the father with the shared intention of the parents that the children would live with the mother in Hong Kong for two years. It was held that their stay in Hong Kong was not for a temporary purpose only and they had acquired habitual residence during the time they lived in Hong Kong.

100. In *MJB v CWC*, the mother from Hong Kong had agreed to relocate with the father to the UK. Even though the infant was in the UK for about ten weeks, it was held there was a sufficient degree of stability and integration in the social and

family environment in the UK for the infant's residence there to be habitual.

101. The present situation is very different. On the evidence, there was clearly no agreement or common intention of the couple to relocate to the USA (whether it be permanent or for a temporary period) when they left Hong Kong on 30 June 2019. There is no reason why M's reluctance and reservations, which were clearly and persistently communicated to F, should not be taken into consideration in assessing the quality of the family's stay in the USA, as submitted by Ms Yip. As the judge had found, M's frame of mind in going to the USA was as set out in the Note and it must be clear to F there was no intention on her part that she and B were to relocate to the USA permanently. She had agreed to go on the written assurance in the Note that she was to travel back to Hong Kong with B once her interview date for the Green Card was set and F would not restrict her and B returning to Hong Kong any time she wished or relocate to Hong Kong any time she wanted. This is a finding of primary fact that the judge is clearly entitled to reach on the evidence. And there is no basis for Ms Yip's submission that M did not rely on the Note. It can hardly be said that the judge was plainly wrong in this finding.

102. As the family had left in ambiguous circumstances on 30 June 2019, B would not lose her habitual residence in Hong Kong for some time and correspondingly would not acquire a new habitual residence in the USA until later. The judge

found in respect of B's stay in the USA of 59 days, there was no sufficient evidence of a sufficient degree of integration by M or B in the social and family environment in the USA to acquire the necessary degree of stability for B's residence to become habitual. This is a finding based on evaluation of facts. As mentioned earlier, it is a matter of degree upon which judges may legitimately differ and unless it be shown that the judge's finding was outside the generous ambit within which a reasonable disagreement is possible, there is no basis for the appeal court to interfere.

103. Ms Yip urged upon us that the family had, in the short span of their time in the USA, made joint efforts to settle in the new environment and had done its best to integrate, pointing to the matters relied on by F which have been set out in the Judgment as summarised above. She submitted that matters beyond the parties' capability, such as the opening of a bank account by M in her own name in the USA, or M obtaining a US driving licence before the issue of her Green Card, or her working in the USA[27], should not be taken into account as indicative of a lack of sufficient integration.

104. I do not think these matters are sufficient to warrant interfering with the judge's evaluation of the different factors she took into account. Nor has it been demonstrated that the judge's weighing exercise was plainly wrong.

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[27] Judgment, §102

105. Ms Yip pointed to the messages between M and a US attorney from 12 to 19 July 2019, contending that it was clear from those messages that M had wanted to try to live in the USA and her state of mind was that she had relocated to the USA and all she wanted was an option to come back to Hong Kong while prolonging their residence in the USA. In one message on 17 July 2019, M said she planned to live in the USA for one year and two months and to return to Hong Kong in September 2020 for B to start school at the age of three. She asked the attorney if she came back to Hong Kong and F filed for divorce, whether the State of California would order her to bring B back to the USA as Hong Kong was a party to the Convention.

106. The judge had considered M's messages to the US attorney and took the view that M was posing several scenarios to the attorney and considering different options. The judge considered the message of 17 July in the context of all of M's enquiries and, viewed in that light, concluded that it was clearly one of the scenarios raised by M and should not be regarded as indicating that M had formed an intention to reside in the USA for one year and two months[28]. That is a finding the judge was entitled to make, nor can it be said that she was plainly wrong.

107. Ms Yip contended that the Note should not be taken at "face value", because it was self-serving, unreliable and "contrary to what happened in reality". That was because the family

[28] Judgment, §89

did not leave for a holiday as stated in the Note and M's subsequent communications with the US attorney showed that the departure to the USA was for relocation. She also argued that the judge had failed to consider "objective evidence" of duress being the complaint made by F to his step-brother not long after he signed the Note, saying he was "blackmailed" by M into signing it.

108. The above contentions are against primary findings of fact made by the judge: that the Note followed the parties' oral discussions and was sought by M to record F's earlier oral promise to her, that there was no sufficient evidence of duress, and that M's frame of mind when she left for the USA was as stated in the Note. I do not think there is any or any sufficient basis to disturb these primary findings of fact.

109. Ms Yip also sought to argue that if, contrary to her submission, F had given consent to M in the Note on 30 June 2019 to remove B from the USA, M failed to establish that the consent given in the Note was still extant or operative at the time of the wrongful retention of B in Hong Kong on 8 October 2019. In support of this contention, she cited *Re P-J (Abduction: Habitual Residence: Consent)* [2009] 2 FLR 1051 at §§35 to 49, 53 to 57.

110. This argument was not raised before the judge. Nor did it feature in the Notice of Appeal or the two written submissions lodged on appeal on behalf of F. F should not be allowed to raise it. In any event, I do not think this

argument would assist him. On the plain wording of the Note, there is no question of the consent not subsisting at the time of the alleged wrongful retention in October 2019, as F had agreed he would not restrict M and B to return to Hong Kong "when they wish to do so", or relocate to Hong Kong "any time [M] wants". If F should contend that this consent, which appeared to be open-ended, was vitiated, it is for him to show valid grounds which would vitiate this open-ended consent. This he has failed to do.

111. The finding of habitual residence was made after a careful evaluation of the facts. Having considered all the available evidence, the judge was not satisfied that B's residence in the USA had acquired the necessary degree of stability to become habitual. On the established principles, there is no basis to interfere with the judge's finding.

Conclusion and costs

112. I would dismiss the appeal of F.

113. Mr Chan sought an order that F should pay M's costs of this appeal on the basis costs should follow the event. The judge made no order as to costs in dismissing F's originating summons, as she saw no reason to depart from the usual approach in cases concerning children. I do not understand Mr Chan to seek costs of the hearing below, and there is no reason to interfere with the judge's discretion to make no order as to costs.

114. I would make an order there be no order as to the costs of this appeal, adopting the approach of the judge.

Hon Cheung JA:

115. I agree with the judgment of Kwan VP.

Hon Yuen JA:

116. I agree with the judgment of Kwan VP.

(Susan Kwan)	(Peter Cheung)	(Maria Yuen)
Vice President	Justice of Appeal	Justice of Appeal

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