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CACV 75/2015

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 75 OF 2015
(ON APPEAL FROM HCMP NO. 392 OF 2015)

BETWEEN

M — Plaintiff

and

E — Defendant

Before : Hon Lam VP, Cheung and Barma JJA in Court
Date of Hearing : 12 May 2015
Date of Judgment : 12 May 2015
Date of Reasons for Judgment : 5 June 2015

REASONS FOR JUDGMENT

Hon Lam VP :

1. I agree with the Reasons for Judgment of Cheung JA.

Hon Cheung JA :

I. The appeal

2.1 The *Hague Convention on the Civil Aspects of International Child Abduction* ('the *Convention*') provides the protocol amongst the contracting states for the prompt return of children wrongly abducted from their habitual residence by one parent against the wish of the other parent. In Hong Kong the *Child Abduction and Custody Ordinance* ('*CACO*') Cap. 512 implements the *Convention*.

2.2 The plaintiff in these proceedings is the wife ('the Mother') and the defendant is her husband ('the Father'). They have two children. The habitual residence of the children was Sao Paulo, Brazil. On 1 July 2014 the Father removed the children without the consent of the Mother from Brazil to Hong Kong. The Mother sought the assistance of the Brazilian Central Authority under the *Convention* for the return of the children. The Central Authority of Hong Kong on behalf of the Mother commenced the proceedings and sought the return of the children to Brazil. The matter was heard by Deputy High Court Judge Bebe Chu (now Bebe Chu J) who acceded to the Mother's request and ordered the return of the children to Brazil. The Father appealed against the

judgment. At the conclusion of the appeal before us we dismissed the appeal. I now give reasons for the judgment.

II. Background

3. The background of the case as summarised by the Judge below is as follows :

(1) The Father was born in Argentina and is now 58 years old. He holds Argentine, Venezuelan and Brazilian nationalities. The Father has business interests in South America, Hong Kong and Japan. He is a permanent resident of Hong Kong and has lived in Hong Kong since 2003, although he has also maintained residence in Brazil.

(2) The Mother is an Argentine national born in Argentina and is now 35 years old.

(3) The parties married in Argentina in April 2006 and after marriage, they settled in Sao Paulo, Brazil.

(4) The parties' daughter CI, now 8, and son RS, now 5, were born in Brazil. The children have both Argentinian and Brazilian nationalities.

(5) The marriage ran into difficulties in 2011 and the Father accused the Mother and her sister who worked in the Father's business in Brazil of embezzling funds belonging to his business.

(6) The Father said in early October 2011 while he was in Hong Kong, he had tried to contact the children for a few days but was unsuccessful. Then on about 8 or 9 October 2011, he found out that the Mother had taken the children and left for Buenos Aires, Argentina. He left Hong Kong on 9 October 2011 to return to their home in Sao Paulo, Brazil. Upon arrival, he found that the Mother had cleared their home of all her personal effects and also the children's. He flew to Buenos Aires and went to the house of the Mother's father seeking access to the children. He was told to leave and was told the children were not there. The Father then called the police, and the Mother issued domestic violence proceedings.

(7) The Father returned to Sao Paulo, Brazil and contacted the Brazilian Central Authority and proceedings were commenced on 27 October 2011 in Argentina for the children to be returned to Brazil under the *Inter-American Convention on International Return of Children* ('1st Return Proceedings'). This *Inter-American Convention* contains similar provisions as the *Convention*. The 1st Return Proceedings lasted some 1½ years and eventually on 18 April 2013, the Court in Argentina ordered the children to be returned to Brazil. The Mother's appeal was later dismissed on 24 October 2013 ('Return Decision').

(8) The Father had no contact with the children for about two years between February 2012 and April 2014.

(9) When the parties went to apply for new passports for the children on 29 April 2014, they agreed to an endorsement in the children's respective passports that each child was authorized by the parent(s) to travel unattended ('Travel Endorsement').

(10) During the 1st Return Proceedings and after the Return Decision, without the Mother's knowledge, the Father had obtained an *ex parte* order on 15 January 2014 from the Courts in Brazil granting him sole custody of the children ('1st Custody Order').

(11) Eventually, on 16 May 2014, the children returned to Brazil with the parents. Upon arrival in Brazil, the children were taken away from the Mother by the police and handed to the Father pursuant to the 1st Custody Order. The Mother said this was contrary to what was provided for in the Return Decision when the Argentine Court of Appeal had said that in order to preserve the health and interest of the children, the proper transition began with the return of the children to Brazil with the Mother accompanying the children and keeping their custody at least until the Brazilian judicial authority had decided on this issue.

(12) The Mother had also said that the Father and/or his Brazilian lawyers failed to comply with what was stated in the Return Decision, namely that they should have sent an official letter to inform the Argentine Central Authority whether there

was any judicial process against the Mother or any arrest warrant order against her. The Father's response was that there was no such judicial process. The Mother was clearly unaware of the 1st Custody Order.

(13) The Mother filed an appeal on 23 May 2014 against the 1st Custody Order. On 25 May 2014, the Court of Appeal in Brazil granted the Mother sole custody of the children ('2nd Custody Order'), but the Father lodged an appeal immediately and the 2nd Custody Order was stayed and a hearing was fixed on 5 June 2014.

(14) On 5 June 2014, a conciliation hearing took place in the First Private Law Chamber of the Sao Paulo State Court of Appeals. The parties eventually arrived at an agreement, which resulted in an order being made on 5 June 2014 ('the Consent Order'). By this Consent Order, the parties agreed to custody orders and there were provisions as to which floor the Father and the Mother were to respectively reside at, and also where the children were to reside, all under the same roof in the same house located at Rua Bernardino Fanganiello, 704, Casa Verde ('Property').

(15) The truce did not last long. On 28 June 2014, the Mother made a complaint to the police against the Father for alleged physical assault against her and her mother ('Grandmother') who was visiting from Argentina. The

Father counter-alleged that he was assaulted by the Mother and the Grandmother.

(16) On 28 June 2014 the parties accused each other of physical violence. The Father then left with the children, and the Mother said she understood that he was taking them to lunch, but then they disappeared.

(17) The Father and the children left Brazil on 1 July 2014 on South African Airways to Johannesburg and then flew to Hong Kong. They arrived in Hong Kong on 3 July 2014.

(18) The Mother applied on 27 August 2014 to the Sao Paul State Court of Appeals Judicial District of Sao Paulo, Regional Jurisdiction 1, which granted her two orders, one awarding custody to the Mother ('3rd Custody Order'), and the other one was a Seek and Recover Order ('Recovery Order') to return the children to her.

(19) The Mother reported the children missing on 23 September 2014 to the Federal Police Department and the Interpol, and she said it was only then that she learnt of the Father and the children had left Brazil on 1 July 2014.

