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N. v. O. [1999] 1 HKLRD 68

N. v. O.

In the High Court of the Hong Kong Special Administrative Region

Court of First Instance

Miscellaneous Proceedings

23 October 1998

Hartmann J.

Hartmann: These proceedings concern a five-year-old boy named J-M P N who, since January of this year, has been living in Hong Kong with his mother, the defendant. In August, the plaintiff, who is the boy's father and who lives and works in Luxembourg, instituted proceedings in this court seeking an order that his son be placed into his physical custody in Luxembourg. The father has founded his action an two bases; first, on the provisions of the Child Abduction and Custody Ordinance (Cap 512) which gives the Hague Convention on the Civil Aspects of International Child Abduction the force of law in this jurisdiction and, failing that, on the discretionary jurisdiction of this court to order such removal where it is shown to be in the best interests of the child.

On 12 October, at the end of the hearing, I declined to make either order. Instead, I ordered that proceedings should take place in this jurisdiction to decide the issue of custody; a power vested in this court by reason of the fact that the child is its ward. My reasons for declining the father's application are contained in this judgment.

A brief history

The defendant in this matter (whom I shall call the mother) was born and raised in the United States of America. She is now 27 years of age. It appears from the papers that she is a woman of considerable ability, having excelled at university in the United States both academically and in sports.

In the summer of 1991, while pursuing a course of studies at a university in Germany, the mother met the plaintiff (whom I shall call the father) and a romance ensued. The mother went back to the United States to complete her studies but then returned to Europe to join the father. They were married in Luxembourg on 23 October 1992. A few months prior to the wedding the mother obtained employment with an international corporate bank and remains employed by that same bank up to the present time.

What then of the father? He is twenty eight years of age and is a citizen of Luxembourg. It appears from the papers that he comes from a large Luxembourg family. He too is a person of considerable ability. When the parties met, he was studying electrical engineering and today, duly qualified, is employed in the field of information technology with an international company. He continues to reside in Luxembourg where he owns his own home. J-M, the child of the marriage (whom I shall call the child), was born in Luxembourg on 6 April 1993 and is now, therefore, just over five and a half years of age.

At a relatively early stage of the marriage unhappy differences arose between the parties and in April 1995 the mother instituted divorce proceedings in Luxembourg. It is not disputed that from the outset the father indicated his desire to have custody of the child. One of the reasons was his fear that the mother intended to return to the United States and take the child with her. According to the mother, she found it increasingly difficult to remain in Luxembourg and therefore resolved to make a 'new beginning' in the United States. In August of that year she obtained from her employer approval 'in principle' for a transfer to the New York office.

It is apparent from a reading of the papers that the father has always alleged a desire on the mother's part to distance the child from him, both geographically and emotionally. To that end he alleges that the mother has resorted to various deceits upon the courts and himself. This the mother has denied. It is her case that she has always been prepared to offer the father generous access to the child but that the father has manipulated matters to damage her in the eyes of the courts, his prime motive not being the best interests of the child but rather a desire to seek a reconciliation with her or, failing that, to cause her hurt. She too, therefore, alleges the practice of various deceits by the father. Whatever the true situation, it is apparent that the Luxembourg courts did know something of the mother's desire to return to the United States and to settle down there. This is apparent from various rulings made by those courts.

The first ruling of the Luxembourg courts concerning custody was made on 2 October 1995 and reads in part as follows: N and O maintain respectively their request for the custody of the mutual minor child J-M, born on April 6, 1993. It is a normal steady judgment that a minor child during the progress of the divorce will be confined to his mother unless she is suffering any mental troubles (Court of Appeal 6.4.1987, No 9450) O, having a high salary, has declared to bring the child to kindergarten during working hours. N from his side only accuses his wife for changing her residence to her home country, the U.S.A. Missing serious difficulties of the side N and having found nothing against the mother, I give the child to the mother and allow the father visiting rights. That the mother did not oppose. This is in the best interest of the child.

From the affidavits of law which have been presented to me (regrettably not from independent sources) it appears that the ruling of 2 October 1995 was not intended to be a final order and was what in Hong Kong would be called an order for interim custody of the child. In short, it was an order made to regulate the affairs of the parties in the best interests of the child until the courts were in a position to decide upon a final determination of the custody dispute.

