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HCMP 2284/2019
[2020] HKCFI 222

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 2284 OF 2019**

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

BETWEEN

BMC

Applicant

and

BGC formerly known as WCY

Respondent

Before: Hon B Chu J in Chambers (Not Open to Public)

Date of Hearing: 10 January 2020

Date of Judgment: 17 January 2020

J U D G M E N T

Introduction

1. This is an application under the Child Abduction and Custody Ordinance (Cap 512) and the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (“**Convention**”) by the applicant for the return of his child with the respondent, B, to the United States of America (“**USA**”).
2. The applicant and the respondent are husband and wife and for easy reference, I shall refer to them as H and W respectively. B

is their daughter. W opposes the return, and the key issue is whether B's habitual residence was in USA prior to her being unilaterally retained in Hong Kong.

3. Counsel Mr Enzo Chow appeared at the hearing for H, and Mr Eugene Yim appeared for W.

Brief background

4. H and W were married in Hong Kong in January 2017. W gave birth to B in Hong Kong in September 2017, and B is now about two years and four months old. B holds both a Hong Kong SAR passport and a USA passport.

5. H was born and raised in California, USA and he holds a USA passport. He moved to Asia after obtaining a university degree in East Asian Language and Culture and a MBA in International Business. He had worked in Asia for 18 years, of which 7½ years was in Japan and 6 years in Shanghai.

6. H had previously been married to the same Japanese woman in 2001 and 2007, who had divorced him twice for reasons which are not really relevant to the present application.

7. In February 2015, while working in Shanghai, H received a job offer to work for a company in Hong Kong as [REDACTED]. He accepted it and worked in Hong Kong for about 4½ years.

8. W was born, raised and educated in Hong Kong. She is currently [REDACTED] old and is a permanent resident in Hong Kong

holding a HKSAR passport. She attended university in Hong Kong [REDACTED]

[REDACTED]. She had never lived overseas even though she had travelled to many countries. At the time when the parties met online in June 2015, she was employed [REDACTED] by a [REDACTED] company [REDACTED].

9. The parties started dating not long after they met in person in December 2015, and their relationship developed quickly. By February 2016, W was staying a few nights a week at H's flat.

10. They were engaged in June 2016. W's job [REDACTED] [REDACTED] was terminated on 31 October 2016. According to W, she did not look for jobs as she and H were planning for their wedding.

11. The parties travelled to California to meet H's family in December 2016. In January 2017, the parties registered their marriage in Hong Kong and held their wedding ceremony in Phuket, Thailand. In or around April 2017, W discovered she was 4 months pregnant.

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

13. H said the parties had previously discussed options for their future and that they both wanted to move to USA, and that when W discovered she was pregnant, she requested him to process

her “Green Card” application for permanent residence in USA as the process could take up to two years. According to H, W wanted to relocate to USA with him after birth of their child, and that H submitted an application in June 2017 for W to obtain the Green Card.

14. In June 2017, the parties went to USA to attend H’s father’s 80th birthday celebration. It was H’s evidence that there were again discussions about the family moving to USA in order to bring up the baby there.

15. After B’s birth in September 2017, the parties went with the baby to USA in December 2017 for a 4 week Christmas vacation and on that occasion B was baptised.

16. It was H’s allegation that W was suffering from post-partum depressions, which she denied, and W alleged that H had displayed symptoms of obsessive-compulsive disorder (OCD), which he denied. Anyway, according to W, since December 2017 and November 2018, she had been seeing a social worker and psychologist respectively for advice on their marital problems, but on her own admission, she had stopped seeing the psychologist in around June 2019.

17. Since B was about 11 months old, ie in August 2018, W had enrolled her in a playgroup for 12 classes until October 2018. W also enrolled B for 10 classes [REDACTED] in April 2019 and also music lessons.

18. In December 2018, H was informed by his supervisor that he would no longer be managing the Hong Kong sales team and that another sales manager was going to take over from January 2019 onwards. H felt that his employer was pushing him out of his role, and he had told W this. As the parties were going to USA for 4 weeks to celebrate Christmas with his family, according to H, they took the opportunity to start looking for homes in California together. According to H, they both had an enjoyable time in USA and were feeling positive about the intended move to USA.

19. As expected, on 12 April 2019, H was notified by his employer that his role in Hong Kong was being made redundant and that his Hong Kong work visa would expire on 30 June 2019. H was informed that there was a role available to him in USA and he was strongly encouraged to accept it in order to develop the USA market.

