

HONG KONG / JUDGMENT

FR v. MF

[2021] HKCFI 1557

COURT

Court of First Instance

DECIDED

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HCMP 532/2021

[2021] HKCFI 1557

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 532 OF 2021

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 the children, namely V, a girl born on 3 March 2011 and L, a girl, born on 8 February 2014

BETWEEN

FR

Applicant

and

MF

Respondent

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

Date of Hearing: 25 May 2021

Date of Judgment: 3 June 2021

JUDGMENT

(Habitual Residence, Grave Risk, Children's Objections)

Introduction

This is an application issued by the father of two children of the family for their return to France under the Child Abduction and Custody Ordinance (Cap 512) ("Ordinance") and the Hague Convention on the Civil Aspects of International Child Abduction, 1980 ("Convention"). It is the father's allegation that the mother has wrongfully retained the children in Hong Kong without his consent.

Counsel Mr Azan Marwah appeared for the father ("F") on instructions of Messrs Withers, and the mother ("M") was represented by Ms Elizabeth Liu of Messrs Fan Wong & Tso. Deputy Principal Government Counsel Ms Anthea Li and Senior Government Counsel Ms Hing Kwok appeared for the Hong Kong Central Authority as observers to provide assistance to the Court.

The relevant provisions of the Convention

The Ordinance has incorporated various provisions of the Convention. For the purposes of the present application, Articles 3, 12, 13 and 15 of Convention are relevant and they are set out hereinafter for easy reference.

Article 3 of the Convention states that:

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

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

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 states that

:

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.”

Then Article 13 states:

“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—

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

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.”

Further, Article 15 of the Convention states that:

“The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.”

Brief Background

F was born in France in July 1976 and he will be 45 years old in July this year. He is a French citizen. M is Chinese and she was born in Hong Kong in July 1977. She will be 44 years old in July this year. M voluntarily acquired French citizenship in November 2016, and is now both a Hong Kong and French citizen.

The parties met in Hong Kong in 2001, and they started to live together. In 2004, F started a business on his own. Between 2004 and 2006, the parties lived in France when M was studying French there but they returned to Hong Kong during the holiday breaks between July to September 2005. The parties returned to Hong Kong in 2007 immediately upon M's completion of the French course in France in December 2006. They then moved to Shanghai in early 2008, with F leaving first and M joining him in April 2008.

The parties married in a civil ceremony in Hong Kong in June 2009 and a week later, they held a Church ceremony in France. Their older daughter V was born in March 2011 in Hong Kong. L was later born in February 2014 in Hong Kong. V is now 10 years old and L is 7 years old. The children both hold French passports and are registered in the French "Livret de Famille" (family booklet).

In 2016, the family moved back to Hong Kong from Shanghai and were living in Hong Kong until the children left Hong Kong for France with F in July 2020.

V attended a local kindergarten from February to June 2016 and in September 2016, she started to attend K3 at an international school and she had completed Grade 3 in June 2020. L attended a local kindergarten from September 2016 until June 2019, and from September 2019 until June 2020, L attended K3 at the same international school as V.

M alleged that F started to suffer from depression and insomnia since his business failure in 2011 and in mid 2017 his depression and insomnia became more serious and he then developed a drinking habit. F started to consult a general practitioner and was on medication.

On 28 February 2020, V had a serious accident while playing on her scooter at a friend's birthday party and was in ICU for 5 days. This had added to the parties' stress at the time. According to M, it was F who first raised the idea on 24 March 2020 of moving to France for a few months for V to improve her French. F on the other hand said it was M who informed him that she could no longer cope with life in Hong Kong and that in March 2020, F's mother offered for the family to move into her property in France.

Between March and June 2020, the parties discussed the option of moving to France and about life in France with the children, and according to F, the parties agreed to relocate to France and for the children to start school in France in September 2020.

However, according to M, she told F directly and through his best friend ("O") that she was not comfortable with F's idea of moving to France but F ignored her protests and started to make all the arrangements for the move. M claimed that she had discussed with her then employer to keep the position for her and according to M, F thought it would be great if her employer could

keep the position open for her for 2 years, and that he had said that he would need a break of minimum of 2 years from Hong Kong, but he had also said if M wanted to come back next year she could.

It was M's case that the move to France was only for a temporary period of 2 years, and it was under such circumstances that F left with the children on 9 July 2020 leaving M to deal with the other arrangements in Hong Kong. M said she was not able to secure a leave without pay with her then employer and she then resigned from her job.

What was not disputed was that on 9 July 2020, F and the children flew to France on one way tickets. On 4 October 2020, M left Hong Kong and arrived in France also on a one way ticket.

As seen later, M had alleged several incidents took place between October 2020 and December 2020.

On 28-29 December 2020, M told F that her elderly father was dying and she wanted to take the children back to Hong Kong to visit their grandfather one final time before his passing away. F said he did not agree but M was insistent, and that F finally agreed as long as the children returned in time to resume school for the new semester which would start on 1 March 2021.

M booked return flights from France to Hong Kong for herself and the children leaving Paris on 29 December 2020 with a return flight booked for 13 February 2021.

In January 2021, M told F that she wanted to stay in Hong Kong for a few more days to celebrate some of her friends' birthdays. M then changed the return flights to 17 February 2021.

F received a message from M at 8:35 am French time on 17 February 2021, that she wanted a divorce and that she would be remaining in Hong Kong and would not be returning to France with the children. F said he was shocked.

It later transpired in a letter dated 3 May 2021 from the Hong Kong Christian Service ("HKCS Letter") that on 10 February 2021, M had sought help from the Yau Tsim Integrated Family Service Centre ("Family Service Centre") of the Hong Kong Christian Service due to divorce matter and V's emotional distress.

Anyway, on 17 February 2021, after hearing the news, F filed a formal complaint with the French police and instructed French lawyers on 18 February 2021, and submitted to the French Central Authority an application for request for the return of the children.

In the meantime, without F's consent or knowledge, M arranged for L to commence attending a local school in Hong Kong on 12 April 2021. She also arranged, without F's consent or knowledge, for V to attend a separate local school in Hong Kong on 19 April 2021.