(20) In early October 2014, the Mother submitted information to the Brazilian Central Authority for the return of the Children under the *Convention*. The request was formally lodged on 30 October 2014 and was received by the Hong Kong Central Authority on 10 November 2014.

(21) The Hong Kong Central Authority obtained an *ex parte* order on 13 February 2015 for the children not to be removed from Hong Kong.

(22) The originating summons which commenced this proceeding was filed on 16 February 2015. The children were said to have been wrongfully removed on 1 July 2014, from Brazil where they were habitually residing. The Judge heard the application on 19, 20, 23 March 2015 and gave her judgment on 2 April 2015. On 8 April 2015 the Judge ordered a stay of execution of her order of 2 April 2015 pending the determination of the appeal. In the meantime the Mother is given interim care and control of the children with access to the Father.

III. <u>The Consent Order</u>

4.1 In order to provide a complete picture of the terms of the Consent Order I will now set out its terms, leaving aside the attendance of the parties at the beginning and the approval of the order by the Judge at the end.

> ‘ Upon starting the services, it was proposed the conciliation, which resulted successful. The parties agreed to the following terms :
>
> 1) The [mother] shall hereafter reside, permanently, at the property located at Rua Bernardino Fanganiello, 704, Casa Verde, ground floor, which is furnished, the [father] assuring her stay at the location. It is noted that the [father] resided (and shall continue to reside, permanently) at the same address on floor No. 1 (middle floor). The [father] agrees that

the [mother] receives visits of her relatives at such property, without living permanently at the location.

2) During four months, custody of the [children] shall be practiced by the [father], and the children shall reside with the father on the middle floor. During this period, the children will remain with the mother every Wednesday, and the mother shall pick them up at the school, overnight stay authorized, and the mother shall take them directly to the school on Thursday.

3) As of the fifth month, custody of the [children] shall be shared. The [children] will continue to reside at the same address, but as of then, the visits shall be free, even because the parties reside at the same address, being hereby agreed that the children shall sleep on Mondays and Wednesdays at the father's home, and on Tuesdays and Thursdays at the mother's home.

4) The parties agree that the children shall remain on weekends with each parent, who shall pick them up at school on Fridays, and shall take them directly to the school on Monday.

5) Irrespective of the regime of visitation already agreed upon, every day the mother is authorized to take them to school, agreeing to being accompanied by the father whenever possible.

6) The [father] shall pay to the [mother], during four months, alimony consisting of water, light, internet, in addition to the amount of R$1,500.00 (one thousand, five hundred Reais). After the four months, the [father] will be automatically relieved of the allowance owing to the [mother].

7) The [father] shall be responsible for paying all expenses concerning the children, such as school, food, dwelling, clothes, healthcare, leisure, etc.

8) The parties agree to attend psychological treatment with the [children], obliging to make appointment with the psychiatrist and neurologist … , who shall guide them concerning the best treatment to be followed by the family. The [father] shall pay for the amount due to the doctor and the subsequent treatment.

> 9) The parties agree that if they shall go courting with, or set up a stable union or marriage with third parties, they shall leave the house where they reside, and the children shall remain at the home of the other parent, and there shall obviously be renegotiation concerning visitations.
>
> 10) The parties also agree to the divorce, and the Honorable Judge shall 'a quo' issue the respective registry warrant.
>
> 11) Upon this agreement, it is extinguished the incidental warrant of provisional custody, the suit for alimony provision, this instrumental appeal, and the statutory appeal, as well as the warrant for legal separation and the warrant for provision of consent and the parental alienation proceeding. It is expressed that the issues, subject matter of agreement herein, shall no longer be discussed in the proceeding of divorce, which is already awarded, and the first instance proceeding shall proceed only with respect to the discussion of the division of the property, located both in Brazil and in Argentina, including those that are subject to simulation action in that country and here.
>
> 12) Any possible costs remaining from the proceedings extinguished hereby shall be supported by the [father]; as well as its attorney's fees.
>
> 13) Upon return of the records to the first instance, the Honorable Judge shall 'a quo' issue the respective fee certificates on behalf of the [mother's] attorney, with the respective arbitrament on each of the proceedings.
>
> 14) The parties resign to the right of interposing any appeal against this agreement. They request homologation.'

4.2 The Consent Order was homologated (meaning approved or ratified) by Justice Santini of the Court of Appeal of Sao Paulo.

4.3 The provision for custody under the Consent Order is that, for a four month period, the Father has custody of the children and that they shall reside with him on the middle floor of the house, but stay with the Mother every Wednesday and on alternate weekends; and they would share custody from the fifth month onwards.

IV. The *Convention*

1) Articles 3, 5, 12 and 13

5.1 In order to found jurisdiction under the *Convention*, the removal and retention of a child must be wrongful. This depends on whether they were made in breach of the rights of custody of the other parent. This can be seen from Article 3 of the *Convention* :

> ‘ 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.’

5.2 The rights of custody are different from the rights of access. The two terms are defined in Article 5 as follows :

> ‘ For the purpose of this Convention-
>
> (a) ‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;
>
> (b) ‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.’

5.3 Rights of custody are respected by the obligation in Article 12 to order the return of the child ‘forthwith’ where he has been wrongfully removed or retained in terms of Article 3, unless one of the limited exceptions provided for in Articles 12 and 13 apply. Rights of access are respected through the arrangements in Article 21 for securing their effective exercise. *In re K* [2014] AC 1401 at paragraph 20.

5.4 For the purpose of this appeal the relevant limitation is Article 13, namely the Hong Kong Court is not bound to the return of the children if the Father who opposes their return establishes that the Mother had ‘consented to or subsequently acquiesced in the removal or retention (‘article 13(a)’)’ or ‘there is a grave risk that the children’s return will expose them to physical or psychological harm or otherwise place the children in an intolerable situation (‘Article 13(b)’)’.

2) The underlining objective of the *Convention*

5.5 It is worth repeating that the underlining objective of the *Convention* is to secure the prompt return of the children to their place of habitual residence. This approach is considered to be in the best interest of the children. The objective is found in the *Explanatory Report to the Convention by Elisa Pérez-Vera* (the '*Explanatory Report*'), see Hague Conference on private international law, Actes et documents de la Quatorzième session 6 au 25 octobre 1980, vol. 3 (Child Abduction) :

> ' 16 The Convention's objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'. The insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules indeed resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal.'

5.6 This objective is to meet the two elements that are invariably present in abduction cases :

> ‘ 1) Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this context the type of legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem.
>
> 2) Secondly, (the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.’