20. H accepted that when he told W about this and that his visa was going to expire imminently, W was not happy and was initially taken aback by their need to relocate so soon. She had asked H whether he would be willing to provide her with an apartment in Hong Kong so that she and B could live in Hong Kong for a few months at a time after the relocation. H however told W that he would not be able to afford both an apartment in Hong Kong and in California and also he did not want to be apart from B for such a long period of time. He however indicated that W and B could travel to Hong Kong around 3 or 4 times a year to spend time with W's parents for 2 to 3 weeks each time. H accepted that W had strong reservations to the imminent relocation, and H

A had messaged his father in law, ie W's father, for assistance. It
B was H's case that notwithstanding her initial reservations, W
C eventually agreed to relocate to California and flight tickets
D were purchased for the family to depart on 30 June 2019, and
E that W had also asked him to proceed with her Green Card
application.

F 21. W's case was however that although H had raised the idea of
G moving to USA after she became pregnant, she had made it clear
H to him that she did not want to move, and that there was no
I common intention to move to USA as alleged by H. She said
J her unwillingness to move can be seen in various WhatsApp/
K WeChat messages. W also relied on a handwritten note signed
L by H on 28 June 2019 ("**Note**")¹. It was W's case that she only
went to USA on 30 June 2019 a temporary basis and that she
and B could return to Hong Kong any time as W would wish.

M 22. Without going into the details at this stage, the parties landed in
N USA on 30 June 2019. They initially stayed with H's brother
O and his wife for about two weeks.

P 23. On 5 July 2019, the parties jointly signed a 12 month lease and a
Q 12 month renter's insurance. H said it was on 6 July 2019, they
R moved into the apartment ("**US Apartment**") but W said thy
S formally moved in only on 13 July 2019. In the process,
T unfortunately, H broke his foot.

U
V

¹ B3:530

A 24. According to H, due to his broken foot, there was some tension
B between the parties for the first two months in USA. However,
C according to H, W and B integrated well into the social and
D family environment in USA and that they were happy.

E 25. On 18 July 2019, the parties received an email confirming W's
F interview with the USA Embassy in Hong Kong on 16 August
G 2019. H said W wanted to delay this and he helped her to seek a
H delay and later the appointments were re-fixed to 10 September
I 2019. H then arranged to purchase flight tickets for W and B to
J depart from USA on 27 August 2019 and to arrive in Hong Kong
K on 28 August 2019, for W to have time to attend the required
L medical examination prior to the interview. There were no
M return flights booked for W and B but H explained that this was
N due to the time needed for the processing the Green Card
O application was not known, and that the purchase of return flight
P tickets was withheld based on US immigration advice.
Q However, it was H's case that there was clearly a common
R understanding between H and W that W should return to USA
S with B once the Green Card was issued.

P 26. It was not disputed that the Green Card was issued to the W on
Q 27 September 2019 but she did not inform H. By 3 October
R 2019, H said he found it strange that that W still had not
S received the Green Card and he contacted the USA Embassy.
T On 8 October 2019, the USA Embassy responded to his queries,
U confirming that W had been sent her passport and Green Card on
V 27 September 2019 by way of SF Express. He immediately
emailed W and asked her about when she wanted to return to
USA as he needed to purchase flight tickets.

A 27. It was H's case that W's attitude towards him completely
B changed and that she started to ignore his questions as to when
C she would be returning to USA with B and was demanding
D money from him as a condition. H said W did not provide him
E with any explanation as to why she had suddenly changed her
F mind. By late October 2019, W would hang up the phone
without answering H's questions about B.

G 28. H said as he was desperate for W to return to the USA with B, he
H tried to reach out to her family for help. He then sent WhatsApp
I messages to W's father and also W's sister but to no avail. H's
J sisters also sent private messages to W to encourage her to
return to the USA.

K 29. In the end, H purchased a ticket to travel to Hong Kong and
L arrived on 30 November 2019, and he also purchased flight
M tickets for him, W and B, to fly back to USA together on 7
December 2019.

N 30. It was H's evidence that W refused to see him on 1 December
O 2019 as arranged by him, and in the end, only her father met
P with him and H's friend ("T"). W's father explained to H that W
Q refused to see him. For the next few days, T then helped H to
R try to contact W, and eventually it was not until 5 December
S 2019 that W agreed to meet H together with her father, along
T with T and T's wife. During the meeting, W indicated that she
U would only allow H access to B at a supervised community
V centre.

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

32. The originating summons herein was then issued by H on 12 December 2019.

W's main reasons for opposing the return

33. W's main reason for opposing H's application was that she only agreed to her and B accompanying H to the USA at end of June 2019 for a temporary visit and that her intention had been consistent throughout, namely she would not move to USA with B permanently, and that B's habitual residence remained to be Hong Kong. Her case was that the trip to USA was a holiday and at most, for her and B, to try out living in USA, and that it was for them to explore within that period of time if B and she would like the life in USA and that she and B could return to Hong Kong any time she wished.

34. As mentioned earlier, W relied on the Note, in which H had acknowledged that the visit was a holiday and that W and B would be free to come back to Hong Kong any time when W wished to do so.

