

HONG KONG / JUDGMENT

D v. L

[2026] HKCFI 402

COURT

Court of First Instance

DECIDED

20 January 2026

CASE / FILE NUMBER

HCMP2139/2025

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HCMP 2139/2025

[2026] HKCFI 402

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2139 OF 2025

IN THE MATTER OF DD, male, a child born on xx February 2024

and

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

and

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

BETWEEN

D

(in substitution of the Secretary for Justice

(in his capacity as the Central Authority designated under the Child Abduction and

Custody Ordinance, Cap.512) pursuant to the

Order dated 14 November 2025)

Plaintiff

and

L

Defendant

Before: Hon Winnie Tsui J in Chambers (Not open to public)

Date of Hearing: 6 January 2026

Date of Judgment: 20 January 2026

J U D G M E N T

INTRODUCTION

This is an application for the return of DD (“the child”) to the United States of America under the Child Abduction and Custody Ordinance, Cap 512, and the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

The child was born on xx February 2024. He will be two years old next month.

The originating summons was taken out by the Secretary for Justice, acting in his capacity as the Central Authority of Hong Kong under the Hague Convention, on 11 November 2025. He did so at the request of the Central Authority of the USA. The mother and the father of the child were named as the 1st and 2nd defendants respectively.

At the directions hearing on 14 November 2025, I granted leave for the Secretary for Justice to withdraw from these proceedings and for him to be replaced by the father, who has since become the plaintiff. The mother is now the only defendant. The Secretary for Justice was granted leave to observe these proceedings and be served with all the documents.

PROCEDURAL HISTORY

Since the commencement of these proceedings and up to 2 January 2026, the mother acted in person.

At the directions hearing on 14 November 2025, she was reminded of her right to seek legal representation. But she indicated that she would choose to act by herself. Directions were given for the filing of evidence and the proceedings were adjourned to 11 December 2025 for substantive argument.

On 2 December 2025, a legal aid memorandum was filed with the court indicating that the mother had applied for legal aid. The proceedings were therefore automatically stayed pursuant to section 15 of the Legal Aid Ordinance, Cap 91.

As of 11 December 2025, which was the date fixed for the substantive hearing, the legal aid application was still pending. In light of the importance of this case to the child, the father and the mother, I postponed the argument pending the outcome of the legal aid application and,

given the intervening Christmas holidays, the hearing was re-fixed to 6 January 2026. At the directions hearing, the mother also indicated that she wished to file further evidence to oppose the application. A deadline was imposed for her to make a formal application which was to be accompanied by the draft affirmation. Leave was later granted on paper.

On 18 December 2025, the mother's legal aid application was refused.

On 2 January 2026, just two working days before the substantive hearing, a notice to act was filed on behalf of the mother.

At the hearing, the father was represented by Mr Robin Egerton and Ms Nicole Chui. The mother was represented by Ms Sasha Allison.

THE ISSUES

It is not disputed that the child was removed by the mother from the USA to the Philippines on 2 June 2025. It is also not disputed that at that time, the father had rights of custody under the law of the USA as defined under the Convention, and he was exercising these rights over the child.

At the hearing, the issues in dispute were confirmed by the parties as follows (which had been narrowed down from the agreed list of issues lodged before the mother was legally represented):

Was the child habitually resident in the USA as of 2 June 2025?

Was he wrongfully removed from the USA on that date? If the answer to (1) is yes, the mother accepts that the removal was wrongful.

Did the father acquiesce in the retention of the child in the Philippines after the removal?

Is there a grave risk that to order the child to be returned to the USA will expose him to psychological harm or otherwise place him in an intolerable situation?

Is the child now well-settled in the Philippines?

The issue in (3) relates to the defence under Article 13(a) whereas the issue in (4) relates to the defence under Article 13(b). The issue in (5) is not an independent defence. It is accepted by the mother that it only goes to the issue of discretion. It is only relevant if the court comes to the stage of considering whether to exercise its discretion to make a return order under Article 13(b).

THE EVENTS LEADING TO THE HAGUE APPLICATION

The parties have filed fairly extensive evidence on the events leading to the Hague application. As the parties managed to narrow down considerably the issues in dispute at the hearing, I will only recite the evidence which is relevant to the disputed issues.

I would also remark at the outset that there are not much disputes over the primary facts. This is not a case where the father and the mother are putting forward rival versions of what had happened. In fact, a large part of the factual narratives put forward by the parties are not disputed. There are also contemporaneous text messages exchanged between them, which show

on a real time basis what was happening at different times. What divides the parties is the conclusion to be drawn from these primary facts on the issue of habitual residence, acquiescence and grave risk.

The background

The father is from the USA. He is now 30 years old. From July 2023 to July 2025, he worked as a security officer at xx in Florida. He now works as a mechanic for a business owned by his stepfather. The mother is from Cebu in the Philippines. She is now 26 years old.