5.7 The objective of the *Convention* is discussed by the English Supreme Court per Baroness Hale of Richmond and Lord Wilson JJSC in *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 :

> ‘ 14. ….the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this: see the Explanatory Report of Professor Pérez-Vera, at para 25.
>
> 15. Nowhere does the Convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction (although this is sometimes how it may appear to the abducting parent). The premise is that there is a left-behind person who also has a legitimate interest in the future welfare of the child:

> without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident. Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right.'

5.8 It is further important to point out that it has been the very object of the *Convention* to avoid an in-depth examination of the child's future in the determination of an application for a summary order for the return to the child's state of habitual residence and a properly careful determination did not equate to an in-depth examination of the entire family situation, see *In re S (A Child)* [2012] 2 AC 257, per Lord Wilson JSC at paragraph 37.

V. Rights of custody

1) Meaning of this term

6.1 In construing the term 'rights of custody', it is the duty of the Court to construe the *Convention* in a purposive way: it is repugnant to the philosophy of the *Convention* for one parent unilaterally, secretly and with full knowledge that it is against the wishes of the other parent who possessed rights of custody to remove the child from the jurisdiction of the child's habitual residence. It is to be construed broadly as an international agreement according to its general tenor and

purpose, without attributing to any of its terms a specialist meaning which the word or words in question may have acquired under the domestic law of Hong Kong, see *Rayden and Jackson on Divorce and Family Matters* (18th Ed), Vol 1(1), paragraph 45.18 citing *Fothergill v Monarch Airlines Ltd* [1978] AC 141 at 274), *Re F (A Minor) (Abduction : Custody Rights Abroad)* [1955] Fam 244; *C. v C. (Abduction : Rights of Custody)* [1989] 1 WLR 654).

6.2 The Court emphasizes the 'autonomous' meaning of this term in the *Convention*, thus Baroness Hale in *In re K* held,

> ' 53 There can now be no doubt that the *content* of the "rights of custody" protected by the Convention has its own autonomous meaning. The second conclusion of the Second Special Commission to Review the Operation of the Convention (held 18-21 January I993) was that
>
> > "The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression "rights of custody", for example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention."
>
> This conclusion was more recently reaffirmed by the Sixth Meeting of the Special Commission (held 1-10 June 2011).'

6.3 The term 'rights of custody' had been discussed in a number of cases including the following :

(1) *C. v C. (Abduction: Rights of Custody)* [1989] 1 FLR 403, per Lord Donaldson M.R. at 413B-C:

> ‘ “Custody”, as a matter of non-technical English, means ‘safe keeping, protection; charge, care, guardianship’ (I take that from the Shorter Oxford English Dictionary, 3rd ed, rev (1973)); but ‘rights of custody’ as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is ‘the right to determine the child’s place of residence.’ This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right — in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention … ’ (emphasis added)

(2) In *Re V-B (Abduction: Rights of Custody)* [1999] 2 FLR 192, the parents were divorced in the Netherlands and the Dutch father was granted contact with the two children whereas the Welsh mother was granted sole custody, who undertook to inform the husband of ‘any matters of importance relating to the children, including specifically, a decision to reside abroad’. The mother subsequently took the children to live in Wales without informing the father. Ward LJ after referring to Lord Donaldson’s statement in *C. v. C.* held that :

> ‘ This case establishes that a right of veto can amount to a right of custody but Mr Levy QC [counsel for the father] seizes upon the words he emboldens in that last sentence to support his submission that a failure to consult constitutes a wrongful removal. That submission ignores the condition

> upon which consultation is predicated, which are the words I emphasise, namely provided the parent has a right to object. Here the father has no right to object: he has a bare right to be consulted.'

6.4 In *AC v. AS* (unrep.) HCMP 4266/2001 Deputy High Court Judge Lam (as he then was) after reviewing the authorities stated that :

> ' 22. …We have to be vigilant in guarding against elevating a right of access to an extent that it would deprive the person with custody the right to determine the child's place of residence.'

6.5 The distinction between rights of custody and access must be kept in proper perspective because in situations where one parent has only the right of access to a child, if in fact he or she has the right, not merely to be consulted but also to object to the removal of the children from the country of habitual residence, then that parent has the right of custody in the *Convention* sense. This is so even if this right is to support rights of access rather than to protect rights of custody. Hence Baroness Hale in *In re K* further stated :

> ' 54 It was for this reason that England and Wales was able to conclude, from an early stage, that a right to veto the child's relocation abroad (what the Americans call a *ne exeat* right) was a right of custody for the purpose of the Convention, even if its purpose was to support rights of access rather than to protect rights of custody, a view which is now widely shared among member states: see *C v C (Abduction: Rights of Custody)* [I989] 1 WLR 654; *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, especially the discussion by Lord Hope of Craighead, at paras 8-19; and now, *Abbott v Abbott* (2010) 130 S Ct 1983 in the United States.

> 55 It was also for that reason that Dyson LJ, in *Hunter v Murrow* (above, para 36) divided the question of whether the father had rights of custody into two. The first, which he called "the domestic law question", was what rights the father had in national law. The second, which he called "the Convention question", was whether those rights were to be characterised as rights of custody for the purposes of the Convention.'

2) Brazilian law

(1) Brazilian Central Authority

6.6 The Brazilian Central Authority had for the purpose of instituting the present proceedings informed the Hong Kong Central Authority that the applicable Brazilian law was based on the relevant 2014 Brazilian law.

6.7 The Brazilian Central Authority later clarified that the applicable Brazilian law at the time of the children's removal was Law 11,698 of June 13, 2008, with modifications to Articles 1,583 and 1,584 of the 2002 Law ('2008 Law') and not Law 13,058 of December 22, 2014 amending Articles 1,583, 1,284, 1,585 and 1,634 ('2014 Law'). However, the Brazilian Central Authority was of the opinion that the 2008 Law protected the parental authority of the parent who did not have custody in the same way as the 2014 Law, and that even under the 2008 Law, the Mother held parental responsibilities over the children at the time of the removal and the Mother shall be consulted and shall agree to any change in the place of habitual residence of the children.

(2) Professor Pinto

6.8 The Judge summarised the opinion of Professor Pinto, the Father's expert on Brizilian law. Professor Pinto opined that at the time of the removal, under the 2008 Law, the Father held a unilateral custody right which, among other things, allowed him to settle the children's residence to his discretion, as the 2014 Law had not yet come into effect.

6.9 According to Professor Pinto, prior to the 2014 Law 'the Judge would attribute at his discretion if the custody would be unilateral or shared', but after the 2014 Law, the Judge 'came to bear the obligation of determining the shared custody as a rule, but keeps on respecting the parties' will, provided no litigation occurs'.

6.10 Further, according to Professor Pinto, it is only after the 2004 Law, 'the city where the child would live in came to receive direct interference by the Judge', as under the 2014 Law, 'the full performance of the family power is for both parents to perform, whatever the marital status might be, said power consisting in granting or denying them the consent to move their domicile to another city'.