35. W denied H's allegation that the Note was signed under any pressure or duress as alleged by him.

Date of removal or retention

36. H's case was somewhat confusing as in his 1st affidavit, he had referred to B's "wrongful removal"². However, it was not disputed that he had consented to W and B leaving USA on 27 August 2019 for Hong Kong. His case was that he had never given his consent to B to remain in Hong Kong permanently or indefinitely, namely he had only agreed to W and B to return to Hong Kong temporarily for the sole purpose of obtaining the Green Card and that the return to Hong Kong was intended and agreed between the parties to be on a temporary basis and that W would return with B to USA a few weeks before B's 2nd birthday or as soon as the Green Card was obtained³. According to H, W then changed her mind and on 20 September 2019, W sent him a message that she would not return to USA "*so soon*".

37. In Mr Chow's written submissions on behalf of H, it would appear that H's case was that B was being wrongfully retained in Hong Kong⁴, and the date was said to be at the latest, on *7 December 2019* when W had evinced her clear intention to retain B in Hong Kong against the wish of H.

38. However, during the hearing, Mr Chow submitted that the date of wrongful retention should in fact be earlier, namely *8 October*

² See heading above para 15, A:39

³ At para 4, A1:35

⁴ At para 38, Chow's Skeleton Submissions

2019, in that 8 October 2019 was the date that H found out that the Green Card had been issued to W, and when H sent an email to her asking when she would be able to return to USA with B, W's attitude changed.

39. Thus, H's case was, he only consented to W returning to Hong Kong temporarily to obtain her Green Card, and since 8 October 2019 when he learnt that the Green Card was issued, there has been no consent from him for B to remain or be retained in Hong Kong. I will proceed on the basis that H's case was that of "wrongful retention" of B in Hong Kong and that the date of retention was 8 October 2019 or not later than 8 October 2019.

The disputed issues

40. As set out by Mr Yim, the issues were:

- (1) Was B habitually residing in USA within the meaning of the Convention immediately before the alleged wrongful retention by W?
- (2) For determining (1) above, what was the purpose of the parties going to USA on 30 June 2019?
- (3) Did W's conduct constitute a wrongful retention of B within the meaning of the Convention?
- (4) Should the Court refuse the order sought by H on the ground that H had consented to the alleged wrongful retention pursuant to Article 13(a) of the Convention?

41. As seen later, I will be considering Issue (2) first.

42. It was not disputed that H has rights of custody within the meaning of the Convention, both under the law of USA or the law of Hong Kong and that at the time of the alleged retention those rights were actually exercised by H or would have been so exercised by H but for the retention. It was also not disputed that B's habitual residence was in Hong Kong prior to 30 June 2019. As the date of unilateral retention said by H was 8 October 2019, the issue was whether immediately prior to that date, the habitual residence of B was USA.

The legal principles

43. The Ordinance (Cap 512) has incorporated various provisions of the Convention. In particular, Article 3 of the Convention states that:

“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.”

44. As for habitual residence, the Court of Appeal has in *JEK v LCYP* [2015] 4 HKLRD 798, at paragraph 7.7, summarised the following principles:

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

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

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

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

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

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

45. Mr Yim also referred the Court to *ME v CYM* [2017] 4 HKLRD 739 where it was said by Lok J that in the case of a very young child where the mother is usually the main caregiver, the Court

should also assess the mother's integration in her social and family environment such as the reason for the move and her geographic and family origins⁵.

46. There was no dispute to the above general legal principles.

Primary Carer of B

47. There were some disputes as to who was the primary carer of B. W complained that H was in his affirmation "belittling" W's involvement in taking care of B⁶. I do not think this was H's intention and H was only claiming he was the primary carer. Realistically, as H was working full time in Hong Kong after his paternity leave and also he had to go on business trips, W, being a full time mother would be spending more time caring for B prior to 30 June 2019. After arrival in USA, H was mostly working at home and according to W, working on the computer from 7:30 am to 9:00 pm. On H's own evidence, he broke his leg and he had admitted it was difficult for him to care for B. Having considered all the evidence, it would seem more probable than not that W has been the primary carer of B since her birth although H had helped in B's care.

Issue (2) – Purpose of the parties going to USA on 30 June 2019

Common intention

⁵ At para 26

⁶ See para 28 of W's Counsel's submissions, and paragraph 41, A:49

A 48. As seen earlier, it was H's case and evidence was that there was
B a common intention between the parties even before the birth of
C B that they would relocate to USA in the future.

D 49. W admitted that she and H had discussed the possibility of
E moving to USA and that after she became pregnant, H had again
F raised the idea of moving to USA. However, W's evidence was
G that she had made it absolutely clear to H that she did not want
H to move to USA so soon mainly because her support system was
I in Hong Kong. W explained that she wanted their child to spend
J more time with her parents as W's mother was not in good
K health, and that if B were to leave her maternal grandparents for
L a long time when she was still an infant, there would be no
M chance for her to form a close bond with them or even remember
N their faces.