The father and the mother met on an online dating website in November 2022. They met in person for the first time in May 2023 in the Philippines. In the same month, the father proposed to the mother while they were on a cruise. The father then returned to the USA.

In around June 2023, the mother told the father that she was pregnant. The father started applying for a fiancée visa for the mother in August 2023.

The child was born in the Philippines on xx February 2024. The father was there for his birth.

In May 2024, the child obtained USA citizenship and a USA passport. (He also holds a Philippines passport.)

The mother obtained her fiancée visa on 7 August 2024, which was valid for one entry into the USA.

17 August 2024: move to the USA

Shortly after that, on 17 August 2024, the father, the mother and the child travelled from the Philippines to the USA.

It is not in dispute that at that time, the intention of the father and the mother was for the mother and the child to be relocated to the USA permanently and for the three of them to build their family there. In any event, that cannot be seriously disputed on the evidence.

The father's evidence, which is unchallenged, is that the mother packed and took along with her practically all her belongings, including childhood photographs, and the three of them travelled with six heavy check in bags and two to three carry-on luggage items on to the plane.

Further, after the removal of the child to the Philippines, in a text message written on 4 June 2025, the mother said this to the father of her decision to settle in the USA:

"Hey [D], as I'm typing right now, I'm already on the plane with [DD] to the Philippines. ... I gave up everything to be in the US, and by everything I mean my family, my friends, my country, the comfortable and familiar life, a chance to have a life without worrying of financial stress and the feeling of being genuinely happy. I rushed so much to go there because I know how beautiful our life would be together – until everything happened. ..."

... I thought I finally have the family that I've always dreamt of, but I was wrong. Love isn't supposed to have conditions. I just really wanted to have a complete and happy family [D]. I believed in our marriage with my whole heart. I gave it everything. I thought we shared the same dream." (underline added)

Life in the USA

Shortly after the arrival in the USA, the father and the mother married on 28 September 2024. That was in accordance with the conditions of the mother's fiancée visa and would enable her to apply for a permanent residency or "adjustment of status" in the USA.

The father's family home is in Homestead, Florida. It was however the mother's preference not to live in Homestead near the father's parents as she wanted the family to have its own independent life. The father acceded to her request and took up a lease of an apartment in Orlando, Florida which was a four-hour drive from Homestead. The lease was for 16 months and commenced in August 2024. As explained by the mother:

"Renting an apartment in Orlando allowed us to have our own independent life whilst still being close enough to his parents that we could visit them over the weekend. [D] also has two brothers that are living in Orlando so he still had some family nearby."

The father worked full time in Orlando, Florida, and the mother took care of the child at home. Financially, the mother was dependent on the father.

The mother applied for employment authorisation on 2 January 2025, which was approved on 27 March 2025. From that day onwards, the mother was eligible to work in the USA. However, the father says that she did not make any serious attempt to get a job. Despite urging, she did not learn how to drive or study for a learner's permit.

On the other hand, the mother says that when the father was at work, she had to take care of the child and do the household chores, leaving her with very little free time. The only limited free time she had was when the father was back from work but by that time she was already tired. Anyway, even when the father was at home, she was still primarily taking care of the child as the father wanted to rest after a long day at work. She suggested that the child be put in day care but the father did not agree. It was impossible for her to find time to learn to drive or apply for jobs.

The mother says that as the months went on, she became increasingly frustrated at her lack of independence. In her 2nd affirmation, she said that she was unhappy with her life in the USA, notwithstanding that the father did put in an effort, help her out and spend time with the family. She said:

"21.

... On days when he finished work earlier, he would typically come home and we would go to either the shopping mall or to the park with [DD] for a couple of hours. On the days that [D] was not working, we would similarly go to the shopping mall, the park, or sometimes to the beach. It would generally always just be the three of us and we would rarely spend time with other friends.

22.

Given the nature of [D]’s job and the odd working hours, he would typically not help me much with the household chores. However, when I would do the dishes or other household chores, he would help look after [DD]. [D] did try put in effort in our relationship and plan date nights together or buy me little gifts ...”

As to the daily life of the child, the father says that he was registered for doctors, paediatricians and he took out medical insurance for the child. The father also says that he paid for a college tuition prepaid fund for the child. However, the mother says that the father has failed to produce any documentary proof in support in this action.

The father says that as time went by, the mother and the child began to grow their social circles and the child went to children parks with him, met other parents and children of various ages. On this, the mother says that during the time she was in the USA, she made about seven friends in Orlando mainly through the father’s circle of friends. But all of these friends worked and she would therefore rarely spend time with them during the week. She largely spent her days with the child inside the house or at a nearby park within walking distance.

It is not in dispute that the child had interactions with the father’s family whilst living in the USA. The paternal grandparents went to Orlando for the child’s first birthday. But, typically, it would be the family of three who would travel to Homestead to see the grandparents. They would make the trip about three times a month and it would usually be a day trip. In his affidavit, the father described the child’s relationship with his family, including his mother and two brothers and a long-term partner of one of the brothers, as “strong”. On the other hand, Ms Allison submitted at the hearing that the relationship was superficial at best.