6.11 According to Professor Pinto, the term ‘guarda/guardianship’ and ‘custody’ are synonymous expressions under the 2002 Law, although the legislation used the expression ‘guarda’/‘guardianship’. He then went on to state that Article 1,583 of the 2002 Law provided wide liberty for the spouses to decide about the custody and visitation to children, with the judge being called to decide only and exclusively when no amicable composition would be reached. Further, upon the 2008 Law being introduced, the law came to accept the possibility of the parents to institute the shared custody, without excluding the unilateral one.

6.12 Professor Pinto went on to state that the amendments to Articles 1,583 and 1,584 of the 2008 Law were brought in ‘so as to deal with the modality of shared custody, now as a rule to be observed by the Judge upon the act of deciding when there is a litigation about how to distribute the custody/visit.’

6.13 It was also Professor Pinto’s opinion that the parents’ rights and duties were not altered and kept on being basically the same, and that it is the parents’ duty not only to represent and assist the children in the civil life acts, but, much beyond that, to assist them physically, morally and intellectually, as developing human beings.

6.14 Professor Pinto then explained the term ‘family power’ (the set of rights and duties the parents have as to their

children) ('Family Power'), namely 'two orders of relationships outstand : a) the one derived from the parents' rights and duties in respect to the children's person, and b) those rights and duties concerning the children goods administration, as contained in the Civil Code, Article 1,634.

6.15 He further elaborated on the concept of Family Power in his 2nd report, in that Family Power is wider and does not 'confound' with custody, since they have different reflections. According to Professor Pinto, Family Power determines a set of powers and duties the parents have in respect to the children and the assets, irrespective of the concept of custody, and the parent who has no custody will not lose the right to decide on the issues of child's interest.

3) <u>The Judge's view on the 'rights of custody'</u>

6.16 The Judge held that the Mother has indeed the rights of custody to the two children and the removal and retention of the children are wrongful. These are her reasons :

> ' 105. In the present case, the parties reached an agreement, and the agreement did not provide simply for one parent to have custody and the other to have visitation rights. It was a detailed agreement and the parties had agreed to the Mother *permanently* residing on the ground floor of the Property, and the Father to continue to reside *permanently* on the 1st floor (middle floor) of the Property. During the initial four months, even though the parties agreed to custody of the Children be practised by the Father, what the parties had agreed was that the Children were to reside with the Father on the middle floor, where the Father was to continue to reside *permanently*. The

parties had also agreed that during this period, the Children were to remain with the Mother every Wednesday, who was to pick them at school and the Children were to stay with her overnight and she was to take them directly to the school on Thursday.

106. The parties agreed to shared custody as of the fifth month, with the Children were to continue to reside at the same address, with free visits to either parent, and that the Children would sleep on Mondays and Wednesdays at the Father's home, and on Tuesdays and Thursdays at the Mother's home, and the Children to remain on weekends with each parent.

107. The provision as to whether the Children were to live in the initial four months was expressed in mandatory terms. Further, where the Children were to live as from fifth month onwards, was also expressed in mandatory terms. It was also agreed that if either party were to set up a stable union or marriage with third parties, that party would have to leave the Property and the Children were to remain in the home of the other parent.

108. It was also an agreed term that irrespective of the regime of visitation already agreed upon, every day the Mother was authorized to take the Children to school, agreeing to being accompanied by the Father whenever possible. It was also an agreed term for the parties to attend psychological treatment with the Children.

…..

111. Professor Pinto had said that the custody order to the Father for the initial 4 months was not a "provisional" order but definite with a certain term of force. I accept that the custody order for the initial 4 months did not appear to require any further confirmation from the court, and was definite in that sense, but in my view the Father's custody order was clearly for a finite and a short limited period until the shared custody was to take effect as from the 5th month onwards, and that the shared custody order was the final order for an indefinite period, until the parties were to renegotiate and come to a further agreement, or until the Brazilian Court had made a new order. The Hong Kong Central Authority, based on advice from the Brazilian Central Authority, had in their 03.03.15 Letter referred to the custody order to the Father being a temporary order.

112. Mr Wingfield had submitted that the Mother already had "accrued rights" at the time of the removal under the Consent Order, and not merely some indefinite future rights. I agree.

113. Further, whether the right to decide about changes in the place of habitual residence was that of sole custodian under the 2008 Law or not, I am of the view that under the Consent Order, the Father's "guarda"/ custody/ guardianship was expressly subject to conditions/terms agreed by both parties as to certain rights of the Mother, namely (i) the parties were to reside *permanently* at the Property where the Children were to reside; (ii) the Mother had the right to take the Children to their school; (iii) the Mother had the right to attend psychological treatment with the Children; (iv) the Mother would have the shared custody and care of the Children as from November 2014.

114. There was nothing to indicate that the parties or the Children were to reside elsewhere other than in the Property in Sao Paulo, or the Children's school was anywhere other than the school they were attending in Sao Paulo, or the psychological treatment was to take place anywhere else other than in Sao Paulo. There was nothing to indicate the Consent Order could be varied unilaterally without the consent of the other party or an order of the court. Indeed, this could be seen from the Father's own action of instructing Mr Gerace own lawyer to start a new action to vary the Consent Order, with a view to moving out from the Property with the Children, which led to the Civil Prosecutor's Recommendation referred to later in this judgment.

115. Having considered the terms of the Consent Order, I am of the view that under the agreed terms, the Mother had the right to decide about changes in relation to the Children's residence, and the Father could not change it without her consent or an order of the court. This is not merely a right to be consulted.

.....

119. In light of what I have said I am satisfied that for the initial four months even when the Father was agreed by both parties to have unilateral custody, this was only a temporary or interim order, and the Mother had rights relating to the care of the person of the Children including, in particular, the right to determine the Children's place of

> residence, whether under the 2008 Law or the Children's Act or simply under the Consent Order. It is my conclusion that the Mother held rights of custody under Article 3 and Article 5 of the Convention immediately before the Removal, whether by operation of law or under terms of the Consent Order agreed by the parties and homologated by the Court of Appeal in Brazil.'

4) The Father's case

6.17 Mr Coleman S.C. and Ms Theresa Chow for the Father argued that Articles 3 and 5 of the *Convention* that was given domestic effect in Brazil use the word 'guarda' as the Brazilian-Portuguese for 'custody' by virtue of Brazil Act No. 3413 of 14/4/2000. This is precisely the same term as has been used in the Consent Order, in which the Father was granted 'guarda' of the children for the first four months following the order. The Father had 'rights of custody' in the *Convention* sense, but not the Mother under the Consent Order at the time of removal. The Mother only had 'visitation rights'.