Ten days after that ruling -- on 12 October 1995 -- the mother left Luxembourg for New York. The child accompanied her. The child at that time was two years and six months of age. In respect of the move, in her affidavit of 4 September 1998 the mother stated that, after a brief holiday with her family in Missouri, she obtained her own apartment in New York and arranged for the child to attend a local day care centre. A baby sitter was also employed. It is the mother's contention that she in no way attempted to hinder the father from having access to the child. In this regard, she said: As soon as my accommodation arrangements had been settled, I notified my lawyer, Mr. Rodesch, of my contact details. At no stage prior to January 1996 did I receive any request, either through my lawyer or from the Plaintiff personally, for visitation to J-M or, indeed, any enquiry about how he was getting on at school and in his new life. I was busy settling into a new job and was relieved to have left behind the very stressful events of the previous two years and had no particular desire to contact the Plaintiff personally, however, I would certainly have accepted telephone calls and letters had he made the effort. I would also have been pleased to co-operate in the arrangement of access visits. There was no gift, telephone call or letter for J-M from the Plaintiff, even at Christmas.

Contrary to this, it is the father's contention that the mother did not keep him advised of the child's whereabouts. He alleges that the mother's departure was without the consent of either himself or the courts in Luxembourg and that he was left in ignorance of his son's abode. As a result, he was forced to seek the assistance of New York lawyers who issued habeas corpus proceedings.

While, in the absence of oral evidence tested under cross-examination, it is not for me to make any findings of fact, I am constrained to say that I find it a little strange that the process servers in New York apparently had no difficulty in locating the mother in order to serve the habeas corpus papers.

It must also be remembered that at all times in New York the mother remained employed by the same corporate bank which had employed her in Luxembourg. What too of the mother's counsel in Luxembourg; what attempts were made to utilise his services to locate the child? The papers are silent on these matters.

Whatever the truth of the factual situation, in mid-January 1996 the parties did come together with their lawyers and the father was able to enjoy a period of access with his son. It was agreed in writing that the writ be withdrawn and that the parties 'shall proceed with all matters in Luxembourg'.

In addition to the New York habeas corpus proceedings, after the departure of mother and child from Luxembourg, the father sought a review of the earlier order of the Luxembourg courts giving interim custody of the child to the mother. A ruling in respect of this review was given on 6 January 1996 and in part reads as follows: Concerning this subject, the Judge estimates that the mother of the young child up to now, regarding maintenance and education, did not fail and grants her the temporary custody. The fact that, following the separation from her husband and the request of divorce, she returned in the second half of October 1995 to her mother country should not be prosecuted on the temporary custody level which is only granted for the child's benefit. Moreover this benefit for the child, now two years and eight months old, who followed his mother to U.S.A., her mother country, in which he lives at the moment, commands that the child stays with his mother. J-M's father, though, will benefit by a right of visit and accommodation to negotiate according to the benefit of the child and to the personal situation of the parents.

It is apparent from this ruling that by early 1996 the mother's removal of the child from Luxembourg had been 'regularised' to the extent that the Luxembourg courts had not demanded the return of the child under the Hague Convention or any other jurisdiction and had in fact, recognised that, until a final determination of custody had been made, the child should remain the care and control of the mother in the United States while the father would enjoy visitation rights.

It appears that the father did have access to his son in New York at Easter 1996 and also during the summer of that year in Luxembourg. On this second occasion the mother flew herself and the child to London where the father collected the child and returned with him to Luxembourg for a period of one month. At the end of that month, the father escorted the child back to London.

However, matters between the father and mother had not settled. In March 1997, the father made a further application to the courts in Luxembourg seeking review of the interim custody order made in favour of the mother. The father complained of the prohibitive cost of travelling to New York to see his son or in bringing him to Europe. He also complained of the mother's obstructive attitude in arranging access. The mother did not herself fly to Luxembourg to oppose the application but was represented by counsel. On 18 July 1997, the court dismissed the father's application, holding that the mother should retain interim custody and that the father's rights of access should not be altered.

Shortly thereafter, in August 1997, the father flew to New York to collect his son and returned with him to Luxembourg for a period of access of one month. According to the mother it was at about this time that she was asked by her employers if she would be interested in moving to Hong Kong. In early September, the mother flew to Luxembourg to collect her son and at this time she says she advised the father of her intended transfer to the Far East.