On 20 April 2021, F filed the originating summons herein, and M was served on 21 April 2021. On 29 April 2021, at a direction hearing, this Court directed amongst other things that a social welfare officer (“SWO”) to interview the children as soon as practicable to seek their views, and whether there is any objection to their return to France and the report was submitted 14 May 2021 (“SWR”).

The SWR

The children were interviewed individually by the SWO on 7 May 2021. Briefly, as reported by the SWO, V had expressed that she wanted to stay in Hong Kong and objected to return to France. As for L, she had clearly expressed that she preferred to stay in Hong Kong and refused to return to France. I shall consider further the contents of the SWR later in this judgment.

The ARTICLE 15 DETERMINATION

At the direction hearing on 29 April 2021, Mr Marwah had attached to his then submissions a copy of a determination under Article 15 of the Ministry of Justice of France stating that the habitual residence of the children before their retention by their mother was in France, and that the parties exercise parental authority jointly over the children under the Article 372 of the French Civil Code, and confirming the wrongful nature of the retention of the children by their mother in Hong Kong (“Article 15 Determination”). At the request of this Court, Ms Li, for the Hong Kong Central Authority, kindly assisted the Court by obtaining a confirmation from the French Central Authority that the Article 15 Determination was indeed issued by them and that the original would be mailed to the Hong Kong Central Authority.

Notwithstanding the issue of the Article 15 Determination, it is stated therein that the determination in no way prejudices the assessment of the wrongful nature of the retention, which is to be made by this Court.

THE AGREED LIST OF ISSUES

There is no dispute that F has rights of custody of the children and that the date of unilateral retention of the children by M in Hong Kong, without F’s consent, was 17 February 2021 (“Date of Retention”).

The agreed disputed issues are as follows:

Whether the children were habitually resident in France at the material time

Whether the retention of the children in Hong Kong is wrongful

Whether the children (in fact) object to return to France

The weight, if any, to be place on the purported wishes of the children

Whether there is a grave risk that the return of the children to France would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation

Whether the children were habitually resident in France at the material time

Legal principles

The Court of Appeal has in *LCYP v JEK (Children: Habitual Residence)* [2015] 4 HKLRD 798 restated the principles on habitual residence as follows:

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 reasons 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.

There was no dispute to the above general legal principles.

The children's habitual residence prior to 9 July 2020

In paragraphs 3 to 8 of Ms Liu's submissions, she had set out the background of the parties and the places where they had worked and lived between 2001 and 2020, and submitted that Hong Kong has always been the habitual residence of the whole family since 2001. What is clear is the upon the parties' return to Hong Kong in 2016, V and L had been attending schools in Hong Kong.

Immediately prior to their move to France in July, V had completed her Grade 3 at the international school where she attended for some 4 years and L had completed her K3 at the same school where she attended for a year.

There is in fact no dispute that prior to F and the children leaving for France on 9 July 2020 the children's habitual residence was in Hong Kong.

The children's habitual residence between 10 July 2020 and the Date of Retention

M's evidence was that the issue of moving to France was first raised by F in March 2020 as he found out V's French was not good and that F suggested of going to France for a few months. From the what's app messages between 24-25 March 2020 produced by M, it appeared that V was last one of her class and F had said "Situation with the girls is dramatic ... so that's my last plan ... after u will manage alone, we will go back to france up to august ... enough is enough" and F then imposed a stricter study timetable for the children. M then went on to say that she was having different kind of meetings that day at work to talk about how to survive in the situation and she had said the worse was she might lose her job and she was very serious. F had responded that "Like everyone else this situation ... then we take a plane for few months ... then come back in august ... NO PROBLEM". However, later on 26 March 2020, W then wrote "I start to take it easy and even think to move to France all of us to have a new life, it might be good for all of us. No stress and more focus on kids. As you said, let the situation bring us to the place which might be good for us."

F had produced copies of some undated messages sent to him by M (which appeared to be on or after 26 March 2020) in relation to the move and that M had said France would be a good place for them to restart and to get stronger and that her objective was to send F and the girls safe to France first and she would join later.

As seen from those above messages, although in March 2020, F's initial suggestion was to go to France for a few months until August, it was M who had mentioned about moving to France to have a new life as she was stressed at work and that she wanted to focus more on the children. It would also appear from messages between M and F's friend O around 23 March 2020 and messages between M and F's mother ("Paternal Grandmother") around 16 April 2020 that F was having drinking problems at this time.

Although M might seem to be having second thoughts about the move as seen in messages between M and F's friend O on 15 June 2020, there was nothing in those messages between the parties thereafter to indicate that M had in fact changed her mind about the move.

F had produced what's app messages between M and the Paternal Grandmother on 16 June 2020 where M admitted to the Paternal Grandmother that she never had a mother's life with the children since they were born and that she was always busy at work, and M had referred to Paternal Grandmother's house as a "dream building" for all of them to live together on different floors.

F had also produced the messages between him and M on 16 June 2020 about flights to France, and M had responded asking him to go first as she could not go in July. By 24 June 2020, M and F had received the new school invoice for V and L from their school in Hong Kong and they were discussing about having to pay the invoice first and later requesting for refund, and also asking the school to provide them with a document for the children to apply for a school in France and they were also discussing when M would stop working, whether at end of August or end of September 2020.

It was M who said that she was thinking to talk to her employer about keeping the position for her and asked F to provide an indication of a period. F suggested 2 years, and M had said “Not sure for 2 years, be at least try and even one year, I will take”, to which F has responded “We go for 2 years ... I need a break of 2 years min from HK Not negociable But u can come back next year of course if u want”.

F had also produced messages he sent to M in late June 2020 informing her about the activities (soccer and taekwondo classes) he found for the girls and M had replied on 26 June 2020 that she was happy for all the activities that F found. In particular, on 7 July 2020, M wrote a letter as the employer of the family’s helper (“J”) for immigration purposes, to confirm that as she would be moving to France and “completely leave Hong Kong”, she would be terminating the contract with the helper on 15 July 2020.

Suffice to say, all those messages indicated that M had clearly and voluntarily agreed to the move even though F had said it was for a minimum of 2 years.