March 2025: the deterioration of the relationship

In March 2025, disagreement began to surface. It is unnecessary to go into any detail in this judgment. The mother accused the father of having an extramarital affair with his co-worker, which the father denied.

In April 2025, the mother engaged divorce lawyers in Florida and requested the father to sign some divorce papers. Later on, the mother started to ask the father to sign a form entitled “Parental Consent and Authorization” which, if signed, would give the mother full authority to make all decisions regarding the child and would allow her to relocate with the child to any place as she decided in her discretion. The father refused to sign it. The mother would later demand the father sign the form again and the father would refuse every time.

In the meantime (beginning from early March 2025), the mother made four trips to New Jersey to spend time with her friend. There were two trips when she did not take the child with her. The first one was in mid-May, and she was away for six nights. At that time, she was very unhappy and she and the father kept arguing. She therefore wanted to go away and that time also coincided with her friend's birthday. The second time was on 24 May 2025. According to the mother, the situation at home became intolerable for her. She stayed at another friend's place in Orlando for the night and on the following day, she flew to New Jersey to stay with her friend. She returned to Orlando on 29 May. For each of the four trips, it was with the father's agreement.

It was the mother's wish to return to the Philippines with the child. She repeatedly made that known to the father. On 25 May 2025, she wrote:

"You need to understand that you took me here with promises you did not keep. Set me free. I don't and won't ask anything else. It is not fair to lock me here for years just because you [expletive omitted]."

I want the decision to be mine.

It is not my country, I do not know if I can stay. And I have no income and with a child, I can't have a full time job. It is so unfair.

You can always visit [DD] whenever you want.

If u want to move after me, then it's your decision.

I'm going back to ph on may 30

Think about it. The papers are there"

As the mother was away, the father had to take DD to Homestead to seek help from his family to look after him while he was at work. The child stayed there from 24 to 31 May.

What happened during this period is not entirely clear. (It is one of the few instances where the parties' accounts of events are markedly different.)

According to the father, shortly before 31 May, the mother suddenly called him announcing that she had decided to come back into their lives. She said she wanted to meet in Orlando to (belatedly) celebrate the father's birthday on 31 May. The father therefore brought the child to Orlando to meet up with her. The mother said she would be agreeable to marriage counselling. The father thought that everything was back to normal. He left the child with the mother on the night of 1 June and went back to Homestead.

According to the mother, when she returned to Orlando on 29 May, the father refused to bring the child back from Homestead. Eventually she went to the police on 30 May. The police did not intervene as it was a civil matter. Eventually, the father brought the child to Orlando on 30 May. The following day, the father travelled back to Homestead.

Notwithstanding the different versions of what led to the meeting on 31 May, I do not find it necessary to make any factual finding in this regard as it is not relevant to any of the disputed issues.

2 June 2025: removal of the child to the Philippines

Without the knowledge of the father, the mother and the child boarded a plane at the Orlando airport on 2 June and arrived in the Philippines on 4 June.

On 4 June, the mother sent a long note to the father, expressing her feelings about the whole situation. She wrote:

“Hey [D], as I’m typing right now, I’m already on the plane with [DD] to the Philippines. I have been having second thoughts to do this because it isn’t fair but it’s also not fair what you all did to me, especially emotionally. I’m sorry for deciding this but I want to choose myself too this time.

...

There’s no revenge or bitterness in my heart. I’m simply choosing to break the cycle. I will always respect you as [DD]’s father but I cannot stay in a relationship where the foundation of trust has been broken. That’s not the example I want to set for our son.

This is not easy. I didn’t come here to destroy this family. I came here with hope, love, and dreams. But I also came here with strength. The strength to stand up for myself and my child when things fall apart. I hope you can understand that. I hope you can support me, or at least respect my decision, even if it’s not what you hoped for.” (underline added)

The following exchange, dated the same date, is also relevant:

“Mother:

If you ever file a case, I understand. I wont stop you. Im just a mom who wants her child with her. You know where to find me.

...

Father:

I really miss him

How has he been? Please send me any photos that you can. I really miss him

I didn’t think you’d take him out of the country despite me telling you I wasn’t okay with you doing so.” (underline added)

It is the father’s case that before the abrupt departure, the child had started treatment to deal with fluid in his ear. He asked the mother to bring the child back to the USA for the treatment on 17 June. I quote below part of his message:

“I am still providing for all of [DD]’s needs. I am still [DD]’s primary provider, and I always will be, as any loving father would. I’ve made sure that [DD] has more than enough supplies here in the US, where he lives. You’re making it clear that [DD]’s needs aren’t being met over there. You’ve told me [DD]’s been sick, and needs surgery for his ears apparently.