Whatever the father may or may not have said directly to the mother, it appears that the prospect of the move alarmed him. After the mother confirmed that she would be making the move, the father wrote letters of protest to the embassy of the People's Republic of China in the United States and also to the Consul-General of the People's Republic in Luxembourg. The father still appears convinced that the mother has engineered her placement in Hong Kong in order to sever his ties with his son. In his affidavit of 15 September 1998, he stated: It is my belief that the Defendant [the mother] deliberately moved to Hong Kong to frustrate my access, knowing that it may not be financially feasible for me to visit J-M as often as I wish and further that it would be much more difficult for J-M to come to Luxembourg.

On 12 January of this year the mother arrived in Hong Kong with her son. Her contract was for a period of two years. However, it is recognised that such contracts are often extended. The mother has indicated that both she and the child have settled well into Hong Kong life and she would consider extending her stay if that were possible. The mother has described her present situation and that of the child in the following terms: In early February 1998, I moved into my new accommodation in South Bay. This is a very pleasant and spacious, two bedroomed, two bathroomed apartment of approximately 1,100 feet with a maid's quarter. The apartment has a balcony and it is three minutes walk from the sea. Within our block, there is a swimming pool and a children's swimming pool with many other young children living in the surrounding apartments. I have a live-in amah, Arnie Amar, who is Filipina and has more than 14 years experience of child care (10 years in Hong Kong caring for young children of expatriate families and prior to that 4 years in the United Arab Emirates). Arnie and J-M have a very good relationship and J-M is now attending the Bradbury School (which is part of the English Schools Foundation) on Stubbs Road, 20 minutes away from the apartment. He takes the school bus to and from school everyday. Initially, J-M attended for two months at pre-school in Repulse Bay and started, after his 5th birthday in April, at the Bradbury School. J-M seems very happy at school and generally with his life in Hong Kong. I too am happy with the move and have settled easily into my new office.

In Luxembourg, seemingly in light of the move to Hong Kong, the father resolved to bring matters to conclusion and in March of this year the Luxembourg courts pronounced a decree of divorce in his favour, finding (in the mother's absence) that there had been fault on her side. Concerning matters of custody, the court ordered that the final hearing take place in May of this year.

The mother flew to Luxembourg on 13 May, the day before the hearing. The child flew with her. On her arrival, she stayed with friends. It appears that the father made a request for his son to remain with him in Luxembourg for two weeks or so but the mother found difficulty with this, suggesting rather that the son make his normal visit to Luxembourg during the forthcoming summer holidays. As a result, the father was only able to see his son for a relatively short period of time. It is apparent that the mother's actions in this regard did not find favour with the court determining the matter of final custody.

On 14 July of this year that Luxembourg court delivered judgment in respect of custody. It awarded final custody to the father while the mother was granted rights of access. In essence, the reasoning of the court may be found in the following two paragraphs: Due to the frequent substantial geographical relocations made solely for professional purposes by the mother in the space of three years, in the light of the projected plans to move to London or New York, given the difficulties encountered by the father in exercising this visiting and accommodation rights due in part to the geographical separation imposed both on the child and on the father, and in part to the lack of flexibility in arranging the exercise of such rights on the part of the mother, in the light of the obstacles created by the mother to the father exercising his right of supervision, and given the inability of the mother to establish a stable, happy relationship between the parent without custody and the child, it is in the interests of the child to grant ultimate custody to the father, given that the mother having invested in her professional occupation to the detriment of the good of her child, has shown herself to be incapable of taking into consideration the interests of the child and taken him abroad, despite the confirmed reticence of the father. The father, who has been deprived of his 'joint parenthood' while having looked after the child from birth and taken care of him for the first two years of his life, who has sought custody from the outset of the divorce proceedings, who has made tangible proposals to organise the material life of the child in the event that he is awarded custody, and who has made provision for a system to adjust the child to family and school life in Luxembourg, appears more apt to offer the child, J-M a stable, secure living environment.

