

HCMP 2831/2014

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 2831 OF 2014**

IN THE MATTER OF LTY, female,
a child born on 3 December 2008

AND IN THE MATTER OF LTW,
male, a child born on 30 April 2013

AND IN THE MATTER OF the
Child Abduction and Custody
Ordinance, Cap. 512

AND IN THE MATTER OF the
Hague Convention on the Civil
Aspects of International Child
Abduction, 1980

BETWEEN

LPQ Plaintiff

and

LYW Defendant

Before: Deputy High Court Judge Lok in Chambers (Not open to public)

Date of Hearing: 15 December 2014

Date of Decision: 15 December 2014

Date of Reasons for Decision: 17 December 2014

REASONS FOR DECISION

1. This application seeks the return of 2 children (“the Children”), a girl born on 3 December 2008 (“the Girl”) and a boy born on 30 April 2013 (“the Boy”), to Japan which is their place of habitual residence.

2. In the hearing on 15 December 2014, I allowed the application and ordered the return of the Children to Japan. I now give my reasons.

3. This application was initially brought by the Secretary for Justice in his capacity as the Central Authority designated under the Child Abduction and Custody Ordinance (Cap 512). Subsequently, by a consent order made on 4 December 2014, the mother of the Children (“the Mother”), who initiated the proceedings and originally the 2nd Defendant, became the Plaintiff in substitution for the Secretary for Justice. The father of the Children (“the Father”), originally the 1st Defendant, remained as the Defendant of the present proceedings.

BACKGROUND

4. The Mother was born in Shanghai and holds a Mainland passport. She currently works as an information technology software engineer in Japan. She holds a diploma in Computer Science.

5. The Father was born in Hong Kong and holds a Hong Kong passport. He obtained a Bachelor degree in Mechanical and Automation

Engineering and a Master degree in Automation and Computer-aided Engineering. Apart from operating a part-time business of the procurement of Japanese goods to Hong Kong (代購) (“the Procurement Business”), he is currently a househusband looking after the Children.

6. The Mother and Father met in October 2006 through an online social networking service. By that time, the Father was working in the Procurement Business and so he had to travel to Japan frequently. They were married on 6 March 2008 in Hong Kong.

7. In April 2008, the Father moved to live in Japan under a dependant visa as the Mother was working there at the time.

8. The Girl and the Boy were born in Japan on 3 December 2008 and 30 April 2013 respectively. Since the birth of the Children, the Father had been taking care of them at home. The Father supplemented the household income by operating the Procurement Business on a part-time basis.

9. In 2012, the Mother and Father purchased a flat in Japan as their residence. From the evidence, it is not clear whether the flat was purchased in the sole name of the Mother or the joint names of the couple.

10. Through the Father, the Children obtained Hong Kong residency and Hong Kong passports. I understand that, through the Mother, the Children are also eligible to obtain Mainland passports. Under Japanese law, the Children cannot acquire Japanese nationality by birth.

11. Throughout the years, the family did travel to the Mainland and Hong Kong on a few occasions for holidays and to visit the family of the Mother and Father.

12. The relationship between the Mother and Father deteriorated remarkably in June 2014, and since then they always had quarrels and arguments.

13. On 1 August 2014, the Father left Japan and travelled to Hong Kong with the Children. Before leaving for Hong Kong, the Girl was studying in a kindergarten in Japan.

14. After arriving at Hong Kong, the Father and Children have been staying in a flat rented by the Father. He has also arranged for the Girl to study in a kindergarten in Hong Kong. The Boy is still too young to attend school.

15. On 4 September 2014, the Father commenced divorce proceedings in Hong Kong. The Mother is challenging the jurisdiction of the Hong Kong court.

16. On 7 November 2014, the Mother, with the assistance of the Secretary for Justice, commenced the present proceedings against the Father seeking the return of the Children to Japan.

17. The Mother visited the Father and Children in Hong Kong on 2 occasions in September and October 2014. The Mother also attended the hearing in person.

THE HAGUE CONVENTION

18. This application is made under the Child Abduction and Custody Ordinance. Such Ordinance implements the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the Convention”).