To summarise, the evidence showed that:

It was with full knowledge and consent of M that F travelled with the children on one-way tickets to Paris with the bulk of the family’s belongings on 9 July 2020:

The children’s school was informed that the family were relocating permanently to France and the debenture was returned;

A leaving party was arranged for the family’s friends and the children by F’s best friend O;

M released the domestic helper J who had cared for the children for a long time, informing the Immigration Department that she would be moving to France and leaving Hong Kong completely;

M also arranged to have the domestic helper J transferred to the employment of family friends;

M arranged to return their leased flat to their landlord and disposed of the furniture left in Hong Kong;

M formally resigned from her then employer informing them that she was relocating to France;

M left Hong Kong to join the family in France on 4 October 2020 on a one way ticket.

M has admitted in her 2nd affidavit that the parties went to live in France for two years. F purchased new furniture for the family when he and the children moved into their new home in France.

Upon their arrival:

They lived in a house owned by the Paternal Grandmother and this was their only home;

F's family was nearby;

V and L were enrolled in a local elementary school;

F obtained the required school insurance for the children;

V and L were enrolled in various extra curricular activities. V was also keen on attempting modelling, so she was auditioned and was selected by modelling agencies. The children also began attending English lessons, to keep up their English;

F opened a French HSBC account and also accounts for the children;

When M arrived in France, she also went to set up an account and secured a French mobile telephone and credit card. Before she left Hong Kong she obtained an international driving permit to allow her to drive in France;

The children settled in well, made friends and did very well in the Autumn school semester;

V developed a group of best friends (5 girls from her class) with their chat group described as "BFFs [Best Friends Forever] for life" ("BFF Chat Group");

When M left with the children on 29 December 2020, M admitted that that was for the limited purpose of visiting her ailing father and that they had intended to return to France, having purchased return tickets. M had informed the children's school accordingly. There was no home for them in Hong Kong and they have been staying temporarily with M's sister.

Having considered all the evidence, I find that that F's move to France with the children was with the consent of M and the family's intention was to settle in France for at least 2 years. The evidence showed that the actual stay of F and the children in France of almost 6 months was not transient and that the children had settled and integrated well in their new environment. Their return to Hong Kong on 29 December 2020 was only of a temporary duration and for a specific and limited purpose only. I am of the view that the children's habitual residence immediately prior to the Date of Retention was in France.

Whether the retention of the children in Hong Kong was wrongful

In light of my above findings, F has satisfied this Court that the unilateral retention of the children by M in Hong Kong on and/or after the Date of Retention was and has been wrongful under Article 3 of the Convention.

Whether there is a grave risk that the return of the children to France would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation

The legal principles

Cheung JA has summarised the principles of grave risk in *M v E*, CACV 75/2015, 05.06.15 at paragraphs 8.1 & 8.2 as follows:

“8.1

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

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

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

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

8.2

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

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First, it is clear that the burden of proof lies with the “person, institution or other body” which opposes the child’s return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

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Second, the risk to the child must be “grave”. It is not enough, as it is in other contexts such as asylum, that the risk be “real”. It must have reached such a level of seriousness as to be characterized as “grave”. Although “grave” characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as “grave” while a higher level of risk might properly be

qualified as “grave” while a higher level of risk might be required for other less serious forms of harm.

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

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Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child’s immediate future, because the need for effective protection may persist. (Emphasis added)”

There was no dispute to the above general principles.

M’s case

M alleged that:

Notwithstanding that F had admitted that he was suffering from depression and insomnia, he had refused to seek help from a psychologist and only relied on anti-depressants, tranquilizers and sleeping pills prescribed by a general practitioner in Hong Kong;

F started to have a drinking problem in 2018 and had often got out of control and became drunk both at home with the children present and outside;

There were at least two incidents namely on 22 March 2020 and 20 May 2020 which took place in the children’s presence prior to the children moving to France.

As said earlier, M's case was that F has been suffering from depression and insomnia since his business failure from 2011. F admitted that he suffered from depression and insomnia for around 4 years and that he had been to see doctors in Hong Kong and in France of his own free will. He was aware of his problems and knew he needed treatment.

What is clear is that M was fully aware that F had a drinking problem which was getting worse in March 2020 as seen in M's chat message to F's friend O, and also the Paternal Grandmother had also sent M messages in April 2020 in relation to F's drinking problems.

In the 1st of the incident on 22 March 2020, it was alleged that F was drunk and he slapped a crystal glass into the sink and that he had asked V to pour him another glass of vodka. When V refused, he had shouted at V and V was scared. In the other incident on 20 May 2020, after a dinner for the children's teachers, F had got very drunk, and he had hit M with a pillow very hardly. As M was holding her phone, it knocked on her mouth causing her lower lip to bleed and that the incident was in presence of the children.

Yet, notwithstanding the above incidents, and M's present complaints about F's drinking problem, M had allowed F to take the children to France on his own without her in July 2020 and for the children to be cared for by F during some 3 months.

M's evidence was F's condition had deteriorated between July and December 2020 in France and she referred to the following incidents:

Before M's arrival, in mid August 2020, there was an occasion when F took the children to a gathering at his friend's home, and he still intended to drive the children home, and that it was V who initiated in asking the mother of the host family to drive them home, and that night, F had held L upside down and swung her around and L banged her head on the glass door, and that V had to take care of L that night;

There was an incident two weeks after M's arrival in October 2020 when F had a big argument with Paternal Grandmother when F was again obviously drunk with the children present, and that he was so drunk that he defecated inside his room and urinated at the entrance of the apartment;

On 1 December 2020, F told V to remove her top because she was not wearing a bib when she was eating and that he did not allow V to have her dinner that day, and that night, F had also slapped V on her thigh.

In relation to the 1st incident, F had explained that he had told his friends that if they were going to be drinking then he would take a Uber, but the wife of his host told him that as she would not be drinking, she would bring them back home. As V was playing with the host's children upstairs, she would not have been able to comment about whether F had been drinking or how much. After they got home, the children did not want to go to bed and they were playing together with F for awhile and that while playing, L did accidentally hit her head.