Upon receipt of the judgment, the mother lodged an appeal which I understand is to be heard during the course of this coming month. However, in addition to pursuing her right of appeal in Luxembourg, on 18 July the mother issued proceedings in this court (under reference HCMP 3390/98) seeking to have the child made a ward of court. That application has not yet been heard, having been stayed so that the father's present matters may first be considered. But, of course, in terms of s 26 of the High Court Ordinance (Cap 4), where application is made to make a child a ward of court, the child becomes a ward automatically upon the making of the application and

remains so until the court is able to determine the merits of the matter. Accordingly, although the hearing of the application was stayed, the child nevertheless remained a ward of this court at the time the father's application was heard.

The Hague Convention.

As stated earlier, the father has sought the return of his son to Luxembourg under the provisions of the Hague Convention which, since 5 September 1997, has had the force of law in Hong Kong in terms of the Child Abduction and Custody Ordinance.

The Convention, which was signed in the Hague on 25 October 1980, is designed to counter the growing problem of the civil abduction of children across international borders. Although neither the preamble nor art 1 of the Convention have been enacted into Hong Kong law, they may nevertheless be considered in understanding the objects of the Convention. The preamble states the objects succinctly; namely, 'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence'.

In my judgment, it is important in this case to understand the essential mischief which the Convention is designed to counter and the manner in which it does so. The essential mischief is the removal -- either by abduction or wrongful retention -- of a child from its natural environment. By 'natural environment' I mean the family and social environment of the country in which the child's life has developed or is developing. The means by which the Convention counters such mischief is by an early restoration of the status quo which is achieved by ensuring the prompt return of the child to the country of its natural environment. If this were not done, it would allow the party who has abducted the child to a country of refuge or wrongfully retained the child in that country to seek the assistance of the courts there and by that means create a jurisdiction which is more or less artificial.

Clearly, the efficient functioning of the Convention is based upon the co-operation of Contracting States; art 7 makes that plain. But, in respect of the matter now before me, it must be remembered that the Convention is not simply a jurisprudential machine designed to bring about reciprocal enforcement of custodial judgments. There must first be a wrongful removal from the State in which the child was habitually resident or a wrongful retention of the child outside of that State. In this regard, art 3 reads: The removal or the retention of a child is to be considered wrongful where --

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4 concerns the scope of the convention ratione personae as regards those children who are to be protected and reads: The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen years.

If the court in the Contracting State where the child is found is satisfied that there has been an abduction or wrongful retention it is obliged to act expeditiously in ordering the return of the child to the State where it was habitually resident immediately before such abduction or wrongful retention. In this regard, art 12 reads: Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the

preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Only in restricted circumstances is the court not obliged to order the return of the child. Those circumstances are detailed in art 13 which reads: Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Accordingly, in the matter now before me, for the Convention to apply, two matters must be proved; first, that the mother either abducted the child from Luxembourg in breach of the father's rights of custody or wrongfully refused to return the child to Luxembourg in breach of such rights and, second, that the child was habitually resident in Luxembourg immediately before the mother's abduction or wrongful retention.

In respect of the first of those two matters, it is not the father's case that there was a wrongful removal from Luxembourg. Even if there was some initial confusion over the legality of the mother's removal of the child to New York in October 1995, the Luxembourg courts clearly sanctioned and recognised such removal in their interim orders made in January 1996 and July 1997. In addition, in exercise of his visitation rights, the father has on two occasions brought the child back to Luxembourg and at the end of such access has either personally taken his son out of Luxembourg or delivered the child in that country to the mother in full knowledge of the fact that the mother would remove the child. It must also be remembered that in May of this year the mother returned to Luxembourg with the child to attend the final custody hearing and thereafter removed the child without any suggestion being made that such removal was wrongful within the meaning of the Convention.

In the absence of an abduction, it is therefore the father's case that there was a wrongful retention of the child outside of Luxembourg in breach of his custodial rights. For the purposes of the Convention, however, retention is not a continuing state of affairs, it is an event which occurs on a specific occasion. In this regard, I refer to the dicta of Lord Brandon in Re H; Re S (Custody Rights) (1991) 2 FLR 262: With regard to the first point, whether retention is an event occurring on a specific occasion or a continuing state of affairs, it appears to me that art. 12 of the Convention is decisive . . . the period of one year referred to in this article is a period measured from the date of the wrongful removal or retention. That appears to me to show clearly that, for the purposes of the Convention, both removal and retention are events occurring on a specific occasion, for otherwise it would be impossible to measure a period of one year from their occurrence.