6.18 Mr Coleman argued that the Judge misconstrued the terms of the Consent Order where she misunderstood the choice of word 'permanently'. The word 'permanently' is used in contra-distinction to visits of the Mother's relatives 'without living permanently' at the property. On proper construction, the meaning of the phrase is simply that the parties are to reside at the property as occupants and not as visitors. The Judge was wrong to find that it was a condition

of the Consent Order that the Father live permanently at the property with the children with no right of relocation.

6.19 Mr Coleman further argued that the Judge also erred in finding that under the terms of the Consent Order, the parties agreed that the Mother did not merely have a right to be consulted but enjoyed 'the right to decide about changes in relation to the children's residence, and the Father could not change it without her consent or an order of the court', which is in effect a right of veto. The ordinary rules of construction of contracts apply in the construction of a consent order: see *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] 1 WLR 3251 at 3257G, *per* Lord Steyn :

> ' 18. The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.'

6.20 Mr Coleman argued that the Consent Order grants the Mother access and visitation rights, but is completely silent on any rights of veto. On its proper construction, the Mother could only have visitation rights. There is simply no basis to construe the terms of the Consent Order to afford the Mother a right to veto the Father's choice of residence of the children while he enjoyed sole 'guarda'.

6.21 Mr Coleman further relied on the two expert's reports of Professor Pinto on Brazilian law which stated that the Father's decision to move to Hong Kong with the children did not violate any of the Mother's rights. Further, according to the Brazilian law in force at the time, the parent with sole 'guarda' may unilaterally decide the children's place of residence. There is no general 'family power' pursuant to which a parent may give or refuse consent for relocation whether or not he/she has 'guarda'.

6.22 In respect of the expert's evidence, Mr Coleman argued that the expert's evidence was unchallenged and the Mother had chosen not to cross-examine the expert although he was expressly made available for that purpose. Mr Coleman submitted that it was not properly open to the Judge to substitute the expert's evidence with her findings of Brazilian law. He relied on *In Re B (A Minor) (Abduction)* [1994] 2 FLR 249 where Staughton LJ held :

> ' The first place where we should look for the meaning of an Australian statute is in the expert evidence; strictly speaking, that should be the last place too. (page 266 E-F)
>
> .....
>
> On that material it seems to me highly probable that the law of Western Australia attributes some effect of some kind to an agreement between parents as to custody or guardianship. No doubt the courts retain ultimate control, and rights conferred by an agreement remain provisional, conditional or inchoate. It would not in my

> view be regarded as wholly ineffective. But my ultimate conclusion is that we ought to resist the temptation to make our own findings of Western Australian law. The point is not as simple and easy as Mr Munby suggests. We should stick to the expert evidence, tentative as it is. If we do that, we are left with the view that an agreement can confer something properly described as a right of custody. (page 268 A-C)'

5) My views on 'rights of custody'

(1) Source of the right

6.23 Article 3 of the *Convention* contemplates that the rights of custody may arise 'in particular' in three ways: by operation of law, by administrative or judicial decision, and by an agreement having legal effect.

(2) Brazilian law

6.24 First of all, I disagree that the Judge had made findings on the Brazilian law without taking into proper account the opinion of Professor Pinto. Under Article 15 of the *Convention* the Central Authority of the state of the children's habitual residence may issue a declaration that the removal is wrongful in breach of the parent's custodial rights. The Judge had expressly directed that such a declaration should be obtained by the Hong Kong Central Authority from the Brazilian Central Authority. A declaration dated 24 February 2015 was issued by the Brazilian Central Authority who stated that it is the authorised body to issue the declaration. The declaration stated that the removal

was to be considered wrongful within the meaning of Article 3 of the *Convention* in that it had had breached the parental rights held by the Mother. The Judge summarised the other relevant parts of the declaration :

> ‘ 62. The Declaration stated that the Removal was to be considered wrongful within the meaning of Article 3 of the Convention in that it had had breached the parental rights held by the Mother. It further stated that :
>
> > “2. According to the Brazilian Civil Code, even if a parent is granted with sole custody rights over the child, it does not imply that the other parent has been deprived of the parental responsibility which includes the right to decide about any changes in their place of habitual residence.
> >
> > 3. According the Brazilian Law, custody and parental responsibility are two different institutes. Custody refers to the care of the child in day to day activities, while the parental responsibility is much broader, including the right to decide the child’s country of habitual residence. A parent may have only access rights to the child, but still hold parental responsibility, which means that this parent shall be consulted and shall agree to any change in the child’s place of habitual residence.
> >
> > 4. Further, the Children’s act, Federal law no 8.069 of June 13th 1990 states in article 84 that consent of both parents is required for removing a Brazilian child from Brazil and in case a Brazilian child travels in the company of one of the parents, the express authorization of the other parent is required in a document with his/her sworn signature. The Law also states that without prior and express judicial authorization, no child or adolescent born in Brazil may leave the country in the company of a foreigner resident or have residence abroad.

> 5. By the time of the removal of the children from Brazil to Hong Kong the father had no judicial authorization to unilaterally change the children's habitual residency. The mother and the Sao Paul State Court of Appeals were not informed of such removal and no judicial authorization has been given to the father. Hence the removal of the children is to be considered wrongful. " '

6.25 The Judge recognised that the declaration only has persuasive force and is not binding on her. The Judge had also taken into account a letter dated 3 March 2015 from Justice Santini who homologated the Consent Order. The Judge dealt with the matter in this way :

> ' 117. The Mother had produced a letter from Justice Santini dated 3 March 2015, which contained comments made by Justice Santini when considering the Mother's request for suspension of her financial application. Justice Santini had mentioned that "There are signs of attempt to frustrate the judicial decisions by the perpetrator that, after the judicial agreement, took the children out of the country without the mother's permission". She then went on to say that it was convenient to keep the terms to prevent frustration of the sharing, and information was requested, including about action of INTERPOL in the proceedings with regard to custody of the Children.
>
> 118. Mr Coleman submitted that the comment by Justice Santini was a "throw away" line. Justice Santini was the judge who homologated the terms of the Consent Order. She was familiar with the matter. Whether it was a "throw away" line or not, her comments were consistent with the views of the Brazilian Central Authority, and indeed with my interpretation of the terms of the Consent Order, that permission of the Mother would have to be sought for the Removal.'

6.26 The Judge was fully aware of the difference in view of Professor Pinto and the Brazilian Central Authority :

> ‘ 100. It seems from what Professor Pinto’s reports that one of the major amendments introduced by the 2014 Law was that under the 2008 Law, if no agreement was reached by the parties, the Judge would determine proprietarily (sic) that it would be shared and that the shared custody was applied “whenever possible”, and the exception applied if the father or the mother relinquished it, and the law did not oblige the child to spend a half of the time in the house of each of the parents.
>
> 101. In any event, it seems Professor Pinto did not dispute that under the 2008 Law the parent without sole custody still has parental responsibilities and rights and Family Power towards his/her child and the main difference between him and the Brazilian Central Authority is whether these rights include a right to decide on the child’s habitual residence.’