As for the 2nd incident, F explained the reason why he had an argument with Paternal Grandmother was directly as a result of M's behaviour around the house and M's lack of respect on occasion for his mother and that since they moved to France, Paternal Grandmother was making a lot of comments about everything they were doing, and it was a source of friction between them.

As for the 3rd incident, F explained that it was very common in French culture to cover one's clothes with a napkin whilst eating in order to avoid dirtying one's clothes, and that F was only asking V to cover her top with a napkin, not a baby "bib". F also said it was not correct that he slapped V's thigh or that V was scared of him. F said he had never hurt or hit the children.

What is clear is that in the HKCS Letter, there was no mention that F had ever hit V notwithstanding that V had attended 3 individual counselling sessions and 2 conjoint sessions with M and both V and L provided by the responsible social worker Ms Cheung ("Ms Cheung"). Even though V had expressed that she felt scared, this seemed to be when her father blamed her mother, her sister and her or when she felt scared, cried and worried after phone conversation with her father.

M had relied on the SWR. The SWO reported that V was scared as her father scolded and hit her by hands when her father was drunk at home on some occasions, and that L had said she was unhappy that her father once got drunk and scolded her mother as well as hit her at home.

However, M had not made any allegation about herself being hit by F, or L being hit by F. There was only the 1st incident in mid August 2020 before M arrived, and there was no sufficient evidence that L banging her head was not an accident. Apart from the 3rd incident in which M complained that F had slapped V's thigh, there was no sufficient evidence that V or L had ever been physically hit by F.

In any event, Ms Cheung had seen V on more occasions than the SWO who only saw V and L on one occasion. What was reported by the SWO did not appear to be consistent with what was stated in the HKCS Letter. Further, although V seems to be having emotional problems, as set out in the HKCS Letter, this seems to be more related to her parents' divorce. In any event, there was no sufficient evidence that V had had any emotional problems or other psychological problems before she left France at end of December 2020.

As said earlier, M's case was that F's drinking problems got worse after they moved to France but M mainly mentioned the 1st and the 2nd incident. In fact, it seems that V only mentioned the 1st incident to her mother on 20 December 2020. What M had said was that V had indicated to her parents that she wanted to do some modelling work, and F took it very seriously, and that he had enrolled V for a modelling agency which requested V to provide a self-introduction video. V then did not want to do it and that according to M, V got terribly upset and it was then V told M about the 1st incident.

It is not quite clear why V became terribly upset on 20 December 2020 after F had talked to her. In any event, if V were indeed concerned at the time of the 1st incident, one would have thought she would have told her mother immediately in August 2020, or at least as soon as her mother arrived.

F had referred to the message M's sister sent to him on 29 December 2021 when she had said that F is a very good dad and husband. F had also said both he and M drink and that he admitted that he sometimes drank too much but so had M. F had also produced photographs of one occasion when M had vomited in the taxi in front of the children and had to pay for professional cleaning of the taxi and that the children had to help to carry her back home.

The 2nd incident in France took place after F had a serious argument with Paternal Grandmother, and appeared to be an isolated incident involving M's behaviour towards Paternal Grandmother.

Having considered all the evidence, I do not find that there was sufficient evidence that the children would be exposed to grave risk of physical or psychological harm if returned to France. Further, M's concerns can be met with having protective measures in place.

As for intolerable situation, Ms Liu's submissions seemed to be mainly based on that the children would have no social and family life in France. By the time, M arrived, the children had started school, and the weather was also starting to get cold, and with the Covid-19 pandemic around, no doubt social life would be curtailed. As seen in the BFF Chat Group, even though M had said that V had told her that her classmates in France were not real friends, V had in fact made friends at school and even on M's case, there had been stay over nights for V and her friend/s. As for family life, F's side of the family was nearby, and the Paternal Grandmother was living in the building with her husband.

Again, having considered all the evidence, I find that there was no sufficient evidence that the return would expose or place the children in an intolerable situation.

Whether there is objection on the part of the children to return

The legal principles

Re M (Children) (Abduction: Child's Objections) [2015] 3 WLR 803, [2015] EWCA Civ 26 is a leading UK authority on the child objection exception. As set out by Black LJ, as she then was:-

"In England and Wales, the normal approach to the child's objections exception is to break the matter down into stages. There is what is sometimes called the "gateway stage" and the discretion stage. The gateway stage has two parts in that it has to be established that (a) the child objects to being returned and (b) the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views. If the gateway elements are not established, the court is bound to return the child in accordance with article 12. If the gateway elements are established, the court may return him or her but is not obliged so to do. This approach has not been challenged before us."

Black LJ went on to consider the developments and divergence in approaches over the years. As said by Black LJ, in so far as where the law stands in relation to the gateway requirements, “certain features can perhaps be treated as tolerably well established”. These features are very briefly:

Factual matters: whether a child objects to being returned is a matter of fact, as is his or her age, and that the degree of maturity that the child has is also a question of fact;

No chronological threshold: there is no fixed age below which a child’s objections will not be taken into account. However, the younger the child is, the less likely it is that he or she will have the maturity which makes it appropriate for the court to take his or her objections into account;

Objections and not anything less: the child’s views have to amount to objections before they can give rise to an Article 13 exception, and anything less than an objection will therefore not do;

Objection to return to country of habitual residence: it is said that the child has to object to returning to the country of habitual residence rather than to returning to particular circumstances in that country although it has been clear from early on that there may be difficulty in separating out the two sorts of objections;

Objections are not determinative: the child’s objections cannot be presumed to be determinative of the application; once the court’s discretion arises, it is at large.

Black LJ then dealt with the authorities which appear to reveal an inconsistency of approach at the gateway stage: on the one hand, a highly technical, structured, approach is described which requires the court to go in considerable detail into the circumstance in which the child objects called the (“the In re T approach”), and on the other hand, a much simpler exercise at the gateway stage, with the detail of the case being considered if and when it comes to determining whether return should be ordered (“the more basic approach”).

Black LJ came to the view that the In re T approach should be abandoned:

“69.