On which specific date, therefore, is it alleged that the wrongful retention occurred? The father's counsel, Ms Selina Lau, has proposed two possible dates, both of which came after the court in Luxembourg made its final award of custody on 14 July of this year in favour of the father. Those dates may either be 18 July, that being the date on which the mother instituted wardship proceedings in Hong Kong in full knowledge of the fact that, in terms of the Luxembourg order, the father now had custodial rights over the child or it may be 5 August, that being the date by which the Luxembourg court required the mother to return the child to that country. For the purposes of this judgment, however, it is sufficient to say that the alleged wrongful retention occurred in mid-July of this year.

However, retention is only wrongful in terms of the Convention if, to quote art 3, 'it is in breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal or retention'. So, if the father is to make good his claim for wrongful

retention within the meaning of the Convention, he has to show that his son was habitually resident in Luxembourg in mid-July of this year. In my judgment, he has failed to establish this.

The principles applicable to the concept of habitual residence (which is not defined in the Convention) have been derived from the leading English authorities and summarised by Waite J in Re B (1993) 1 FLR 993. I would adopt those summarised principles which are set out as follows on p 995 of the judgment:

1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.

2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration. All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in Re J, sub nom C v. S (1990) 2 AC 562 refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in Re F (A Minor) (Child Abduction) (1992) 1 FLR 548 the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country.

Waite J further accepted that it is possible for habitual residence to change periodically if that is the intended regular order of life for the parents and children. That, in my judgment, accords fully with the lifestyle and career patterns chosen by an increasing number of people in a world where freedom to travel and commerce have diminished national boundaries. Indeed, in my opinion, the mother in this matter falls into this category.

Lord Brandon in the House of Lords decision of Re J (supra), in considering the concept of habitual residence said at p 578: In considering this issue it seems to me to be helpful to deal with a number of preliminary points. The first point is that the expression 'habitually resident' as used in Art 3 of the Convention is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case.

It is for the court receiving the request to return a child to decide the issue of habitual residence. In this regard, for example, see Re B (Child Abduction) (1994) 2 FLR 915 per Ewbank J: I have to say that the Canadian statute is not reflected in English law, either by case-law or by statute, and the decision where a child is habitually resident has to be decided in this court according to English law.

In the present matter it is not disputed that the child left Luxembourg with his mother on 12 October 1995 when he was aged two years and six months. Since that time it has been the regular order of the child's life to live either in the United States (two years and two months) or here in Hong Kong (ten months) in the care of his mother. He has returned to Luxembourg only three times: twice to be with his father for limited periods of access of one month and once to accompany his mother for a matter of days for the final custody hearing. In my opinion, none of those visits, taken singularly or together, could amount to a resumption of habitual residence in Luxembourg and, in fairness, that is not suggested by the father's counsel. It is undisputed that the child does not speak the language of Luxembourg and that, in essence, in the last three years of his life he has been raised in the culture of

North America not Continental Europe. How then is it suggested that Luxembourg in mid-July of this year remained the child's habitual residence?

In the sense that the child's habitual residence is to be seen as his natural environment; that is, the family and social environment of the country in which up to the time of his wrongful retention his life was developing, Ms Lau has accepted that the concept she argues may perhaps appear artificial. Counsel, however, has referred to the principle contained in para 1 of the summary distilled from the authorities by Waite J to which I have referred earlier; namely, that the habitual residence of young children is the same as the habitual residence of the parents and neither parent may change it without the express or tacit consent of the other or an order of the court. That, of course, must be so. Indeed, it may be argued that one of the principle objects of the Convention is to prevent one parent acting in a unilateral manner in breach of the other parent's rights of custody by removing the child of the marriage to a foreign country or by holding the child in that foreign country in an attempt to create there a form of more or less artificial habitual residence. In such circumstances, as I have said earlier, the courts are obliged expeditiously to restore the status quo.