Bring [DD] back to his home, the US, so we can take better care of him. His appointment for his ears is on Friday, which I informed you of yesterday. His insurance will cover most, if not all of it. Please don’t put his health in any more possible harm by missing this appointment due to lack of effort on your part. If you want the confirmation of this appointment, I’ll send it to you.

Since finances are obviously such a concern, I’ll get you the flight ticket whenever you’re ready. Please don’t delay this any further and put our son through any more struggles and possible danger than he’s already placed in there in the Philippines.” (underline added)

The mother replied to this and she appeared to be complaining about the father not providing for the child while he was in the Philippines. She wrote:

“Yes, you provided, but in the US, not here. And he’s well taken care of. ...

I simply asked you to be a father – whether we’re in the US or here in the Philippines. That has nothing to do with location, just effort and care. ...”

On 12 June, the father petitioned for divorce in the family court in Florida. The papers, however, were not served on the mother until much later on, only after the commencement of these proceedings.

The mother was due to attend an interview with the US Immigration Department for her application for permanent residency on 14 July. As she failed to turn up, her application was denied and her employment authorisation cancelled.

On 15 July, the family court made an ex parte order for the immediate return of the child to Florida, USA and for him to be returned to the father’s custody.

In the meantime, the mother did not inform the father of her address in the Philippines. The father’s contact with her was via Facebook messenger. It is not in dispute that the father was blocked by the mother on a number of occasions. According to the mother, she did so because at times she could not handle the pressure and arguments.

In an attempt to locate the mother and the child, the father met with the General Attaché of the Philippine Embassy in Washington DC to seek his assistance. This seemed to have led to a wellness check on the child and caused the authorities in the Philippines to try to locate the mother and the child.

There was the following message (the date of which is unclear) from the mother to the father:

“You make it go away, and then we can keep on talking

I hear what you're saying, it might be misunderstanding but the police keep chasing us. Just make it go away and we can continue this.

We have to hide now coz of this. Finish this and we can communicate again.” (underline added)

In her affirmation, the mother referred to the visits by the police. She said:

“Now, standing here, I understand that those visits were connected to this case, and that he had in fact triggered investigations into [DD]’s welfare while pretending innocence to me.”

Life in the Philippines

It is the mother’s case that the child settled well in the Philippines.

On 20 June, he had a successful operation for draining the fluid from his ear.

The mother’s family had been very supportive. With such support and with a much lower living cost, the mother was able to enrol the child in various activities, including xx, indoor playgrounds, Daycare at xx, and Occupational Therapy at xx. He made significant progress with his development. He was interacting with children of a similar age a lot more than when he was in the USA.

The mother says that she often encouraged the father to travel to the Philippines to see the child but he always refused. Nevertheless, the father would regularly call the mother and the child. The father was aware of the child’s schedule. He occasionally paid for his activities. The mother says that the father was getting comfortable with the child being in the Philippines. This is how she put it in her affirmation:

“Whilst [D] may not have been on board with the idea of [DD] and I being in the Philippines at the start, he was certainly comfortable with it as time went on and continued to support our life in the Philippines.”

2 November 2025: the mother and the child came to Hong Kong

In early November 2025, a “code blue” typhoon was approaching Cebu. The father and the mother discussed the idea of the mother and the child going to Hong Kong to avoid being in the Philippines when the typhoon hit. The mother was receptive to the idea as she knew that during typhoons, they could lose electricity, internet and even access to food. The father booked and paid for a hotel room for two weeks in Hong Kong.

The mother and the child arrived in Hong Kong on 2 November. Once the father learnt of their arrival, he immediately initiated the Hague proceedings in the USA on 6 November. He travelled to Hong Kong on 7 November.

The father's case

Based on the above, it is the father's case that the child was habitually resident in the USA on 2 June 2025, when the mother removed him to the Philippines without the father's knowledge or consent. The removal was therefore wrongful. The child should now be returned to the USA.

The family court in Florida is already seised of the matter relating to the child and the divorce, in which the father is seeking orders for, among other things, custody and care arrangements. The court will be able to resume supervision without delay. A case management conference took place remotely on 7 January 2026, one day after the substantive hearing of the present proceedings. The next hearing is scheduled to take place on 5 February 2026.

The mother's case

On the other hand, the mother's position is that the child's place of habitual residence as of 2 June 2025 remained the Philippines, notwithstanding that he had lived in Orlando, Florida for more than nine months before that. She contends that the child's habitual residence is closely tied to hers due to his young age and there was not sufficient integration in Orlando during the time they lived there.

However, if the court finds that the child was habitually resident in the USA, the mother raises two defences to oppose a return order.

First, the father had acquiesced to the child remaining in the Philippines and not returning to the USA through (1) his conduct of providing some financial provision for the child in the Philippines, and (2) not making it clear to the mother that he wished for the child to be returned. While there was an initial message in which the father asked for the child's return, his subsequent messages over time gave rise to the mother's reasonable belief that the father accepted the idea that the child was to remain in the Philippines. This is the defence under Article 13(a).