In the light of all of this, the position should now be, in my view, that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views. Sub-tests and technicality of all sorts should be avoided. In particular, the Re T approach to the gateway stage should be abandoned.”

The approach of Black LJ in In re M was followed in LCYP and JEK (Children: Habitual Residence) [2015] 4 HKLRD 798. Cheung JA had also said as follows in relation to “preference” as opposed to “objection” in paragraph 9.10:

“9.10

For my part, I do not find it necessary to go into a discussion on the true purport of the words ‘objection’ and ‘preference’. A forthcoming child may use the expression ‘I object to return to New Jersey’, while a child who is less forthcoming, particularly one who has concern about the feelings of both of his parents, may simply say ‘I prefer to stay in Hong Kong’. What is important is the substance of the views of the child and not simply the labels to be attached to his views.”

This Court has followed the above general principles in *RS v BK* [2018] HKCFI 1814.

Whether this Court should see the children

It is F’s case that the children have been influenced by M in expressing their views to the SWO. M denied this and during the hearing Ms Liu had suggested that if this Court had any concerns, this Court should see the children.

Mr Marwah however submitted that it would not be necessary for this Court to see the children and that the impact on the children of them seeing the Judge should be considered and that it could place further pressure on them and that if it could be avoided, it should be avoided.

Mr Marwah had also submitted that it would be rare for a judge to see a child in a Hague abduction case. In this respect, I do not agree. Neither party has referred this Court to *In re KP (A Child) (Abduction: Rights of Custody)* (Practice Note) [2014] 1 WLR 4326, which was a child’s objections case referred to by Black LJ in *In re M*, the focus of it was a meeting that had taken place between the child and the judge, which was said to have crossed the line between, on the one hand, hearing the child and, on the other, gathering evidence.

As seen in paragraph 44 of *In re KP*, it would appear that after the House of Lords case of *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, prior to which it was unusual for children to be seen by a CAFCASS officer in child abduction proceedings, a sea-change occurred and all children over the ages of six or seven were then routinely interviewed by the specialist CAFCASS High Court team and that in addition, there had been greater willingness amongst judges to meet children.

Having said this, it was summarised by Lord Justice Moore-Bick in paragraphs 53 and 54 in *In re KP* that:

“53.

a)

There is a presumption that a child will be heard during Hague Convention proceedings, unless this appears inappropriate (*Re D*);

b)

In this context, ‘hearing’ the child involves listening to the child’s point of view and hearing what they have to say (*Re D*, para 57; *JPC v SLW and SMW*, para 47);

c)

The means of conveying a child's views to the court must be independent of the abducting parent (Re D, para 59);

d)

There are three possible channels through which a child may be heard (Re D, para 60):

i)

Report by a CAFCASS officer or other professional;

ii)

Face to face interview with the judge;

iii)

Child being afforded full party status with legal representation;

e)

In most cases an interview with the child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary (Re D, para 60);

f)

Where a meeting takes place it is an opportunity (JPC v SLW, para 47; De L v H, para 45; Re J [2011], paras 31 to 40):

i)

for the judge to hear what the child may wish to say; and

ii)

for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome;

g)

a meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process (Re J [2011], paras 31).

54.

None of the reported cases goes further than the guidelines by suggesting that a judicial meeting might be used for the purpose of obtaining evidence from the child or going beyond the important task of simply hearing from the child that which she may wish to volunteer to the judge. As Lord Wilson SCJ describes in Re LC at para 55, where a child's evidence might prove

determinative of an issue, it may be adduced by an appropriate process into the full proceedings by witness statement, report from a CAFCASS officer or, where the child is a party, by her advocate's cross-examination of the adult parties and closing submissions. Going further, where oral evidence is required, Lord Wilson indicated that an age appropriate process should be deployed."

This Court saw the child in question in RS and BK. Insofar as this Court could recall, there was no objection for the Court to see the child in that case.

Although I do not agree that it is rare for a judge to see a child directly in a Hague abduction case, I do not find it necessary to see the children in the present case. There was no evidence in the SWR that V and L had asked to see me, nor was there any such evidence in the HKCS Letter. F had objected to M's production of the HKCS Letter saying that it was self serving. I do not find it necessary to exclude it and it is a question of what weight to be attached to it.

Further, as seen in *In re KP*, where a meeting takes place, it is really for the judge to hear what the child may wish to say and for the child to hear the judge to explain the nature of the process and, in particular, why despite hearing what the child may say, the court's order may direct a different outcome. The children have already seen the SWO and V has also seen Ms Cheung in 3 individual sessions. V and L are now respectively 10 years and 2 months old and 7 years and 3 months old and no doubt they have already been affected by their parents' divorce, and being uprooted twice in less than a year. Having considered the circumstances of this case, I accept that for them to be brought to the Court to meet with a judge may add further to their stress, in particular V, and I do not see it necessary for me to meet with them.

The "gateway stage"

M had said in paragraph 60 of her 2nd affidavit that during their 3 weeks' quarantine in January 2020, she and F often communicated through what's app as usual and the children also had facetime with their father, and that during those 3 weeks, the children looked much happier than when they were in France. It was M's evidence that the children both told her during this time that they did not want to return to France, that they were happy in Hong Kong because they would not be scolded by their father.

F had produced copies of V's what's app messages in the BFF Chat Group with her French school friends, which was created by V, as administrator, on 26 September 2020 and there were 6 participants including V. On 16 January 2021, one of the girls had sent a message to say it was snowing, and V had responded "Really ("Sad" Emoticons) I've never seen snow Never seen ("Sad" Emoticons) Yes Very, very very sad Yes Please". This was followed by various voice messages and on 17 January 2021, at 16:28, V had sent a message to her friends saying "I'm coming back on 20 February".

The above exchange of messages between V and her friends were during the 3 week quarantine which ended around 21 January 2020. There was no indication in those messages that V was much happier in Hong Kong or that V did not want to return to France.