In the present case, however, it must be remembered that no assertion of a wrongful removal of the child, from Luxembourg in October 1995 has been made. Nothing has been placed before me to suggest that having been given interim custody of the child by the Luxembourg courts on 2 October 1995, the mother was restrained by court order from departing from Luxembourg with the child. Even if that issue is ambiguous, it is clear that by orders of the Luxembourg courts made on 6 January 1996 and again on 18 July 1997 the mother's removal of the child to the United States and her settled residence with the child there was recognised and approved.

It is true, of course, that these were all interim orders. But, in my judgment, that factor taken on its own cannot act to prevent the mother (and through her, the child) from ceasing to be habitually resident in Luxembourg or taking up habitual residence elsewhere. Each case must depend on its own facts and the presence of on-going litigation (which may run for many years or never be completed) is simply one fact to be taken into account. In the present case, for example, a period in excess of two years passed before the father sought a final resolution of the custody issue and the probabilities suggest that his actions were precipitated by the mother's move to Hong Kong. But what if there had been no such cause to seek a final resolution, what if the father allowed four or five years to pass? Would not the factual circumstances determining the habitual residence of the child change accordingly?

It has been argued on behalf of the father that while generally the concept of habitual residence is linked to actual residence there are exceptions to the rule. Where, for example, a child's removal to another country is understood to be temporary then the child does not take up habitual residence in that other country. That, of course, is true; the most obvious example in Hong Kong being the despatch of children to boarding school in other countries. Similarly, a business posting to a foreign country may be acknowledged as being purely temporary and while the parents may set up home in that foreign country for the duration of the temporary posting, the family's habitual residence remains the home country. For example, an engineer may take his family from the United Kingdom to the Middle East for the duration of a particular engineering project, the intention being to return to the United Kingdom immediately the project is completed. Such illustrations are countless. Each, of course, depend very much on their own facts and reliance in each case must be placed on the intention of the parents. On this basis, it has been argued by Ms Lau that the mother knew full well that whatever arrangements she made for the child's daily life, pending the final determination of the custody issue by the Luxembourg courts, such arrangements would have to be essentially temporary in nature. The child could have no settled residence until that final determination and accordingly, notwithstanding the length of the child's absence from Luxembourg, his residence elsewhere did not displace his habitual residence in that country.

I regret, however, that I cannot accept that argument for two reasons.

First, habitual residence is not to be confused with permanent or final residence. In that regard, I refer to para 2 of the summary of Waite J supra.

Second, what remained uncertain while litigation was on-going was the final order of the Luxembourg courts as to the matter of custody not country of residence. Put simply, the Luxembourg courts were never asked to decide whether the child should remain in a foreign country or return to Luxembourg, they were asked which of two parents could best ensure the welfare of the child. The father (like the mother) is employed by an international company. If he had indicated to the Luxembourg courts that, if granted custody, he intended to settle with the child across the border in France where he had been transferred and now had a residence, would that have barred his application? Of course not; it would simply have added another factor for the courts to take into consideration in deciding which parent was best able to ensure the welfare of the child.

What then are the factual circumstances unique to the present case which satisfy me that -- at least by 6 January 1996 when the Luxembourg courts made their first order recognising and approving the mother's removal of the child to the United States -- the habitual residence of the child ceased to be that of Luxembourg?

In my judgment, it is clear that when the mother left Luxembourg in October 1995 in order to live and work in the United States it was her settled intention at that time to leave Luxembourg permanently. Other than for a few days, she has not since returned and she has made it plain to the Luxembourg courts that she has no intention to settle in that country again. She arrived in the United States in mid-October 1995 and remained there until she was transferred to Hong Kong in early January of this year. She is American by birth, her family are there; once in New York she rented accommodation and worked. She was in the United States for a period of approximately two years before the matter of her transfer to Hong Kong arose. If she had not been requested to transfer for business reasons, the probabilities indicate that she would still be living and working in the United States, the home of her native language and her native culture.

In my judgment, it is further clear that by 6 January 1996 the Luxembourg courts had recognised that the mother could retain custody of the child in the United States, the father being given rights of visitation which took into account the reality of geographical distances. Over the next two and a half years it was therefore for the mother to decide where, on a day-to-day basis, her son lived and went to school. Because of his tender years, her settled intention to cease being habitually resident in Luxembourg and to take up such residence in the United States (and now Hong Kong) became his intention or, to put it another way, by order of the Luxembourg courts the child was allowed to take up habitual residence outside of that country.