O 50. What was clear was that H submitted the application for Green
P Card for W prior to the birth of B. W's evidence was that H told
Q her to apply for the Green Card first and to consider later, as the
R Green Card application would take a few years to process. W
S also said that her involvement in the application would be
T minimal with H doing all the procedural preparations. Further,
U W's case was that after B was born, she had told H countless
V times that she did not intend to relocate to USA, at least not until
B was much older.

51. W herself had referred to WeChat messages from H to her on
8 May 2017⁷ (“08.05.17 Chats”). It was clear in those chats

⁷ B2:381-382

A that H told W that his employer was asking him to manage the
B Hong Kong team and it seemed that H was then asking for an
C assistant so that more of his time would be freed up. H had also
D indicated said to W that he had told his employer that the parties
E might want to move to USA in another year or more. There was
F nothing in W's response that she had indicated any disagreement
G with what H had told his employer, in relation to the parties
H wanting to move to USA in another year or more.

H 52. According to H, the process for the application for the Green
I Card for W was to the USA Immigration Department
J commenced on 26 June 2017, which was about 6 weeks after the
K 08.05.17 Message. The Form I-130 (Petition for Alien Relative)
L was dated 4 September 2017⁸. W had to sign the Form 1-130A
M (Supplemental Information for Spouse Beneficiary), which she
N did on about 4 September 2017.

M 53. H's two sisters L [REDACTED] and J [REDACTED] had each sworn an affidavit in
N support of H's application in these proceedings. It was L [REDACTED]'s
O evidence that at Christmas 2016, W had told her that she loved
P USA and would like to live there one day, and later, during
Q Christmas 2017, H and W had talked about going to California
R to raise B and that when they were leaving USA, they promised
S that within the next year and a half they would return to USA to
T stay.

S 54. J [REDACTED] confirmed that during Christmas in 2016, H and W were
T excited to get married and talked about a life together in Hong
U

V ⁸ B1:43-54

Kong and eventually moving to USA. Further, during H's father's birthday celebration in June 2017, the parties talked about visiting USA at Christmas after baby was born and talked about their plans for the baby's future including moving to the USA eventually to raise their child and they both thought that moving to the USA would be better for the child's home environment and education. It was also J's evidence that during Christmas 2017, H and W had talked about moving to California one day and they both wanted B to be in California before she started school and that it seemed that the parties were making plans to move to California within the next year, and that H and W had looked at houses in different neighbourhoods during their visit.

55. H's sister in law M also swore an affidavit to support H's application. She also confirmed that during Christmas 2016, W was excited about one day moving to the USA as she could have a larger home compared to what she could have in Hong Kong. Further, during a family dinner on about 24 December 2018, H and W had expressed their interests to buy a property in California and had asked M for advice as she is a licensed realtor.

56. W disagreed with what L, J or M had said in their affidavits, and denied having told any of H's sisters during their first trip in December 2016 that if she and H had children, they would move to California. W claimed that her English was not very fluent and could not understand H's family very well as they talked very fast and their English was heavily accented. As M was a real estate agent, W said M was just showing

A the parties properties around Brentwood without particular
B purpose and that W never said she wanted to reside in
C Brentwood in California as alleged or that she wanted to relocate
D to USA.

E 57. Anyway, being related to H, no doubt his sisters and sister in law
F would support H. Notwithstanding this, their evidence about
G what was allegedly said by W in December 2016 and/or mid or
H end of December 2017 seemed to be consistent with what H had
I said to W in his 08.05.17 Chats and also his application for
J Green Card for W in June 2017.

K 58. Whatever W may now say, it would seem probable that she did
L discuss with H prior to B's birth about moving to the US in a
M year or more, and had agreed for H to proceed to apply for the
N Green Card for her. As said earlier, she herself had signed the
O relevant form. Having said this, although there was mention of
P moving in one or one and half years, I do not find that there was
Q sufficient evidence that W had agreed or committed to any
R definite time frame for any move.

S 59. W had denied that that H's employer was pushing him out of his
T job, and that she had referred to the 08.05.17 Chats, that in fact
U H was offered a choice by his employer to manage the team in
V Hong Kong. She also referred to a message she sent to her
family on 13 April 2019 the day after she was told of the
termination of H's job in Hong Kong in which she told her

family that it was H who wanted to move to US and that he applied for the transfer over a year ago⁹.

60. H denied that he himself had applied for an internal transfer to the USA. He had also produced his emails with his employer in November 2019¹⁰ when he was trying to seek a transfer back to Hong Kong in light of W's refusal to return to USA and his employer responded by saying that he had told H *many times* that there was no point in having 3 [REDACTED] based in Asia and that H would bring a lot more value being based in the USA. In his chat to W on 9 May 2019, H had also stated to W that his company had been pressuring him more and more the last two years, and that he had pushed this out as long as he could and that he could not push it out any further.