As said earlier, M first sought help from the Family Service Centre on 10 February 2021 due to divorce matter and V's emotional distress. First, it would appear that M had already broached the subject of divorce with V unilaterally without F by 10 February 2021, and it was not clear what she had said to V. Second, M had already unilaterally decided that she and the children would stay in Hong Kong. As M had herself said in paragraph 63 of her 2nd affidavit that "Upon careful consideration, I decided it would be better for the Children that we stay in Hong Kong where they are familiar with."

In light of the above, it is thus not be surprising that V would become emotionally distressed in light of her mother's decision, which meant that her father and mother would be living apart in two different countries and that she and her sister would have to live with either their mother in Hong Kong or their father in France. What is clear from the HKCS Letter that V had emotional problems and that 3 individual counselling sessions had to be arranged for V, and that it is telling that Ms Cheung needed to spend more time with V alone.

As stated in the HKCS Letter, V indicated that she would like to stay with her mother and sister in Hong Kong while her father stays alone in France, and that she was stressed when she talked to her father, especially when her father mentioned that he would bring her and sister back to France. V did not reject her father's request to bring them back to France because she did not want to upset him. Although she was scared, cried and worried after the phone conversation with F.

It is not clear as to which phone conversation the HKCS Letter was referring to, since there were at least two conversations F had mentioned, namely on 23 February 2021 and 10 March 2021 in which V was upset. In any event, having considered the contents of the HKCS Letter, I do not find that there was sufficient evidence therein that V had actually objected to return to France even though she had said she would like to stay with her mother and sister in Hong Kong.

M had told F on 17 February 2021 that she recalled F's repeated demand for a divorce and that for the "greater good" of the girls and her body health condition, she agreed to a divorce due to the inseparable differences between her and F and she went on to say "I have already explained to the girls about our separation and what lies ahead of them. They both understood it is the way to be and are happy to remain in HK and not going back to France."

As said, it is clear that M had unilaterally told the children regarding her decision to divorce. F had produced messages he had with V during the period between 18 February 2021 and 22 March 2021. These messages showed that V had a loving relationship with F. Then on 22 March 2021, V sent F a message to tell F that she and L wanted to stay in Hong Kong because they were very happy in Hong Kong, and that they wanted to go to the school in Hong Kong and learn more things and that they also wanted to stay with their friends in Hong Kong and that she hoped that F could understand her wish, and she forwarded a photograph of her and her friends and another message that she was very happy here ("22.03.21 Message").

It was submitted by Mr Marwah that the 22.03.21 Message was sent by V upon coaching/influence by M. M denied this and said she had not written any of the messages sent out from V's phone or that she had taken V's phone from V.

According to F, throughout those messages between him and V, V's English messages were always short and that her longer ones were in French. I note that on 10 March 2021 at 13:05, V had sent her father a longer message in French, the English translation of which was that "It's just I want to talk to Clea because I finished my homework and mama told me that I can but now I finished my homework I can call Clea but mama told popo to take my phone so now I can't call Clea and go to her birthday party".

Compared to all those other messages sent by V to F, the 22.03.21 Message was a rather formal one starting off by "Dear Papa" and with complete sentences with "Hong Kong" typed out in full. The message appeared to be well thought over for a child of V's age, as there were reasons given by V as to why she wanted to stay in Hong Kong. Bearing in mind that the 22.03.21 Message was sent during a period when V was said to have emotional problems and was receiving individual counselling sessions as seen in the earlier mentioned HKCS Letter, it would appear that even if V were expressing her own wish, the 22.03.21 Message was, to say the least, written under the guidance of an adult.

It was not quite clear how F had reacted to V's 22.03.21 Message and/or how he had responded to V, although there appeared to be some phone calls between them. The messages between F and V on 24 March 2021 showed that F had asked V whether she was still living in her aunt Candy's home and V had said yes and V had asked F why he was asking.

F had produced also photographs of V while he was speaking to her on 23 February 2021 and later on 10 March 2021, and V was clearly distressed in those photographs. It was F's evidence that V was crying on the phone as she was upset and was missing her father. On the other hand, M had said these photographs were very misleading and that V was upset for some completely unrelated matters and that F was always good at twisting facts in his favour. M said she had sent a response to F that "the fact is this, please don't confuse". However, this message sent by M was on 18 March 2021 and it was in connection with her message that she was not returning to France, and did not appear to have anything to do with V's crying. In any event, M had not offered any explanation as to why V was upset.

M's explanation as to why she sought help in relation to V's emotional state was that she had noticed that V was behaving strangely whenever F called and that she was trembling when she heard the phone ring and that M had noticed V's mood swings whenever she talked about F.

V was taken to the Family Service Centre for counselling only on 10 February 2021, and not immediately after quarantine. Further, as I have mentioned earlier the reasons why V was taken to the Family Service Centre by M was stated to be “due to divorce matter” and “emotional distress”. Thus, it appears V’s emotional distress was linked to the divorce matter. Anyway, as said earlier, there was no sufficient evidence that V was suffering from any emotional problems or mood swings prior to her leaving France.

When the Court directed on 29 April 2020 that a SWR be submitted, there were discussions as to what the SWO should be told or not be told, and whether the SWO should be sent copies of the parties’ respective affidavits. This Court was not informed at all that V had already been attending counselling sessions at the Family Service Centre or that it was M’s case that V had any emotional problems.

In the SWR, the SWO reported that V “objected” to return to France. The reasons V gave were: (i) she disliked her father’s drinking behaviour (ii) her father had scolded and hit her by hand when he was drunk at home on some occasions; (iii) her father only spent little time staying and going out with her and L; (iv) she was always bored at home in France; (v) she did not enjoy her school life in France as she felt her schoolmates were not very nice to her; (vi) she wished to live with her mother in Hong Kong as her relatives including grandmother, aunt and cousin were residing here; (vii) she enjoyed schooling and was happy to make friends in Hong Kong.

As for L, the SWO reported that she “refused” to return to France. The reasons given by her were: (i) her father had drinking behaviour; (ii) her father once got drunk and scolded her mother as well as hit her at home; (iii) she felt bored when she was living in France because she thought she had nothing to do at home; (she was not interest in studying in France and had little friends there; (iv) she hoped to live with her mother in Hong Kong as her father did not stay with her here; (v) she enjoyed schooling in Hong Kong and made some friends at present; (vi) she also like meeting her relatives, playing with her friends and having outdoor activities with her mother when she stayed in Hong Kong.