6.27 Although Mr Coleman challenged the authority of the Brazilian Central Authority to issue the declaration, there really is no contrary evidence that can put this matter into doubt. Further, foreign law must be proved by evidence as an issue of fact, but the Judge is not bound by the testimony of the expert on foreign law. As repeatedly said the Court must not simply accept uncontradicted evidence as to foreign law uncritically and the Court is expected to look at the underlined bases of the opinion: see paragraph J1/59/1 of *Hong Kong Civil Procedure* 2015 Vol. 2. While the Mother had not cross-examined Professor Pinto, the Judge is not bound to accept his evidence to the exclusion of the other evidence that was available to her. Taking into account that the Brazilian Central Authority has in its declarations stated that according to Brazilian law even if the parent is granted sole custody rights over the children, it does not mean that the other parent has been deprived of the parental responsibility which includes

the right to decide about any changes in their place of habitual residence, the Judge concluded that while a parent may have only access rights to the child he or she still holds parental responsibility which means that this parent shall be consulted and shall agree to any change in the child's place of habitual residence. In my view based on this declaration, the Judge is clearly entitled not to accept Professor Pinto's opinion that under Brazilian law the Father has the sole right to decide where the children should reside. This right given to the Mother who does not have custodial rights and who may only have visitation right, nonetheless amounts to the right of custody in the *Convention* sense because this is the right to determine the child's place of residence as stated in the *C. v. C.* line of cases. In this respect Brazilian law elides with the rights of custody in the *Convention* sense.

(3) <u>The Consent Order</u>

6.28 The Mother's right to custody also arises under the agreement of the parties as embodied in the Consent Order. In my view both the context or factual matrix of the Consent Order and its structure and content point towards the Mother having the right of custody as well.

6.29 As to the context or the factual matrix of the Consent Order, it is unimaginable that the Mother who had returned the children to Brazil from Argentina in May 2014 and having signed the Consent Order regulating the custody of the

children including where they should reside, would readily intend to give up her right to decide on the habitual residence of the children by allowing the Father to remove the children to Hong Kong where they had no previous connections. To construe the Consent Order in this manner would merely pay heed to the words used therein and totally ignore the factual background leading to signing of the Consent Order.

6.30 As to the structure and content of the Consent Order, the Consent Order provides for joint custody to the parents on the fifth month. If the Mother was not even given the right to object to the removal of the children to Hong Kong in the first four months, how could she exercise her joint custody right on the fifth month when the children were no longer there in Brazil? This question only needs to be asked to demonstrate the absurdity of the Father's case that he has the sole right to determine where the children should live.

(4) <u>The wrongful removal and retention</u>

6.31 Since the Mother had not given her consent to the removal, the removal by the Father of the children to Hong Kong must be wrongful.

6.32 In the Court below (and also before us) there were arguments on whether the retention is also wrongful. Although the Mother did not refer to wrongful retention in her application for return, the wrongful retention was one of the express issues that were canvassed before the

Judge. The Judge had found that the children are wrongly detained in Hong Kong by the Father. If the removal is wrongful in the first place and if despite request for the Father to return the children to Brazil, the retention of the children in Hong Kong would be unlawful as well. This is established by the decision of the House of Lords in *In re H. (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476 and reaffirmed in *In re H. and others (Minors) (Abduction : Acquiescence)* [1998] AC 72 at 84. But this case does not call for a discussion on retention since the removal was not lawful in the first place.

VI. Acquiescence under Article 13(a)

1) Principles

7.1 Under Hong Kong law, as in English law, the concept of acquiescence occurs in many different contexts : waiver, election, laches, estoppel etc. However, as pointed out in *re H. and others (Minors) (Abduction : Acquiescence)* these concepts of acquiescence have no direct application to the construction of Article 13 of the *Convention*. Acquiescence under Article 13(a) is a matter of the actual subjective intention of the wronged parent, save only where his words or actions clearly showed, and had led the other parent to believe, that he was not asserting or going to assert his right to summary return and were inconsistent with such return. Acquiescence was a question of fact, the burden of

proof being on the abducting parent. Lord Browne-Wilkinson at page 88 stated that :

> ' In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions. '

7.2 In *Re L* [2004] 1 HKLRD 655, Hartmann J (as he then was) held :

> ' 37. While the Convention in its language emphasises the need for prompt action, it does not demand that a parent must act immediately and through formal channels. See, for example, *H v H* [1995] 13 FRNZ 498, a decision of the High Court of New Zealand…'

7.3 In *In re M (Abduction: Rights of Custody)* [2008] 1 AC 1288 at 1303H, it was held that a discretion not to return is imported into the words of Article 13 itself.

2) <u>The Father's case on acquiescence</u>

7.4 The Father's case on the acquiescence of the Mother is based on the following matters :

(1) The Travel Endorsement in which the Mother had specifically consented to the children travelling unaccompanied.

(2) The Mother had received documents relating to custody proceedings commenced by the Father in Hong Kong

but took no steps to participate and/or oppose the Father's application;

(3) The parties had been in touch through email after the Father 'relocated' to Hong Kong with the children;

(4) The Mother had all of the Father's personal and business numbers and address in Hong Kong, and yet never once contacted him since the relocation, except by an email on 9 August 2014, and SMS messages were only sent to the Father's Brazilian mobile telephone number, even though the Mother knew of the whereabouts of the children;

(5) In a consent letter dated 7 September 2014 addressed to the Hong Kong Immigration Department, the Mother unequivocally and expressly acquiesced in the removal and/or the retention of the children by giving her consent to the children living in Hong Kong.

7.5 Mr Coleman submitted that there was no credible evidence from the Mother as to why she only knew the children were in Hong Kong in October 2014. He forcefully argued that the Mother's denial that she had not been contacted by the Father and she had no inkling where the children was incredible. He submitted that she was well aware that the Father lives in Hong Kong and conducts his business here.

3) Detail of these matters

(1) Travel Endorsement

7.6 The Travel Endorsement was in respect of the arrangement that when the parties went to apply for new passports for the children on 29 April 2014, they agreed to an endorsement in the children's passports which stated the names of their parents and that each child was authorised by the parents to travel unattended. This is no longer a matter strongly relied upon by the Father. In any event, I do not see how this will assist the Father.

(2) Hong Kong custody proceedings

7.7(1) After the Father arrived in Hong Kong with the children, he proceeded to apply for visas for the children to stay in Hong Kong as his dependents, and on 22 July 2014, there was a letter from the Hong Kong Immigration Department requesting for further information from the Father, including the Mother's consent.