61. I see no sufficient evidence that it was H who had sought an internal transfer as alleged by W.

62. W had referred to a chat on 9 May 2019 when she said to H that it would be best for B to be in Hong Kong and that she had been telling H this *for over 1.5 years*, and that if H needed a year to find a job in Hong Kong, that he should find it then and that H was the one who requested to work in USA. H immediately told W that what she said was not true.

63. It was however W's evidence that although her Green Card application commenced in June 2017, it had been set aside for

⁹ B2:383

¹⁰ B4:741-742

A almost 2 years due to her reluctance to proceed and that she had
B been refusing to provide her original birth certificate to prevent
C H from proceeding further, and she also accused that H had
D obtained a certified copy of her birth certificate without her prior
E knowledge and consent. H accepted that W did not proceed with
F the Green Card application after B's birth but said it was still
G valid, and that all she was required to do was to go to the
H Wanchai Police Department in person to obtain her record of no
criminal conviction which eventually she did on 27 May 2019
accompanied by H.

I 64. Having considered the evidence, I find that although prior to end
J of 2017, the parties had discussed and had intended to move to
K USA one day but as I said earlier, so far as W was concerned
L there was no sufficient evidence that she had agreed or
M committed to any definite time frame for any move. Anyway, it
N would appear that soon after birth of B or by end of 2017, W
started to have second thoughts, or at least had become
ambivalent, about any move to USA.

O Events after H received the redundancy notice

P 65. As said earlier, H admitted that W was not happy when told by
Q H on 12 April 2019 that he had received the notice of his
R redundancy in Hong Kong and the expiry of his work visa on 30
S June 2019. It was H's case that eventually W agreed to
T relocating to California and he then booked tickets for departure
U on 30 June 2019.
V

66. Further, according to H, there were the following preparations for the relocation:

- (1) W took steps to move forward with her Green Card application;
- (2) The purchase of return flight tickets for W and B to come back to Hong Kong was due to US immigration law requiring non-citizens to have an exit ticket, and solely for the purpose of enabling W to come back to Hong Kong to complete the steps for her Green Card application and it was intended that W's and B's stay in Hong Kong would be only for a few weeks and that they would return upon the completion of the Green Card process;
- (3) The parties vacated the rented home in Hong Kong and surrendered the lease thereof, sold and/or gifted all the big items which they would not bring to the USA and packed all their belongings for shipment to the USA;
- (4) In the meantime, the parties also jointly looked for potential apartments in the USA;
- (5) There was a farewell party with W's friends and she received farewell gifts;
- (6) There was also a farewell party with the W's family members on 21 June 2019 whereby W's relatives discussed about W's future life in the USA;
- (7) On H's Day in 2019, W also expressed her gratitude to her father on the Facebook;
- (8) On the date of departure, there was farewell by the family members at the airport in Hong Kong. W also appeared to be happy when the family finally left the home in Hong Kong and after they had boarded the flight.

A 67. On the other hand, W's evidence was that H was fully aware of
B her reluctance to move to USA or even to leave Hong Kong on
C 30 June 2019. As said earlier, it was her evidence that her Green
D Card application had been set aside for almost 2 years and this
E was due to her reluctance to proceed and that H had done a
F number of things to mislead her into believing that the Green
G Card application was necessary for her to travel between the
H USA and Hong Kong without being questioned by the
I Immigration, and that eventually it was not until 27 May 2019
J that she went to obtain her record of no criminal conviction after
K H was agreeable to rent an apartment in Hong Kong. Further,
L the termination of the lease of the parties' apartment in Wanchai
M was done by H without informing her in advance, and that she
N had actively looked for an apartment in Stanley for her and B to
O live in Hong Kong, and to be near be parents.

L 68. According to W, when the movers went to their apartment to
M pack their belongings on 27 June 2019, out of the 12 boxes of
N her belongings and B's belongings, only 3 boxes consisted of
O her clothing and that of B, and the remaining 4 boxes were toys,
P and that she had kept more than 10 bags of B's and her
Q belongings at her parents' apartment for their use when they
R returned to Hong Kong.

R 69. W denied attending any farewell party with her friends on 6 June
S 2019, and that there was only a social gathering on 14 May 2019
T when her friends brought gifts for B, which were not meant to
U be farewell gifts. The dinner on 21 June 2019 organised by W's
V family was only a farewell party for H, since her family

members knew that H was leaving but she had not agreed to fly to USA.

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

71. W said her initial discussions with H could be reflected in a chat on 24 April 2019 from her to her family. According to W, H had said at that time she could go to the US for a period of time and that she could come back to Hong Kong, and a period of time of every 3 or 4 months would not be a problem, and that they could rent a flat in Hong Kong if it was not too expensive, although he had said HK\$16,000 would be expensive¹¹.