F had provided photographs of V and L taken while they were in France during their activities before and after M had arrived. Further, as pointed by F, and as seen in their 1st term school reports, both V and L were doing very well in their French school. V was stated to be in CM1 (Year 5) and L was stated to be in CP (Year 2).

So far as V is concerned, what she said about her school friends did not appear to be supported by messages in her BFF Chat Group. So far as L is concerned, she had said about her father once got drunk and scolded her mother as well as “hit her” at home. It was not clear whether L was referring to her or her mother being hit, but there was no sufficient evidence of such incident, nor was M relying on such an incident during which either M or L had been hit by F unless L was referring to the pillow incident. Anyway, it was F’s case that this was a false allegation.

Due to the urgency of the matter, the children were interviewed individually only once by the SWO on 7 May 2021. It was at short notice, and the SWO did not appear to have the full background of this matter. There was no indication from the SWO that she had asked to search the court file or to read any affidavits filed by the parties.

At the direction hearing on 29 April 2021, Mr Marwah had expressed concern as to whether it was necessary for the children's views being sought, they being only 10 and 7. However, in the end there was no objection from F to the children being interviewed by the SWO. In fact, it was agreed that the SWO would be the best person to seek the children's views as to where they might wish to live. There was no evidence from the SWO whether the children, or either of them had attained an age and degree of maturity at which it is appropriate to take account of their respective views. However, if there were any concerns on the part of the SWO, she would have mentioned it.

Mr Marwah submitted that the children do not in fact object to return to France and that they are caught in the middle by M's actions and that their statements had been influenced by M, and it was unclear that the children actually understood the implications of not returning to France, and even if the Court considers that there is objection, Mr Marwah submitted that at most that they object to living with F or attending a specific school or they are objections to living under lockdown, and that these objections do not have anything to do with France or the area they live but only relate to their care arrangements.

The SWR is rather brief. It further appears that the children's views have only been taken at face value, with no analysis as to any evidence. However, on the face of it, the children have expressed objection/refusal to return to France. I am prepared to accept that the "gateway stage" has been passed.

The discretion stage

F claimed to be the primary carer of the children and that M had always worked long hours. Father had said he was the one doing homework with the children in the evenings and putting them to bed. M denied that F was the primary carer and said although she had to work, she tried to go home as soon as possible after work as she had to check the children's homework.

However, it was M's own evidence that the primary carer of the children from 2016 to 2020 was the domestic helper J, with M supervising everything remotely. M had admitted to being "workaholic". It was also M's own evidence that F had always been stricter with the children's homework.

As seen in the earlier mentioned what's app messages M had with the Paternal Grandmother on 16 June 2020, M had admitted that she never had a mother's life with the children since they were born and that she was always busy at work.

M had also delayed going to France because she said she wanted to open the store for her employer and to earn two more months' salary for the four of them. M had also complained that after she arrived on 4 October 2020, she was the only one doing everything every day, and that she found herself even more tired out than when she was in Hong Kong.

M had said that prior to her arrival, Paternal Grandmother had been helping to cook and to clean the house. F admitted that he is not a good cook but said he did take care of all the housework and the children and took them to school and all their activities.

What seems clear is that whether F or M, they would need someone to help them, whether it is to cook, or to clean, or to care for the children. On one hand, F seems to have more flexible time to care for the children although he has his depression, insomnia and drinking problems for which he has been consulting a doctor and taking medication. On the other hand, M has no intention of being a full time mother, as she had said in her 2nd affidavit that she was at that time negotiating a job that would commence in August 2021. Although M claims that she will not return to France even if this Court were to make a return order, as she has to care of her mother, it seems more likely than not that she will be working as she was before.

M has complained that F had only been to a general practitioner in Hong Kong. No doubt, had the general practitioner been of the opinion that F had needed to see a psychologist or psychiatrist, he would have referred F to one. There has been no sufficient evidence that F had been referred to a psychologist or a psychiatrist while he was in Hong Kong or that it was necessary for him to do so. On the other hand, M also had health issues before the family decided to move, in that she was having thyroid problems.

Financially, F will be relying on government financial support although M has said when tourism picks up speed again, F's business is anticipated to bring in some income. F has also said he is selling a property in France and this should give him some additional capital. As for M, as said earlier, she is clearly planning to work full time again.

F has confirmed that upon the return of the children to him, he will be living with them in Paternal Mother's building rent free. It is not clear where M intends to live with the children. At the moment, they are temporarily living in M's sister's flat in Tsim Sha Tsui in Kowloon near the Elements Mall.

Although M is Chinese and was brought up in Hong Kong, she had gone to France to study French and she lived in France with F between 2004 and 2006. She speaks French and as mentioned earlier, in November 2016, she voluntarily acquired French citizenship. Although the parties were married in Hong Kong, as said earlier they had a Church ceremony in France about a week later. Prior to her leaving Hong Kong, M was working mostly for French luxury fashion houses and she was planning to look for a similar job in France.

As also mentioned earlier, both children hold French passports as well as Hong Kong passports. Prior to their move to France, both the children were attending an international school of which English is mainly the teaching language.

The children are said to be fluent in French, and prior to their moving to France, the parties' close friends are French. One of the parties' close friends is O, who is French and as stated in O's affidavit, he has known F and M since 2001 and they have regularly seen each other over the past 20 years, and that his daughter is of the same age as V and is V's close friend. The farewell party that F had mentioned attending with the children prior to F and the children moving out of Hong Kong was the one held by O for them. The other long standing friend of the parties, E, is I believe also French, and E has known the parties since 2007 and E was the one who took over the parties' helper J when F and the children moved out of Hong Kong.

As the children are fluent in French, their integration into school and activities in France was said to be smooth. This can also be seen in particular in V's school report in France. As mentioned earlier, as seen in their 1st term academic results, they were doing very well academically.