While therefore I accept that by mid-July of this year there was in existence an order of the Luxembourg courts granting custody of the child to the father and ordering the mother to bring the child from his normal place of residence to the father in Luxembourg, I cannot accept that immediately before that time the child's place of habitual residence was Luxembourg. At best the court order was intended to bring about a restoration of an earlier regime of habitual residence. The father's application under the Convention for a mandatory return order must therefore fail.

The court's discretionary jurisdiction

It is not disputed that this court has the discretionary jurisdiction, if it is in the best interests of the child, to order that he be returned to his father in Luxembourg. Ms Lau argued convincingly that I should adopt this course and order such return. Having heard submissions, however, and having given them anxious consideration, although I found it a difficult matter to resolve, I declined to make such an order. It is my considered judgment that, taking all factors into account, the paramount interests of the child are best served by a Hong Kong court considering the matter of custody in detail and making the appropriate orders.

When one parent has failed to establish any entitlement to a mandatory return order under the Hague Convention, how should the court approach the exercise of its discretionary jurisdiction? The essential principles are set out in Rayden and Jackson on Divorce (17th Ed) at p 1634 (45.57) in which it is stated that wardship is usually the appropriate jurisdiction to be invoked: In reaching its decisions, the welfare of the child is the paramount consideration of the English court. This principle is not precluded by an order of a foreign court requiring the child to be returned to its jurisdiction;

the English court is not bound by such an order, but must form an independent judgment giving proper weight to the foreign order. The question is not whether the child will be harmed by being sent back to the country from which he or she has been removed, but whether that course will best serve the child's interests.

Even in Non-Convention cases, the Convention has clearly influenced the thinking of the English courts but nevertheless the welfare of the child remains the central consideration. In this regard the learned authors say: . . . the welfare of the child concerned remains the paramount consideration of the court in reaching its decision, whether it be summarily to order the return of the child to the country of its habitual residence or whether it be to refuse such an order and to embark on an investigation of the merits of where and with whom the child should live. In normal circumstances it is in the interests of children that parents and others should not abduct them from one jurisdiction to another and any decision relating to their custody is best decided in the jurisdiction in which they have hitherto been habitually resident.

In the present case, of course, there has been no suggestion of an abduction by the mother and I have stated clearly that, in my judgment, having lived away from Luxembourg for the past three years (and not speaking the language of that country) it would be unrealistic to describe Luxembourg as the jurisdiction in which the child has 'hitherto been habitually resident'. This is not to say that the spirit of the Convention is not a matter which I have ignored. I have given it most careful consideration. I have done so, however, in accordance with the guidelines laid down by the English Court of Appeal in Re P (Abduction: Non-Convention Country) (1997) 1 FLR 780, the headnote of which reads: . . . the overwhelming burden of the authorities was that welfare was the only consideration which governed the court's decision. What was required was for the court to look at the spirit of the Convention in the context of welfare overall.

What then of the principle of comity? It has been argued on behalf of the father that it was the mother who originally instituted action in the courts of Luxembourg and who, for an extended time, benefited from the interim orders made by those courts. The mother has always accepted the jurisdiction of Luxembourg and continues to do so as evidenced by the fact that she is seeking recourse there by way of appeal. The courts of Luxembourg are no different from the courts of Hong Kong in that the best interests of the child are central to all deliberations in matters of custody. The courts of that country have been seized with the matter of the child's best interests for over three years and are best placed to continue to determine the child's welfare.

But the question has to be asked: are the Luxembourg courts best placed at this time to determine the child's welfare. I think not. It has long been accepted that in the ordinary course of events any decision relating to the custody of children is best decided in the jurisdiction in which they have been normally resident. Mr David Pilbrow, who appeared for the mother, argued that the child is now essentially a North American child, a child who speaks only English and who over the past three years has absorbed almost entirely a North American urban culture, a culture which, in many respects is mirrored here in Hong Kong having regard to the lifestyle which the child now leads. I believe there is substance in that argument.