72. W had clearly made her views known in her chats with H on 9 May 2019, that “Best for B was Hong Kong”. They did have further discussions for W to rent a smaller place in Stanley so that she and B could stay in USA a few months then stay in Hong Kong a few months. H however indicated that it did not seem possible as it would be far too expensive, but that W was free to look at what pricing she could find and they could review. W however made it clear in a chat on 22 May 2019¹² that if they were not to rent somewhere in Hong Kong, then she would not be going to USA “*for entire time*” and that there

¹¹ B2:469

¹² B2:431

would be no need for her to proceed in attending the Wanchai Police Station to obtain the record of no criminal conviction.

73. A further matter W raised with H during their chats on 15 May 2019 was over finances when she requested for some money for her own saving on a monthly basis, or for her name to be added to H's bank account, which was referred to by H as "family account". H's response was¹³:

"Yes, that is something I would be 100% open to if you are ready to take on the duties of being a wife as described above. Are you ready to be wife? Keep our family together? Finish the process to get a green card? Move to US?"

74. It was clear from those chats on 15 May 2019¹⁴ that H was only prepared to agree to what W proposed over finances if she were to move to USA.

75. It would appear from the chats W had with a property agent that on 24 May 2019, W did try to make enquiries about renting a flat in Stanley and it would seem that she did view some flats on 3 June 2019 and was mentioning to the agent that the lease could start from 1 July 2019. When W suggested to H about renting an apartment at a monthly rent of HK\$10,000, H said that renting an AirBnB apartment for 4 weeks, say at 3 trips a year to Hong Kong, would cost less. However, W responded on 10 June 2019 that she wanted to be in Hong Kong for few months

¹³ B2:461

¹⁴ B2:458-467

each time¹⁵. Anyway, it would appear that even on 26 June 2019, W was still trying to convince H again to rent a flat for her in Hong Kong as she was asking the agent whether the flat she viewed was still available¹⁶. W had also said as her sister had confirmed that she would be moving out with her children from their parent's apartment, W knew that she and B would have a stable and permanent place to stay in Hong Kong when they returned.

76. According to W, on 25 June 2019 she had discussed with H and that H tried to convince her again that instead of arguing whether she should move to USA or not, she could treat going to USA as a holiday and that he would buy return tickets to ensure that W and B could return to Hong Kong and he would not restrict them to return and live in Hong Kong any time.

77. The above discussion was referred to by W in her chat to H at 9.11 am on 26 June 2019. W was stating that she wanted to stay in Hong Kong and that H wanted to move to USA and that when they last talked, W had said she would stay in Hong Kong and would be happy to visit H in the USA, and that H then asked her to decide on buying ticket for 30 June *as travel for leisure first* W then said she agreed to fly on 30 June as travel, and she wanted H to understand and to agree that she and B would come back to Hong Kong when she wished¹⁷. There was later a long response from H, but there was no clear indication from H

¹⁵ B3:510

¹⁶ B3:512

¹⁷ B3:522

whether he agreed that W was traveling on 30 June 2019 to USA for leisure, and whether he agreed that she and B could return to Hong Kong when she wished.

78. The evidence thus showed up until that time, the parties still had not reached any agreement on relocation to USA.

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

80. The Note was written and signed by H on 28 June 2019. Upon receipt of the Note, W had sent a further chat to H to confirm his agreement that she only agreed to go to USA with B on a temporary vacation and that she could come back and live in Hong Kong with B anytime she would want in future and that H's agreement would be valid every time when she visited US in future with B¹⁸. W had also said if there was no response from H, it meant that he had no objection to what she had said. There was no written response from H. W had sent a copy of the Note to her family telling her family members that H had signed it to indicate that she and B could return to Hong Kong any time and to stay for a long period in Hong Kong.

81. It was H's case that W suddenly asked him to write out the Note on 28 June 2019 to say he would not restrict her and B from

¹⁸ B3:528-530

coming back to Hong Kong to visit any time. As W was adamant, even though he felt being unfairly treated and he was under duress, he did sign it very reluctantly in order to pacify W and that W insisted that he should add a further assurance to her in the Note by confirming that she could relocate to Hong Kong any time she wanted. H had referred to his messages with his brother K [REDACTED] on 28 June 2019 regarding his signing of the Note.

82. However, whether he was reluctant to sign the Note or not or whether he was under any duress, it must be clear to H that W was not willing to relocate to USA permanently at the time and that she had only agreed to leave on 30 June 2019 to go to USA for a holiday, and that she wanted a written assurance that H would not restrict her and B returning to Hong Kong any time she wished to do so. It is my view that this was clearly W's frame of mind when she and B left for USA on 30 June 2019.

My views on Issue (2)

83. In light of what I said above in relation to W's frame of mind, my finding on Issue (2) is that the purpose of W going to USA with B on 30 June 2019 was only for temporary purpose, ie a holiday to see family and to look for an apartment as stated in the Note, and this was known to H. There was no agreement or intention on the part of W that she and B were to relocate to USA permanently when they left Hong Kong on 30 June 2019.