19. There is no dispute that the provisions of the Convention are applicable in the present case. Prior to their removal to Hong Kong, the Children were habitual residents in Japan which is a Contracting State. At all material times, the Mother enjoys and enjoyed the rights of custody under article 5 of the Convention and so the removal of the Children by the Father to Hong Kong is considered wrongful under the Convention.

20. Under article 11, Contracting States shall act expeditiously for the return of the child wrongfully removed. Under article 12, the judicial authority of a Contracting State shall order the return of the child forthwith if a period of less than 1 year has elapsed from the date of the wrongful removal. As the Children only left Japan a few months ago on 1 August 2014, the court should order their return without delay.

DEFENCES PUT FORWARD BY THE FATHER TO OPPOSE THE RETURN

21. Article 13 of the Convention provides that, notwithstanding the provisions in article 12, a judicial authority is not bound to order the return of the child if the person who opposes the return establishes that:

- (i) the person having the care 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 (under article 13(a)); or
- (ii) 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 (under article 13(b)).

22. In opposing the return, the Father relies on the following defences:

- (i) the Mother has consented to the removal of the Children from Japan to Hong Kong; and
- (ii) the Children would be placed in an intolerable situation if there were to return to Japan.

23. As the object of the Convention is to discourage a parent from wrongfully removing a child out of jurisdiction in disregard of the rights of custody of the other parent, the defences available under the Convention are rather limited. Further, the burden of proof lies with the person opposing the return of the child.

24. In *EW v LP*¹, DHCJ B Chu followed the principles set out in *Re E (Children)(Abduction: Custody Appeal)*² and stated that³:

¹ unreported, HCMP No 1605 of 2011 (decision of DHCJ B Chu on 31 January 2013)

² [2012] 1 AC 144 at 160F

³ *supra*, at §91

“ the terms of article 13 were plain; that they needed neither elaboration nor gloss; and that, by themselves, they demonstrated the restricted availability of the defence. The principles set out by the Supreme Court in relation to article 13(b), briefly, are as follows:

- (i) The burden of proof lies with the ‘person, institution or other body’ which opposes the child’s return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate the standard of proof is other than the ordinary balance of probabilities;
- (ii) The risk to the child must be ‘grave’. It is not enough, as it is in other contexts such as asylum, that the risk be ‘real’;
- (iii) The words ‘physical or psychological harm’ are not qualified. However, they do gain colour from the alternative ‘or otherwise’ places ‘in an intolerable situation’ (emphasis supplied). ‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’;
- (iv) Article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to the child’s home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when the child gets home.”

25. In respect of the evidence that is necessary to establish consent, DH CJ B Chu also said the following in *EW v LP*⁴:

“Consent, if it occurs, precedes the wrongful removal or retention; acquiescence, if it occurs, follows it. Consent is not defined in the Convention, but the question whether a wronged parent consented is a question of fact. The issue of consent is a very important matter; the existence of consent needs to be established on the balance of probabilities by clear and cogent evidence, although it is possible in an appropriate case to infer consent from conduct. The consent should be to the child’s permanent removal or retention.”

⁴ *supra*, at §37

26. Bearing in mind the summary nature of such kind of proceedings, admission of oral evidence in Convention cases should be allowed sparingly⁵. In particular, Convention cases usually involve parents staying in different jurisdictions, and sometimes it would be difficult to arrange the wronged parent to attend the hearing to give oral evidence within the short time constraint.

27. With these principles in mind, I turn to deal with the individual defences put forward by the Father to oppose the return of the Children.

(i) *Alleged consent for the removal of the Children*

28. I first deal with the issue of consent. According to the Father, his relationship with the Mother turned sour in June 2014. They talked about divorce and the Father's plan to leave with the Children to Hong Kong. In early July 2014, the Mother's mother ("the Grandmother") came to visit the family in Japan. However, the relationship between the Mother and Father worsened and the Father was very depressed. In one of the evenings in July, the Mother agreed that the Father could return to Hong Kong with the Children. Later, the Mother changed her mind. They then discussed the arrangement about the daily care of the Children if the Father were to return to Hong Kong alone. With no fruitful result, the couple discussed the option of the Father taking the Boy to Hong Kong whilst the Girl stayed with the Mother in Japan. Again the couple could not come to any agreement.