Second, because of her nationality, she is unable to return to the USA with the child. She cannot enter the country even on a tourist visa. This means that she will be kept apart from the child for an indeterminate period of time if an order for return to the USA is made. She has been the primary carer of the child since his birth and such separation will expose the child to psychological harm or otherwise place him in an intolerable situation. This is the defence under Article 13(b).

LEGAL PRINCIPLES

The primary objective of the Convention is to secure the prompt return of the children, who had been wrongfully removed, to their place of habitual residence.

Articles 3, 12 and 13 of the Convention are presently relevant. I reproduce the contents below:

"Article 3

The removal or the retention of a child is to be considered wrongful where—

(a)

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

(b)

at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

...

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

(a)

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

(b)

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Habitual residence

The principles on habitual residence are not in dispute.

The leading authority in Hong Kong is the Court of Appeal's decision in *LCYP v JEK (Children: Habitual Residence)* [2015] 4 HKLRD 798. I reproduce below the general principles set out in para 7.7:

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.

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.

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

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

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

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.

As regards the material factual question set out in sub-para (2), it has been stressed that it is the stability of the child's residence that is important and relevant, not whether it is of a permanent character: see, eg, *Re IG (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123 at para 26.

As regards the requisite degree of integration (sub-para (4)):

The criterion does not require the child's full integration in the environment of the new country which he moves to but only a degree of it. In certain circumstances, the requisite degree of integration can occur quickly: *Re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606 at para 39.

Where the child in question is an infant, the environment in which he lives is a family environment and is determined by reference to the persons with whom he lives and by whom he is in fact looked after and taken care of. This is because an infant necessarily shares the social and family environment of the circle of people on whom he is dependent. This is the main consideration in determining the question of habitual residence. See, eg, *ME v CYM* [2017] 4 HKLRD 739 at para 25, citing *Mercredi v Chaffe* [2012] Fam 22.

As regards the issue of parental intention (sub-para (7)), it is important to understand how it operates as a relevant factor. The modern approach of determining habitual residence is to adopt a child-centred approach. It is the child's habitual residence which is in question. It is the child's integration which is under consideration. These questions are not necessarily determined by the decisions of his parents. It is not a question of the parents determining the habitual residence of the children. It is a question of looking at the impact which the parental decisions about where the children will live have on the factual question of where the children habitually reside: *Re LC (Children)(Reunite International Child Abduction Centre intervening)* [2014] AC 1038 at paras 62 and 64.

As regards the situation concerning a child who has moved from one country to another (sub-para (7)), the question before the court then becomes at which point in time the child has lost habitual residence in the original country and gained habitual residence in the new one. The modern concept operates in the expectation that an old habitual residence is lost when a new one is gained. It is clear from the authorities that this question remains overarchingly a question of fact: *Re B* at paras 45 and 46.

Acquiescence

The principles on acquiescence are well-established. They are summarised by the Court of Appeal in *M v E* (Hague Convention; Rights of Custody) [2015] HKFLR 337 at para 7.1.

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 is a question of fact, the burden of proof being on the abducting parent. The court should determine whether in all the circumstances of the case, the wronged parent has, in fact, gone along with the wrongful abduction.

Grave risk

As to the defence of grave risk under Article 13(b), the principles are summarised by the Court of Appeal in *M v E* at para 8.1.

The burden of proof lies on the party who opposes the return of the child.

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.

The word “intolerable” is a strong word. An “intolerable situation” 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.

The defence 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.

More recently, the English Court of Appeal summarised the principles in *Re IG* at para 47. I would highlight the following here:

The Article 13(b) defence has a high threshold. This is demonstrated by the words “grave” and “intolerable”.

The separation of a child from the abducting parent can establish the required grave risk.

When the allegations on which the abducting parent relies to establish grave risk are disputed, the court undertakes a two-stage process. First, it should establish whether, if the allegations are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. Second, if so, the court must then establish how the child can be protected from the risk.

It is rarely appropriate to hear oral evidence of the allegations made under Article 13(b). But that does not mean that no evaluative assessment should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return.

“In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.”

If the court concludes that the allegations would potentially establish the existence of the grave risk, it must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

It was emphasised in *Re IG*, at para 48, that the court undertakes a two-stage process, and the respective questions posed in the two stages should not be conflated. The court must always decide, first, whether the alleged grave risk exists, and, second, if so, whether there are protective measures which will ameliorate the risk.

DISCUSSION

I shall first deal with the issue of habitual residence.

Habitual residence

Was the child habitually resident in the USA, as alleged by the father, or the Philippines, as claimed by the mother, on 2 June 2025?

The father now seeks a return order under the Convention. The burden is therefore on him to establish, as a matter of fact, that the child's habitual residence was the USA.