Issue (1) – B's habitual residence prior to 8 October 2019

84. The parties stayed at H's brother's home for the first two weeks of their arrival in the USA, whilst H was looking for an

A apartment. As said earlier, according to W, the parties formally
B moved into an apartment in Dublin in California on 13 July
C 2019. W did not deny she co-signed the lease as tenant but
D according to W, she was told by H's brother that it was a legal
E requirement for all tenants over 18 to sign the lease otherwise
F she would be breaching the law and also that if she wanted to
G live outside the USA for 1-2 years, this would avoid questions
H being raised by the US Immigration. W said she had also called
I the Management Office which verified what H had said about
J the legal requirement. However, W said she was not informed
K by H that there was a choice of a shorter lease than 12 months.

I 85. H had relied on the following to demonstrate that W and B had
J settled into their lives in USA: (1) The parties purchased a
K number of big items to build up their home in the USA for the
L family's long-term stay there; (2) the family had integrated well
M in the community in the USA; (3) There were numerous
N gatherings with H's family; (4) the family participated in a
O number of local activities, including attending a local
P Cantonese-speaking Church on Sundays; (5) W learning driving;
Q (6) the family visiting local theme park and other places and the
R family attending 2 business trips with H.

Q 86. Further, it was H's evidence that W had indicated in unequivocal
R terms that she would return to Hong Kong only to receive her
S Green Card and then she would go back to the USA to look for
T employment.

U 87. On the other hand, W's evidence was that she had not settled in
V USA at all:

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- (1) The apartment was chosen by H which she did not like at all, as it was very dim and there was no breeze with the windows all facing north; W had produced her chats with H at the time, which showed that H had failed to take into account her preferences when choosing the apartment;
- (2) Her conduct in she and H shopping together for furniture particularly furniture to protect B's safety did not mean that she planned to move to USA permanently, as it was absolutely necessary to purchase child-safety furniture for B; further getting a new bed was because H's old bed was 20 years old and B was suffering from serious skin allergy due to dust mites and in any event, H was going to live in the apartment;
- (3) As H was working from home from 7:30 am to 9 pm on his computer, her daily routine was extremely dull. In one of her chats to her family on 10 July 2019, she had said she was staying at home every day with B as she was not able to drive, and she was so bored that she had a headache. She went to the supermarket once in the morning and once in the afternoon and that she had been to the supermarket for hundreds of times;
- (4) She only went to the local Church for 3 times instead of every Sunday as alleged by H, and that she attended Church for her mental wellbeing;
- (5) She only started to learn driving on 18 August 2019 for less than 5 times in a parking lot for about 15 minutes each and it was H who was teaching her;
- (6) She could not adapt to the food in USA and she had complained about the food in her chats to her family; further B was not able to adapt to the weather and food in the USA either and fell ill after one week of arrival in USA and had a high fever;
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(7) The parties did not sign up any playgroups for B or had any discussion on B starting pre-school in USA;

(8) She did not open any bank accounts in USA; she had not cancelled any of her bank accounts or credit cards held with HSBC in Hong Kong, nor her mobile phone plans in Hong Kong and she had been paying for her mobile phone monthly plans for July and August 2019 through her Hong Kong bank account.

88. The parties had also made various allegations against each other including violence/aggressiveness and/or mental issues. It is quite clear that after their arrival in USA, there were marital issues between the parties and in particular financial issues.

89. It would further appear that on 12 July 2019 W had sought legal advice online from a US lawyer about the legal effect of the Note and other issues¹⁹, W was posing several scenarios to the lawyer and W was clearly considering different options. Mr Chow referred to one of her questions, that she planned to reside in USA for one year and two months and to return to Hong Kong in September 2020 for B to attend school in Hong Kong, and if H filed for divorce, would W have to bring B back to USA (as Hong Kong was a party to the Convention). In response, the lawyer complained that it was inappropriate to message him outside his office hours, and he also said there was not much he could assist and that W had the opportunity to leave but chose not to and he could not do much about that²⁰. As pointed out by Mr Yim, the question had to be seen in the context of all of W's

¹⁹ B3:624-628

²⁰ B3:628

enquiries and was clearly only one of the scenarios raised by her, and should not be regarded to indicate that W had formed an intention to reside in USA for 14 months.

90. W had sent a chat to her family on 3 August 2019 complaining that H refused to pay her more than US\$200 per month as pocket money. W said she had asked him to open a joint account, but according to W, he refused to do so until W started working and crediting her own income into the joint account.

91. W had also sent a chat to H on 7 August 2019 to ask him for a full time mother allowance, indicating that US\$200 a month was too little but this was clearly rejected by H who said he was doing everything for her and listing out everything he said he was doing/paying and that he had said if she wanted more than US\$200 per month, the parties could make a list of housework for her to do and if she did it, she could earn more from him²¹. In response, W said she would cook all her own food and B's food and she would wash all their own clothes and asked H not to cook for them and not to touch their clothes. W later sent another chat on 21 August 2019 and complained that H still had not given her any allowance²².