⁵ *Re F (A Minor)(Child Abduction)* [1995] 2 FLR 31, *per* Butler-Sloss LJ at p 37

29. Seeing that the Father was in a very terrible state, the Grandmother suggested to the Father that he should leave with the Children to Hong Kong as separation between the couple for a period of time might be helpful for the marriage. On the following day, the Grandmother told the Husband that she had discussed the matter with the Mother and the Mother agreed for the Father to leave Hong Kong with the Children.

30. The couple then had a discussion on 26 July 2014. The Mother proposed to the Father that he could leave with the Children to Hong Kong provided that he agreed to an immediate divorce. She also said that the Father had to work out a good plan for the Children in Hong Kong. The Father agreed to do so and promised to apply for divorce as soon as he arrived in Hong Kong. On the next day, the Mother asked the Father to return to her all his bank and credit cards and the Father did so.

31. The Father then made the arrangement to leave Hong Kong together with the Children. For 4 days, the Father did the packing and made the arrangement to ship boxes of items to Hong Kong. According to the Father, the Mother and Grandmother must have witnessed the packing process. Based on these circumstances, the Father claims that he was taking the Children to Hong Kong with the knowledge and consent of the Mother.

32. I then turn to the evidence of the Mother. She disputes that she had ever agreed for the Father to take the Children to Hong Kong. Whilst she admits that her marriage with the Father went into difficulty,

she does not agree the chain of events mentioned by the Father in his affirmation.

33. According to the Mother, the couple had a heated argument on 26 July 2014. The Mother indicated that the Father could fly back to Hong Kong but not with the Children, and she had not given any consent for the Children to be removed out of Japan.

34. The Mother admits that she had requested the Father to return his bank and credit cards to her. The reason for so doing was because she had a dispute with the Father about their finances, and not because she anticipated that the Father would be leaving Japan with the Children.

35. The Grandmother admits seeing the Father packing some items into boxes. However, as the Father was operating the Procurement Business and it was usual for him to pack merchandises for his customers, the packing process did not arouse her suspicion. Neither the Grandmother nor Mother had witnessed the Father packing any clothing or items of the Children into suitcases or boxes. In any event, the Mother found out later that the Father took away very few clothing and items for the Children.

36. All along, the Mother did not know that the Father was leaving Hong Kong with the Children. On the day when they first went missing, the Mother was so afraid that she made a report to the police. She had also sent various SMS messages to the Father by phone to enquire their whereabouts.

37. According to the Mother, no arrangement had been made to cancel the school place of the Girl in the Japanese kindergarten. If she had agreed for the Girl to go to Hong Kong with the Father, she would have cancelled the Girl's school place.

38. As observed by DHCJ B Chu in *EW v LP*⁶, consent needs to be established on the balance of probabilities by clear and cogent evidence, and it is the burden of the Father to prove that the Mother had given consent for the permanent removal of the Children out of Japan.

39. In my judgment, the Father's evidence does not even come close to the threshold of establishing such consent. The Father's allegations are no more than bare allegations. In determining whether the Mother had in fact given the consent, the court will no doubt be inclined to attach more weight to the contemporaneous words and action of the wronged parent than to the bare assertions of the abducted parent⁷.

40. In fact, the circumstances of the present case and the conduct of both parents seem to suggest that no such consent had been given. If the Mother had given such consent, one would have expected that the Father should have been able to say that he had provided the Mother with the details of his flight to Hong Kong. One would also have expected that as a parent of young Children, the Father should have liaised with the Mother as to what should be packed, arrangement for the Mother to be at the airport to say farewell to the Children, or even an invitation to the Mother to travel with the young Children to Hong Kong to settle, particularly as

⁶ see §25 above

the Father had said that the Mother was concerned about their accommodation and schooling for the Girl. Furthermore, arrangement should have been made to cancel the school place of the Girl in the Japanese kindergarten, and yet this was not the case here.

41. Further, the Mother sent various SMS messages to the Father enquiring the whereabouts of the Children and made a report to the police soon after the Father and Children had gone missing. If the Mother had given consent for the removal of the Children, I do not believe that she would have reacted in the way she had.