In her submissions, Ms Allison emphasises that the mother was the primary carer of the child since his birth. Before they moved to the USA in early August 2024, the child was in the mother's sole care. When the child lived in the USA, the father was the sole breadwinner and worked full time and the daily needs and care fell solely on the mother. While the mother accepts that the father helped out when he was not working, the mother was plainly the primary carer of the child. Based on this, it is submitted on her behalf that the child, an infant, would take the mother's habitual residence in this case. Ms Allison then goes on to submit that there was only a limited degree of stability and integration by the mother in the USA and concludes that the child's habitual residence remained to be the Philippines.

Ms Allison relies heavily on what was said in *ME v CYM*, at para 26, that in the case of a very young child where the mother is usually the main caregiver, the court should assess the mother's integration in her social and family environment such as the reason for the move and her geographic and family origins.

Mr Egerton does not agree that the mother was the primary carer. He would describe the child to have been in the joint care of both parents.

On these submissions, I wish to make a few observations.

In some cases, I do not consider it particularly helpful to try first to identify which parent was the "primary carer" (or "main carer") of the child and then focus on the circumstances of that parent in deciding the issue of the child's habitual residence. The difficulty that one may often encounter is that there is no ready answer to the question of who fits the description of "primary carer", which term has no clear-cut meaning.

Take the present case as an example. What we have here is a young family of three. The father worked full time. The mother did not work but there was an intention to look for jobs if the circumstances permitted. Mr Egerton submitted at the hearing that if one is to look at the actual time spent with the child, then there is no doubt that the mother spent more time with him than the father, and the child was more exposed to the mother than the father. In that sense, one may say that the mother was the primary carer. However, in these modern day arrangements, it is perhaps more apt to describe the child as being in the joint care of the parents, with each of them playing his or her own role towards the caring of the child. Mr Egerton further said that the sound bite "primary carer" does not reflect these arrangements.

I share that observation. I consider that in some cases, including the present one, it would not be helpful to try to identify or label one of the parents as the primary carer, with the consequence that the child's habitual residence may then be aligned with that of that parent.

The proper approach is to adopt a child-centred approach and to firmly bear in mind that it is the child's integration which is under consideration. For an infant, it is well-established that the court should look at his family environment, and it should do so by looking at the persons with whom he lives and by whom he is taken care of, and the circle of people on whom he is dependent: see para 72(2) above.

Here, the child was raised in a family of three. He lived with both parents while he was in the USA. He spent more time with the mother at home as the father worked full time. However, the father also played his part in looking after the child when he was off work. He helped out with taking care of the child at home. The family would go out together to the shopping mall, the park or the beach. It can properly be said that the child was looked after by both parents. It is against this backdrop that one determines the degree of integration of the child in the new environment in the USA after he moved there. In this regard, the court takes into account not only the mother's integration into the environment but also the daily lives of the family as a whole.

In other words, insofar as Ms Allison is suggesting that the mother's integration is the main focal point of the inquiry into the issue of the child's habitual residence, I reject that as being the wrong approach in the present case.

The focus should be on the circumstances of the child. I consider that the following matters are factors which point to the conclusion that there was a sufficient degree of integration by the child in the new environment in the USA.

First, it was the intention of the parents that the mother and the child were relocating to the USA from the Philippines permanently. There can be no dispute that the USA was where the couple wanted the child to be raised and live. It is of course well-established that the intention of the parents does not dictate the habitual residence of the child. But the arrangements which the parents actually made for the child pursuant to that intention – arrangements on how the child will live – will be directly relevant.

Second, on this point, the father and the mother made the arrangements long before the child was born, including the mother's application for a fiancée visa in August 2023.

Third, the child's USA passport was obtained shortly after his birth.

Fourth, once the fiancée visa was approved on 7 August 2024, the family promptly travelled together to the USA within 10 days. On the evidence before the court, it can fairly be said that the mother uprooted herself and the child and moved to the USA. See her text to the father on 4 June 2025 (reproduced in para 26 above): "I gave up everything to be in the US". In this regard, it has been recognised that if a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly: Re LC at para 63.

Fifth, upon arrival, the father took up a tenancy of an apartment in Orlando, Florida as the family home. Ms Allison submits that the family's accommodation was temporary as the tenancy was only for a term of 16 months. The tenancy therefore, she contends, shows that the child was not sufficiently integrated into the new environment. I do not agree with that submission. Here we have a tenancy of 16 months, not just a few months. It should not be forgotten that in the context of habitual residence, it is the stability of the child's residence which is important, not its permanence. In my view, the 16-month tenancy taken up shortly after the child's arrival in the country points to stability, rather than temporariness.

Sixth, the father had a full-time job, and supported the family financially. When the father was at work, the child was looked after by the mother. When the father was off work, the family did things together, like going to the park or the beach.