The child has been living in Hong Kong for ten months. He goes to school here, he plays his sport here, this is the place where he has made and will continue to make friends. The mother indicates that she would like to remain in Hong Kong for an indefinite period of time depending, of course, on the imperatives of her work. In all likelihood, therefore, Hong Kong will be the child's social environment for some time to come. In Hong Kong the welfare authorities will be able to view the child in his surroundings and interview teachers, medical advisors and the like in order to assist the court. The report submitted to the court will therefore be direct and immediate. In such circumstances surely Hong Kong today is the most suitable jurisdiction.

During the course of her most able submissions, Ms Lau, for the father, placed emphasis on the authority of Re K (Abduction: Consent: Forum Conveniens) (1995) 2 FLR 211 where the court ordered that the child, who had been living in England with the mother, should be returned to Texas, the place of the father's residence and where mother and child had previously been residing. I agree that there are a number of similarities between the facts of that case and the one now before me. But

there are also a number of important differences. In Re K, for example, it was said that the child was a 'Texan child of Texan parents' while the judge at first instance commented: 'I have not found this an easy matter. In so very many respects this seems to me to be a Texan case. One only had to listen to the mother and the father giving evidence to realise that this boy is still a Texan boy. All three of them remain citizens of the USA. They are not nationals of the UK.' The same, however, cannot be said in respect of the matter now before me. The parents are of different nationalities; the child at this moment in time is not a Luxembourg boy, he does not even speak the language of that country. In Re K the child had been absent from Texas per some eighteen months; in the present case, in substance, the child has been absent from Luxembourg for three years.

It is to be hoped of course that a child who has the privilege to be born of parents from different cultural and linguistic backgrounds will be able over the years to absorb the best of both worlds which he has inherited. Both the Hong Kong courts and those in Luxembourg have the power to ensure the child is not deprived of that opportunity. But my concern is to determine what at this moment in time is the jurisdiction best suited to determine the child's welfare and I consider it to be Hong Kong.

It has been argued on behalf of the father that if this court accepts jurisdiction there is a real chance of conflicting orders coming into place. I cannot say that such a conflict will come about. I hope it does not. For my part, I have already advised the parties that I will not sit to determine the custody issue so as to avoid any appearance of bias. No doubt the Court of Appeal in Luxembourg will be advised of my ruling and will have an opportunity to consider this judgment. In short, doors have not been closed.

Finally, may I emphasise that I make no criticism whatsoever of the Luxembourg courts. It is apparent that both our jurisdictions adopt the same child-centred and pragmatic approach to cases involving children, both operate under the same sense of urgency and in a spirit of comity with each other. Each no doubt has available to it a court welfare service equipped to make enquiries which will assist the court. The Luxembourg courts dealt with the question of the child's custody because they had jurisdiction to do so and were asked to do so. But it must be remembered that up until now the courts of that country have not been asked to consider whether another jurisdiction may perhaps be better placed to determine the child's best interests. This court, however, has been asked that exact question.

The orders made

My orders therefore are as follows:

1. That the application by the plaintiff for the immediate return of the child, J-M P N (born 6 April 1993), to Luxembourg and into his custody in that country is dismissed.

2. That until further order the child shall remain a ward of this court.

3. That the matter of the child's custody shall be resolved by this court and in that regard:

a. The defendant shall file her affidavit within thirty (30) days of the date of this order.

b. The plaintiff shall file his affidavit within forty (40) days thereafter.

c. The defendant shall be at liberty to file an affidavit in reply but no further affidavits shall be filed without leave of the court first obtained.

d. The social welfare authorities shall be requested to prepare a report on the matter of custody, copies of that report to be made available to both parties.

e. Defendant shall, before the 15 November, apply to set the matter down for hearing on dates suitable to the parties which shall not, however, be before 11 January 1999.

f. There shall be liberty to apply for further directions.

4. That pending a determination of the matter of custody:

(i) The child shall remain in the care and control of the defendant.

(ii) The plaintiff shall be entitled to reasonable rights of access to the child, such rights however, until further order, to be exercised only in Hong Kong.

(iii) Neither the plaintiff nor defendant shall be entitled to remove the child from Hong Kong without the leave of the court first obtained; this order to be registered forthwith by defendant with the relevant government authorities.

5. That as and for costs, there shall be an order nisi that there be no order as to costs subject to the condition that either party may apply within thirty (30) days of the date of this order.

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