42. Finally, the Mother and Father had considerable disputes about the Mother's access to the Children when she visited them in Hong Kong on 2 occasions in September and October 2014. The hostility between the parents certainly does not sit well with the allegation that the Mother had given prior consent for the removal of the Children.

43. At the very best, the Father's evidence amounts to no more than discussions, if not actually words said in arguments, during a difficult and emotionally charged period for the Mother and Father. Further, even if consent had been given, which I do not accept it to be the case, there was no indication that the Mother had agreed for the removal of the Children to be a permanent one. Furthermore, I accept the evidence of the Mother that she had asked for the return of the bank and credit cards from the Father solely because of their dispute over monetary matters. For these reasons, the Father is far from establishing that the Mother had in fact given

⁷ see: the *dicta* of Lord Browne-Wilkinson in *Re H (Minors)(Abduction: acquiescence)* [1998] AC 72 at 90F relating to the determination of whether acquiescence was in fact made; the *dicta* should also apply in determining whether there was in fact consent given

consent for the removal of the Children out of Japan, whether permanently or otherwise, and so the defence based on the giving of consent must fail.

(ii) *Allegation about the Children being in an intolerable situation upon their return to Japan*

44. I then turn to the intolerable situation defence under article 13(b). The Father relies on the following arguments in support of such defence:

(i) the Children would be subject to neglect upon their return to Japan and they would be separated from their main caregiver, i.e. the Father, who has been looking after them since their birth; and

(ii) for the reason that Japanese law does not recognise joint custodial and access rights, the return of the Children to Japan is against their fundamental rights to have contacts with both parents.

45. According to the Father, he cannot return to Japan as it would break him mentally. If the Children were to return to Japan, they would lose the care of their main caregiver. Further, the Mother is not suitable to take care of the Children because of: (1) her busy working schedule; (2) her lack of affection for the Children; and (3) her poor temperament.

46. There is a high threshold for the opposing parent to establish the intolerable situation defence. Apart from the *dicta* of DH CJ B Chu in

*EW v LP*⁸, the learned authors of *Rayden and Jackson on Divorce and Family Matter* (18 ed) said the following about such defence⁹:

“45.68[Article 13(b)] is an exceptional provision intended to deal with unusual issues of welfare which take the case outside the normal provisions of the Convention. The policy of the Convention is that:

‘ ... disputes about children should be determined in the courts of the country of their habitual residence. Children should not be uprooted and placed beyond their jurisdiction. It is for them to determine where the best interests of the children lie. Article 13(b) is the one exception to this. No requested country can be expected to return children to a situation where they will be at serious risk, but this must not be turned into a substitute for the welfare test, usurping the function of the courts of the home country.’

The risk of physical or psychological harm must be weighty and it must be of substance or severe, and not trivial, harm; a very high degree of intolerability must be established. The court requires clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of habitual residence.

45.69 In its consideration of art 13(b), the English court is concerned primarily with the position of the child until the court in the state of habitual residence of the child can assume its role as the forum for decision making in relation to the child; it is assumed that save in exceptional circumstances the courts of the state of habitual residence will be able to protect the child on its return as would an English court in similar circumstances.”

47. In my judgment, the evidence of the Father does not even come close to meeting this very high threshold test.

⁸ see: §24 above

⁹ vol 1(2), at §§45.68 & 45.69

48. I accept the Mother's evidence that she has not neglected the Children. Further, with the help of the Grandmother, the Mother should be able to take care of the Children in their daily life should they return to Japan. In fact, the Father can return to Japan to take care of the Children if he so wishes. The Father complains that he will not go back because it would break him mentally. However, article 13(b) is primarily concerned with the child and not with the impact of the return on the abducting parent¹⁰.

49. Even in the unlikely event that Mother is not able to take care of the welfare of the Children upon their return in a satisfactory manner, the Father can always seek the assistance of the Japanese courts. As mentioned above¹¹, the object of the Convention is to encourage disputes about children to be determined in the courts of the country of their habitual residence. The Hong Kong courts expect the Japanese courts will be able to protect the Children upon their return as would Hong Kong courts in similar circumstances, and so unless intolerable situation can clearly be established, the Hong Kong courts should not usurp the function of the Japanese courts in this regard.