Seventh, it can be said that the child has strong ties and interactions with the father's family. Ms Allison highlights that the paternal grandparents lived in Homestead, which is a four-hour drive from where the father, the mother and the child lived. Hence, the relationship between the child and the extended family can be described as superficial at best. I do not agree. It will be recalled that the family was set up far away from the grandparents by choice (of the mother). Even with such a great distance between them, the father, the mother and the child would travel to visit the grandparents almost three times a month. To me, that suggests a strong tie, rather than a superficial link.

Eighth, the mother obtained employment authorisation in March 2025. She was also in the course of applying for permanent residency. By doing so, she was implementing the intention to stay in the USA and treat it as home.

On the other hand, there are matters which may be said to be pointing to the conclusion that there was only a limited degree of integration. As highlighted by Ms Allison, the mother did not have a job. She did not have a driving licence and that had restricted her mobility. She did not have a social security number. Without that, she could not open a bank account. Her residency status was not permanent.

As I said above, the mother's circumstances should be taken into account in determining the child's integration into the USA. However, that is not the focal point of the inquiry. The mother's circumstances do not carry as much weight as the other factors enumerated above.

On balance, therefore, I find that the child, being a member of a family of three, quickly integrated into life in the USA after leaving the Philippines in August 2024 to an extent that he acquired habitual residence in the USA. It is not necessary to pinpoint the exact time at which he did so. But I have no difficulty in holding that since quite some time before 2 June 2025, he had acquired such habitual residence.

Acquiescence

The burden is on the mother to make out the defence of acquiescence. She relies on two matters. First, she acknowledges that shortly after the child left the USA, the father sent messages to her asking for the child's return: see the messages dated 4 and 17 June 2025, reproduced in paras 45 and 46 above. However, the message of 17 June 2025 was the last message in which the father demanded the return of the child. After that, he never made the request again. Second, in the meantime, the father provided financial provision for the child in the Philippines and paid for some of his activities since about early July 2025.

Based on these two matters, it is said that over time the father accepted the idea of the child and the mother remaining in the Philippines.

In my view, the matters relied on by the mother do not amount to clear evidence that the father had in fact gone along with the abduction. The lack of express request for the child's return after the message of 17 June 2025 is equivocal as to the father's subjective intention. The money paid by the father to pay for some of the activities in the Philippines is also equivocal. In fact, the evidence would suggest that the father was making payments for the welfare of the child and was discharging his responsibility as a father. In the message reproduced in para 47 above, the mother wrote: "I simply asked you to be a father".

Furthermore, as submitted by Mr Egerton, the suggestion that the father had acquiesced is contradicted by the fact that he sought assistance from the Philippine Embassy in Washington DC and that the mother actually knew about it. The mother could not possibly have thought that the father was receptive to the child remaining in the Philippines as otherwise she would not have said, "We have to hide now coz of this": see para 53 above.

The mother fails to establish the defence of acquiescence.

Grave risk

The burden is on the mother to make out the defence of grave risk. This defence has a high threshold.

It is incumbent on her to prove the following:

There is a grave risk that if it is ordered that the child be returned to the USA, she cannot obtain any visa to enter the country, and she will therefore be separated from the child for an indeterminate period of time.

She has been the primary carer of the child.

There is a grave risk that the separation will expose the child to psychological harm or place him in an intolerable situation.

I am not satisfied that the mother has adduced sufficient evidence to show the alleged grave risk in sub-para (1) above.

It is true that as of now she has no status or valid visa to enter the country. It is submitted on her behalf that she cannot enter the country even on a tourist visa.

On the issue of visa, I quote below what the mother has said in her affirmations:

“My visa eligibility to enter the USA is a monumental obstacle. As things stand in terms of immigration policy in the USA I will not be granted a visa to enter the USA as a tourist or to live.”

“I am a Filipino citizen and I do not hold a USA visa. Even to travel to the USA, I would need to apply for a tourist visa and I cannot travel to the USA visa free.”

These are bare assertions. The mother has adduced no other evidence showing that there is a grave risk that she cannot obtain any kind of visa at all, including a tourist visa. It is of course accepted that there will be uncertainty when it comes to the issue of a foreign national obtaining a visa to enter into another country. However, mere uncertainty is not enough: see *Secretary for Justice v C and S* [2024] HKCFI 2821 at para 50. The mother has failed to discharge her burden of showing the alleged grave risk. For that reason, the grave risk defence fails.

I will now proceed to consider the next issue of whether the separation will expose the child to psychological harm or place him in an intolerable situation in the event that I am wrong on the above. Again, I am not satisfied that the mother has made out this part of her case.

Separation of a child from the abducting parent may establish the required grave risk: see para 78(2) above. But whether it is indeed the case must depend on the circumstances of each case. The mother’s position rests on her contention that she has been the primary carer of the child. I have already dealt with this point in the context of habitual residence. I repeat what I said above. It is not a case where the mother can simply be labelled the primary carer. Even if she can, there is no automatic consequence which falls from such labelling. At the hearing, Ms Allison suggested that there is a general proposition that separation of a child from his sole or primary carer will put him in an intolerable situation. But she was not able to cite any authority in support of this proposition save by repeating the “can” statement in *Re IG* cited in para 78(2) above. I do not think there is such a general proposition.