(2) On 23 July 2014, the Father made an application to the Family Court of Hong Kong for custody of the children under the *Guardianship of Minors Ordinance* ('HK Proceedings'). According to the Father, his Argentine lawyer Ms Fabiana Marcela Quaini ('Ms Quaini') had attempted service of the documents of the HK Proceedings on the Mother at her address at the property on 6 August 2014, but

there was no one answering the door, and Ms Quaini had inserted the documents under the door of the Mother's address at the property.

(3) The Father sent an email to the Mother at her usual email address on 13 August 2014, with a copy of the Immigration Department's letter, seeking her consent for the visas for the children to remain in Hong Kong.

(4) The Father further stated that on 18 August 2014, he had caused a set of the documents in the HK Proceedings to be sent by courier service to the Mother to another address at 177, Rua Reliquia, Casa Verde, Sao Paulo ('Rua Reliquia Address') and the Mother had signed the delivery advice of Federal Express on 21 August 2014 ('Delivery Advice').

(5) The Father also said he had sent the Mother an email to her usual email address on 28 August 2014 attaching copies of the HK Proceedings documents.

(6) The Mother denied she had received any email from the Father, or that there had been service of the HK Proceedings documents on her. She denied that she had knowledge of the letter from the Immigration Department.

(3) The Mother's signature

7.8 The letter dated 7 September 2014 by the Mother to the Hong Kong Immigration Department is in the following terms :

> ' By the present I authorize [the Father] on behalf of [the children] to do whatever paperwork required in order to issue any type of visa to stay and live in Hong Kong. '

7.9 The Judge deals with the alleged signature by the Mother on the delivery advice and the consent letter as follows :

> ' 169. The allegations made by the Mother in relation to her signatures on the Delivery Advice and the Consent Letter being forged were serious allegations. It is not this court's function to make any finding on these allegations. However, in light of the history and the hostility of the litigation between the parties, and the evidence showing that the Mother had been the primary carer of the Children since their birth apart from the period when they were taken from her upon their return to Brazil until the Consent Order, and after the Removal, and the various steps the Mother had taken to find the Children, it did not seem inherently probable that the Mother would give her consent to the Children living in Hong Kong with the Father, thousands of miles away with no physical access arrangements proposed for her.
>
> 170. Having considered the above, I accept what Mr Wingfield had submitted, no weight should be given to those two documents in considering whether there had been acquiescence on the part of the Mother.'

7.10 In the course of the hearing the Judge directed the Hong Kong Central Authority to make enquiries with the Immigration Department. The Immigration Department responded by a letter dated 31 March 2015 enclosing documents submitted to the Immigration Department in relation to the children's dependent visa application. Amongst the documents submitted to the Immigration Department by the Father are the letter dated 7 September 2014 and a copy of what purports to be the details page of the Mother's passport valid for the period from 16 September 2012 to 15 September 2017. The Mother seeks to produce to this Court the original of that passport and her subsequent two passports which cover the period from 16 September 2010 to date. It is the Mother's case that the copy of her passport submitted to the Immigration Department had had the dates altered so as to make it appear to be a copy of her then current passport and not the one that expired in September 2010. In fact the original of the passport that was submitted to this Court shows that this passport had expired. At the hearing below the Father through his counsel had said that it had not been necessary to provide the Immigration Department with a copy of the Mother's passport as the notarisation had been sufficient to prove the Mother's signature on the 7 September 2014 letter.

7.11 The Father had made applications on 1 September 2014 to the Family Court seeking sole custody of the

children. H H Judge Melloy gave her judgment on 26 September 2014 in which she declined to grant the Father the sole custody and care and control that he had requested and instead made an interim order granting joint custody of the children to the parents with interim care and control to the Father.

7.12 There was no reference in the judgment to the letter of 7 September 2014 from the Mother. On the contrary the Judge stated that the Mother had not responded to the proceedings at all and that the Judge did not know where the Mother was or what her intentions were.

7.13 Mr Wingfield submitted on behalf of the Mother that although the 7 September 2014 letter had been produced to the Director of Immigration after the hearing before Judge Melloy on 1 September 2014, it had not been brought to her attention before she made her ruling on 26 September 2014. The Judge also noted in the judgment that the Father had said that he needed an order for immigration purposes in order to enrol the children in school. In the hearing before her, the Father through counsel had stated that in fact they had actually started school before the letter was received and the visas worked out.

(4) <u>My view on acquiescence</u>

7.14 While it is not the task of this Court to make findings on the allegation that the Mother's passport had been

altered, the evidence that has been produced to this Court does suggest that there is a *prima facie* case of alteration of the passport. Despite this serious allegation the Father had not responded to it. Mr Coleman explained that it was because of the advice that the Father had been given in response to the letter from the Mother's lawyer who said that the matter of alteration has been reported to law enforcement authorities. In my view, this matter really puts the Father in a bad light and his allegations about the Mother endorsing on the delivery advice and the letter to the Immigration Department must be viewed with caution. More importantly the matter must be kept in proper perspective. There was a mere lapse of about four months between the date of the removal and the date of request by the Mother for the return of the children. She is a parent who had previously taken steps of removing the children from Brazil to Argentina. She was ordered to return the children to Brazil. After the children had been returned to Brazil, she entered into the Consent Order regulating the affairs of the children and apart from the first four months she had secured joint custody of the two children. There was a specific agreement between the parties as to where the children should live. View in this light it is inherently improbable that she would wish to give up her rights to seek the return of the children under the *Convention*.

7.15 Furthermore, the Mother reported the children to the police after their disappearance. When the Mother discovered that the children did not attend school in Sao Paulo, Brazil on

4 August 2014, following the July holidays, she obtained a search warrant for the children from the Sao Paul State Court of Appeal. When the children failed to be located, the Mother applied and on 27 August 2014 obtained the 3rd Custody Order and the Recovery Order.

7.16 The Mother had explained in her statement to the Brazilian Central Authority that her inquiry showed that the Father had taken a flight to London (when the actual route taken by the Father to Hong Kong was via South Africa). She stated she suspected that the Father was actually in Hong Kong. Mr Wingfield accepts that was the only explanation by the Mother. While one may argue that the Mother ought to have come to such a view earlier, it has to be emphasized that acquiescence is a question of the actual subjective intention of the wronged parent, and not of the outside world's perception of her intentions. In this case, the objective evidence does not even begin to show that the Mother had acquiesced in the wrongful abduction. The objective evidence actually showed that she had acted promptly in seeking the return of the children when she discovered that they had been removed to Hong Kong.