50. Furthermore, since August 2014, the Mother has been able to fly to Hong Kong on 3 occasions to visit the Children and to attend the hearing. If the Mother does not have any affection for the Children or does not have time to take care of them, I do not believe that she would have taken time off her work to do all these things for the Children. Hence, the Father's evidence is far from establishing the intolerable situation defence.

¹⁰ *Rayden and Jackson on Divorce and Family Matter* (18 ed) at §45.71

¹¹ see: §46 above

51. Ms Ho, counsel for the Father, also submits that as Japanese law does not recognise joint custodial and access rights, the return of the Children to Japan is against their fundamental rights to have family relations and contacts with both parents. Furthermore, the Japanese courts have strong preference for awarding custody to the mother when the child is in his or her “tender years”. There is also a tendency for the Japanese courts to award custody of the child to Japanese national. Given that the Mother has successfully applied for permanent residency and speaks the Japanese language, the Father submits that custody determination in the Japanese court will swing in the Mother’s favour solely based on racial considerations alone. According to Ms Ho, this in itself will create an intolerable situation for the Children. The Japanese family law will also infringe the fundamental rights of the Father and Children to family life as protected under the Basic law and the Hong Kong Bill of Rights Ordinance (Cap 383)¹².

52. These are very serious allegations made against the law and the courts of a foreign jurisdiction.

53. In support of such contention, Ms Ho relies on an article by Professor Colin P. A. Jones entitled “*In the best interest of the Court: What American lawyers need to know about child custody and visitation in Japan*”¹³. The article is only included in the list of authorities lodged by Ms Ho for the hearing.

¹² Ms Ho relies on articles 14 and 19 of the Hong Kong Bill of Rights Ordinance which relate to the protection of family and home and rights in respect of marriage and family respectively

¹³ 8 *Asian-Pacific Law & Policy Journal* 166

54. The short answer to such complaint is that there is no factual evidence to support such allegations by the Father. It is trite law that foreign law is matter of fact, and so the Father must produce factual evidence, usually in the form of an expert report by a lawyer in the relevant jurisdiction, to prove a particular law in that foreign jurisdiction. In the present case, no such evidence has been supplied to the court to substantiate these serious allegations. The Father has not even raised any complaint about the Japanese law or judicial prejudice of the Japanese courts in his opposing affirmation. In such circumstances, the Father is not allowed to run this defence by just relying on some comments made by a professor in an article submitted to the court in the hearing.

55. In the absence of evidence to substantiate the Father's complaint about the non-recognition of joint custody and access rights in Japanese family law, the Hong Kong courts will proceed on the basis that the Japanese courts, in dealing with any matrimonial matters relating to the Children, will safeguard their interests as would the Hong Kong courts in similar circumstances. Further according to the evidence provided in the affirmation of Yasmin Ebrahim Mahomed, Senior Government Counsel, under article 32 of the Japanese Act on General Rules for Application of Laws, the legal relationship between the parents and their child shall be governed by the child's national law if that is the same as the national law of either the father or mother. In our present case, the Children have the same nationality as the Father as both the Children and Father are Hong Kong passport holders. Hence even in the Japanese courts, the applicable law in dealing with any matrimonial matters relating to the Children would be Hong Kong law and not Japanese law. The Father's complaint about the unfairness of Japanese law is, therefore, irrelevant.

56. For the above reasons, the Father has failed to establish any of the defences under article 13 and I therefore ordered the return of the Children to Japan.

57. The parties were able to agree on the costs of the application and the arrangement for flying the Children back to Japan and so it was not necessary for me to determine these issues.

58. Finally, I would urge the parties to put the welfare interests of the Children at the forefront when they have to resolve their differences in the coming matrimonial proceedings. As the Children are still in their tender age, the Mother and Father should try to reduce the anxiety and injury caused to the Children by the breakdown of the marriage to a minimum. I firmly believe that continuing hostility between the parents would adversely affect the upbringing of their children, and I just hope that the parties would have the wisdom of understanding this simple fact.

(David Lok)
Deputy High Court Judge

Ms Catherine Por, of Stevenson, Wong & Co, for the plaintiff

Ms Helene S W Ho, instructed by Rowdget W Young & Co, for the defendant