92. In my view, H's attitude at the time, as seen in the above chats, could hardly offer any security or stability for W, who, as said earlier, has been the primary carer of B.

²¹ B3:606

²² B3:608

93. W and B left USA on 27 August 2019. They stayed in USA for just under 2 months from 30 June 2019.

94. As mentioned earlier, after B's initial 12 classes at the playgroup ended in October 2018, W had enrolled B in 10 pre-paid classes [REDACTED] [REDACTED] which B started attending in April 2019. According to W, at end of June 2019, there were still unused classes. W said they did not ask for a refund as she had intended for B to return to Hong Kong few months later to continue her attendance. In addition, W said B was also enrolled in music lessons beginning from 8 March 2019, and B's spot at the music school was never cancelled²³.

95. Further, on 21 May 2019, W received an offer for B to attend pre-nursery class at [REDACTED] for the academic year of 2019-2020 starting in September 2019. W said she had paid the fees (with funds from H's bank account) so that B could attend regular classes when she and B returned to Hong Kong. As H had told her that the medical checkup and consulate interview would not take more than a few months to schedule she believed that she and B would return to Hong Kong some time around late August 2019. In fact, W said she paid the remaining deposit fees on 8 July 2019 to the kindergarten whilst she was still in USA.

96. W was in USA on a tourist visa only and when they returned to Hong Kong on 27 August 2019, no return tickets were arranged, although H had explained it was not certain as to when the

²³ See para 25, A:117

Green Card would be issued, and that it was the advice on the USA immigration website not to purchase return tickets in case there were delays.

97. No doubt, W had met up with H's family members after her arrival, but according to W, these family gatherings were infrequent and brief, as seen in a chronology submitted by Mr Yim on W's behalf ("**Chronology**").

98. In my view, co-signing a 12 month lease with H on about 5 July 2019 would not necessarily mean that W had acquired a necessary degree of stability, nor would going to buy furniture with H on that day, or ensuring there were child safety equipments for B. As W had said, this would be absolutely necessary for B, irrespective of her length of stay. Further, as said earlier, it was on 8 July 2019 that W paid the remaining deposit fees for the kindergarten in Hong Kong for B to start in September 2019.

99. Although H said it was W who requested a postponement of her Green Card interview, W said it was H who suggested delaying the interview for one month, as the parties had been tired in the move. The interview was then re-scheduled for 10 September 2019.

100. It can be seen in the Chronology that between their arrival on 30 June 2019 until 27 August 2019, W and B were in USA for 59 days in total from 30 June 2019 to 27 August 2019. The parties had travelled during this period, namely on 23-28 July 2019, W and B accompanied H to Buffalo for a work trip and

later visited the Niagara Falls, and between 14-18 August 2019, W and B accompanied H on a work trip to Los Angeles and visited H's cousin and his family in Los Angeles. In fact, it would appear from the Chronology that W and B were in the Dublin apartment, and in total for only about 35 days.

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

102. It was H's evidence that W could not open any bank account in her own name or obtain a US driving licence until the issue of her Green Card, and she could not work either. Her driving lessons were with H only and in any event not more than 5 times in a parking lot for about 15 minutes each.

103. W's maiden family and friends are all in Hong Kong. As seen in her family chats, she is very close to her family. As said earlier she had maintained her bank accounts and credit card in Hong Kong and in particular her Hong Kong mobile phone plan.

104. Having considered all the present evidence, I am not satisfied that by 8 October 2019, the residence (if any) of W and B in USA could be said to have acquired the necessary degree of stability to become habitual. In my view, W's and B's habitual residence has all along remained in Hong Kong.

Issue (3) and Issue (4)

105. In light of my above decision on B's habitual residence, for Issue (3), W's conduct of retaining B in Hong Kong could not have constituted a "wrong retention" within Article 3 of the Convention.

106. There is no need for me to consider Issue (4) but if there had been wrongful retention of B in Hong Kong, in my view, H had given his consent in the Note to W and B to return or relocate to Hong Kong anytime whenever W wished. I would also have refused any return order on the ground that an objection under Article 13 (a) of the Convention has been made out. I see no sufficient evidence of any duress. In fact, the Note followed the parties' oral discussions and was only sought by W to record H's earlier oral promise to her.

Order

107. In the above circumstances, I dismiss H's originating summons. I see no reason to depart from the usual approach in children cases in relation to costs, and I make no order as to costs.

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(Bebe Pui Ying Chu)

Judge of the Court of First Instance
High Court

Mr Enzo WH Chow, instructed by Withers, for the applicant

Mr Eugene Yim, instructed by Haldanes, for the respondent

Mr Felix Man Yuk-kin, Government Counsel of Department of Justice,
observer