VII. Grave risk under Article 13(b)

1) Principles

8.1 The principles relating to the exception of grave risk can be summarised as follows :

(1) The burden of proof lies on the party who opposes the return of the child. It is rarely appropriate to hear evidence on this issue.

(2) The risk to the child must be grave. It means the risk has reached such a serious level as to be considered grave. The word 'grave' is related to the risk rather than the harm itself, although 'risk' and 'harm' are often linked.

(3) The grave risk associated with return is either of the children's physical or psychological harm which is unqualified *or* they would otherwise be put in an intolerable situation. The latter means a situation that the child should not reasonably be expected to tolerate or put up with, such as physical or psychological abuse or neglect of the child.

(4) This exception is concerned with the future when the child is returned to his home country. At the same time one would expect protective measures for the child to be put in place by the Court of the child's own country.

8.2 This is elaborated by Baroness Hale and Lord Wilson JJSC in their joint judgment in *In re E* :

> ' 32 First, it is clear that 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 that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to

hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

33 Second, 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". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

34 Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "*or otherwise*" placed 'in an intolerable situation" (emphasis supplied). As was said in *In re D* [2007] 1 AC 619, para 52, " 'Intorlerable' 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' ". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

35 Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, 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 she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist.'

2) The Judge's view on Article 13(b)

8.3 The Judge's view on Article 13(b) is that :

' 185. …… Under the Consent Order, the parties are to have shared custody. There is no reason why the Father could not raise all his above perceived concerns to the Brazilian Court, if indeed the Mother were to make an application for permanent removal back to Argentina. I am not satisfied that there is a grave risk that the Mother will again remove the Children to Argentina unilaterally, without a proper court order, as she is fully aware that this is only likely to spark off a third round of return proceedings.

186. I am of the view that the Father had not made out any valid ground for exception under Article 13(1)(b) of the Convention. In any event, the Mother has also filed an undertaking in court, that provided the Father will provide her with sufficient financial provision for the Children and her to live in Brazil and for the Children's schooling in Brazil, she shall not make an application for permanent removal to Argentina. This undertaking will be included in this court's order.'

3) The Father's arguments

8.4 The Father criticised the Judge's approach. The Father contended that there is clear evidence that :

(1) the Mother's extremely alienating behaviour had already occasioned much psychological harm on the children;

(2) there is a real risk that the Mother would again abduct the children to Argentina once she arrived in Brazil without submitting to the jurisdiction of the Brazilian Courts; and

(3) the undertaking provided by the Mother that she would not make an application for permanent removal to Argentina if the Father will provide her with sufficient financial provision for the children and her to live in Brazil and for the children's schooling in Brazil ('the Undertaking') is clearly insufficient.

8.5 The Father relies on evidence which had occurred after the order made by the Judge in that the children are showing further signs of alienation towards him as evidence that the Mother had mistreated the children. The Mother had tried to prevent proper access by the Father to the children and there was recent violence by the Mother against the Father.

4**)** **<u>My view on grave risk</u>**

8.6 I would not dismiss the Father's case on the well-being of the children and the alienation towards him as being groundless. However, my view is that he had not discharged the burden of proof of the Article 13(b) exception. The concern is towards the future when the children return to Brazil whether they would be exposed to grave risk of physical or psychological harm or otherwise be put in an intolerable situation. On the facts disclosed, one

really cannot say that the Mother has behaved violently towards the children while they are in Hong Kong and there is a grave risk that they will face such harm on their return. Parental alienation has been an issue as a result of the two years when the Mother kept the children from the Father in Argentina but the parties had agreed under the Consent Order to attend psychological and psychiatric service with the children. The Father complained that the Mother did not turn up for the treatment. Again one has to bear in mind that this happened in the relatively short period of time between the children's return to Brazil and their subsequent removal to Hong Kong and this is not a firm indication that the Mother would not honour her agreement in this respect. This is more so when it was the Father himself who had disrupted the agreement and unilaterally removed the children and precluded the parties from following through with their agreement to seek treatment. More importantly one would expect the Brazilian Courts would put in place protective measures to ensure the grave risk and intolerable situation would not happen.

8.7 As to the fear that upon the children's return to Brazil the Mother would immediately remove them to Argentina the evidence showed that the replacement passports for the children issued by the Brazilian Consulate in Hong Kong do not contain the parties' consent for the children to travel outside Brazil, so, according to the Father's expert, Article 84 of the *Children and Teenager Statute* would prelude either parent

taking the children out of Brazil, without the consent of the other, or order of the Court.

8.8 The Mother had also given an undertaking to the Judge below that conditional upon the Father making adequate financial provisions for her and the children she would not apply to the Brazilian Court for the removal of the children outside its jurisdiction. This is to address the Judge's concern that on return the Mother would apply to the Court in Brazil for permission to remove the children.

8.9 As *Rayden and Jackson* at paragraph 45.72 stated, the English Court of Appeal has approved the practice whereby undertakings can be accepted by the Courts in order to remove or alleviate what would otherwise be the grave risk or the intolerable situation, until the authorities of the state of habitual residence assume their proper role in protecting the child. However, the practice of requiring such undertakings is not intended by the English Court to circumscribe or influence the hearing in the court of the requesting state, but is designed to smooth the return of, and to protect, the child for the limited period before the foreign court takes over.

8.10 Mr Coleman criticised the Mother's undertaking as being useless, having regard, amongst other things, to the Mother's past conducts, the ease of movement between the Brazil and Argentina borders and the form of wording in the undertaking which does not preclude the Mother from applying

to remove the children from Brazil although not under the guise of permanent removal. All that I can say is that there is a huge mutual distrust between the parents and if a parent is determined to disobey a Court order no amount of careful drafting will be able to prevent it from happening. However, the Court can only look at the matter as it now stands and one just cannot brush aside the undertaking as being meaningless.

8.11 In my view the Judge's decision on Article 13(b) is correct.

New Evidence

9. The Mother had applied for the admission of new evidence relating to her passports and the ruling of Judge Melloy. The Father also applied for the admission of two affirmations. We had considered the new evidence on a provisional basis during the hearing and we had admitted them as part of the evidence for this appeal.

Conclusion

10. Accordingly, the appeal was dismissed.

Costs

11. The Father is to pay the costs of the appeal to the Mother together with the costs of the application for new

evidence to be taxed if not agreed. The Mother's own costs are to be taxed according to *Legal Aid Regulations*.

Hon Barma JA :

12. I agree with the Reasons for Judgment of Cheung JA.

(M. H. Lam)	(Peter Cheung)	(Aarif Barma)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Ian Wingfield, instructed by Boase, Cohen & Collins, assigned by Director of Legal Aid, for the plaintiff

Mr Russell Coleman SC and Ms Theresa Chow, instructed by Stevenson, Wong & Co., for the defendant