The court’s task is to examine in concrete terms the situation in which the child will be on return. In the present case, while the child was in the USA, he was looked after not just by the mother, but by both parents although it must be accepted that he spent more time with the mother than with the father. There were two times when the mother was away from the child for a few days. There were also a few occasions when the extended family of the father helped look after the child. If it is ordered that the child should return to the USA and the mother is not going to be physically with him, it is expected that, given the above history, the father will look after him, with the support of his own family. So far, the extended family has shown to be supportive of the father with some members flying to Hong Kong specifically for these proceedings.

The absence of the mother will no doubt be felt by the child. But with the child being surrounded by the father and the extended family, who are people with close and strong ties to him since he was about six months old, his situation cannot properly be described as “intolerable” under the Hague framework.

For this reason also, the mother fails at the first stage of the analysis under the grave risk defence. There is therefore no need to consider whether the protective measures proposed by the father are adequate to ameliorate the risk.

Conclusion

I hold that the child was habitually resident in the USA as of 2 June 2025. He was removed on that date by the mother to the Philippines without the father’s knowledge. The removal was wrongful. The two defences put up by the mother fails. The court should therefore proceed to make a return order as mandated under the Convention.

ORDERS

As directed, subsequent to the hearing, the parties submitted a draft order for the court’s approval should the court decide that a return order should be made. The draft contains both the undertakings which the father is prepared to give and the directions covering the arrangements for the return. The contents are largely agreed, save for minor differences concerning paras 123(7) and 124(5) below. For the former, I have adopted the father’s version. For the latter, I have mainly adopted the mother’s version.

The father now gives the following undertakings to the court and to the mother to:

accompany the child on his return to Florida, USA and will pay for both their airfares;

pay for the mother’s return economy airfare from Hong Kong to Cebu, Philippines;

assist the mother to obtain an USA visa of her choice by way of contributing a sum of up to US\$4,000 for US immigration advice upon production of relevant receipts;

without prejudice to the appropriateness of quantum, provide an interim monthly sum of 15,000 Philippines Peso pending the next hearing set down before the Circuit Court Of The Eleventh Judicial Circuit in and for Miami-Dade County, Florida under Case No: xx currently scheduled for 5 February 2026;

not initiate any criminal proceedings against the mother in respect of the child’s removal from the USA;

if criminal proceedings are nevertheless brought against the mother in respect of the child’s removal, he will inform the prosecution and the judge that he does not want the mother to be imprisoned;

arrange contact between the mother and the child outside the USA in either Hong Kong or, with prior agreement, at any other jurisdiction having reciprocal arrangements with the USA pertaining to the Hague Convention on the Civil Aspects of International Child Abduction, whilst she is awaiting her visa of choice to enter the USA on the following occasions:

for the child's birthday on xx February 2026 such that the father will land at the agreed location with the child before xx February 2026 and will stay there for at least 5 days;

for at least 5 days in the month of May 2026, with the exact dates to be agreed between the parties; and

further visits as agreed between the parties no more than three months after the previous visit, or as ordered by the Circuit Court Of The Eleventh Judicial Circuit in and for Miami-Dade County, Florida, USA;

facilitate the visits as per (7)(a) to (b) above, pay for the child's, his and the mother's return airfare between the agreed location and their respective residences; and

arrange daily indirect access between the child and the mother during the child's waking hours.

I make the following orders:

The child be returned to Florida, USA, to arrive on or before 27 January 2026.

All of the child's travel documents, including but not limited to his Philippines passport and USA passport shall be forthwith released to the father for the purpose of the child travelling with the father from Hong Kong to Florida, USA, pursuant to para (1) above.

The prohibition order against the child leaving Hong Kong pursuant to para 1 of the order dated 7 November 2025 be uplifted for the sole purpose of the child travelling from Hong Kong to Florida, USA pursuant to para (1) above and such prohibition order be discharged upon the child's return to Florida, USA.

There be liberty to apply as to implementation of this order.

The father and the mother be at liberty to disclose and make use of any documents filed or lodged in these proceedings to his or her legal representatives in the USA and the Florida Courts solely for the purpose of proceedings relating to the parties' divorce and custody, care and control of the child.

There be a nisi order that no order be made on the costs of these proceedings.

(Winnie Tsui)

Judge of the Court of First Instance

High Court

Mr Robin Egerton and Ms Nicole Chui, instructed by CRB, for the plaintiff

Ms Sasha Allison, instructed by Payne Velasco, for the defendant

Ms Clare Leung, Government Counsel, of the Department of Justice, as observer

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Prepared on 29 October 2026 · Esheria