According to M, V had told her that she did not like the attitude and behaviour of her schoolmates in France and that they were very bossy and if she did not do what they asked of her, they would not be friends with her, and that although V had playdate and sleepover with one or two schoolmates, V told M that she just wanted to maintain the relationship to avoid to be alone, and that V had made some "real friends" at her present school. However, notwithstanding what was alleged by M, V did have her BFF Chat Group and that V did have sleepover with her schoolmate/s, and V has only been in her present school for about 7 weeks.

V had been enrolled in gymnastics classes in France for the 2020/2021 season. V also wanted to do some handicrafts and she was enrolled in a local handicraft workshop in France from September 2020 onwards. Both V and L were enrolled in taekwondo for the 2020/2021 season. As said earlier, V was keen on doing some modelling, and F had helped her approach various local modelling agencies and in fact M had attended the meeting V had with one of the local agencies on 14 October 2020. As L wanted to play football, F had signed her one for the local football club in France.

F had said that as the children were attending a French local school in France with all lessons in French, he wanted to make sure they continued to develop their English and that he had arranged for them both to have private English tutors.

M had said that although V is trilingual, her first language in English. As seen in the SWR, V communicated with the SWO in English. M said as L went to a local kindergarten in Hong Kong from pre-nursery to K2 (September 2016) to June 2019, she had a good foundation of Chinses for 3 years, and that she has a lot of interests in learning Chinese. L communicated with the SWO in Cantonese.

By comparison, it seems that V's foundation in Chinese is not as good as L's and that her language skills are in French and English.

The children have now been enrolled into different local schools. V's school is in Central and M said she chose this school for V because it is internationalized-curriculum based and will provide an easier environment for V to integrate. The focus is to strengthen the students' bi-literacy (Chinese and English) and tri-lingualism (Cantonese, Mandarin and English). According to M, V's school has students with 38 different nationalities and provides an international environment to their students. The medium of teaching in this school is English except for the Chinese lessons, and there are two streams of Chinese lessons accommodated for "Chinese Speaking" and "Non-Chinese Speaking". V is in the "Non-Chinese Speaking" class. M had said V liked this school very much.

L has been enrolled in a local school in Kowloon. According to M, L is strong in languages and that the school provides a bi-literate (Chinese and English) and tri-lingual (Cantonese, Mandarin and English) learning environment with native English and native Mandarin speaking teachers. With the school's strong academic background, L loves to go to school every day to learn new things and that L liked this school much more than the one in France as she receives new challenges every day.

According to M, before they left for France, the children used to have drawing classes every Saturday in Hong Kong, and that they wanted to continue with their drawing lessons when they returned. L likes football and M had found a football course for her. M said there is an ice rink on the ground floor of the Elements Mall which is close to their residence, and that the children showed high interest in ice-skating and that they started to have lessons from mid-March onwards.

M had also said that after deciding not to return to France, she had arranged for the children private lessons: English (twice a week for each of them as from 24 February 2021 (until they started going to school); Chinese (once a week each time one and a half hour) as from 16 March 2021 which is still continuing; and mathematics (once a week each time one hour) which is still continuing.

M also said that the children had always had a good relationship with the family on her side and that they also have good relationship with the family of their cousin, and that they usually visit them during the weekends and have dinner with them. M also said that the children and she also had lots of different activities during the weekends in Hong Kong, such as picnicking, cycling, playing at the park, fishing, badminton, birthday parties, growing peanuts, Easter egg hunting, going to beaches to play sand, celebrating the different festivals with family on M's side and friends car racing at parks, footballing, ice skating, movie-watching, going to restaurants etc. M has said the children's social life in Hong Kong is much wider than in France.

The children have been in their new schools for only about 7 weeks. It is not clear why M decided not to enrol the children in their previous international school. Also, M had enrolled the children into different local schools which are not close to each other. V's school is in Central on Hong Kong side and L's is in Shek Kip Mei on Kowloon side. It appears that the children are no longer receiving French tuition, and being in a local school, they will no doubt have to work harder in

learning Chinese. Although L is still young and according to M, seems to have a stronger base in Chinese, V is in the stream of “Non-Chinese Speaking” students.

M was about 5 years old and L was about 2 years old when the family moved from Shanghai to Hong Kong in 2016. Apart from being born in Hong Kong, the children were living in Hong Kong for about 4 years only prior to their move to France. Whilst in Hong Kong, they were brought up in a French expatriate environment. They had no integration problems in France. Even though the children are said to have had regular contact with M’s maiden family, their friends in Hong Kong seem to be mostly French. Although V’s present school is said to have an international curriculum, it is not clear whether V has any French classmates. As for L’s school, as it does not have an international curriculum, it seems most of her classmates are locals.

By not returning to France, and studying at local schools, it is likely that V and L may be leading a more local lifestyle. This is in my view a major change for them together with having to adjust to their parents divorcing and living in different countries.

Having considered all the above and balancing the pros and cons, I have come to the decision that notwithstanding their objection and their wishes, it is in the children’s best interests for them to return to France subject to there being protective measures in place.

Protective measures

This Court has been told that M will not return to France with the children in the event a return order is made.

Due to M’s concerns over F’s depression and drinking problems, at the hearing, this Court has directed F to send to the Court by Thursday 27 May 2021 as to what undertakings and/or protective measures F is prepared to offer.

F’s solicitors produced F’s draft 4th affidavit with F’s proposals. In addition to what has been proposed, first, I am of the view that it is necessary for F to provide an affidavit from Paternal Grandmother confirming that she will assist him in caring for the children and that they can remain living in her property rent-free and further Paternal Grandmother should state for how long she will allow F and the children to live in her property rent-free.

Second, F should also provide an undertaking that he will continue to seek treatment in France (if necessary to include any psychological/psychiatric treatment) for his depression, insomnia, and drinking problems as well as not to drink any alcohol in the children’s presence and when the children are under his care.

Third, F should seek M’s written consent before enrolling the children in any extracurricular activities, in particular, if V is still interested in attempting modelling after her return to France, F should seek M’s prior written consent as to which agency V should model for.

If M is not prepared to accompany the children for the return, she should indicate whether she is prepared to make arrangements for the children to undergo Covid-19 tests (if required) and to complete all necessary documentations and requirements for the children to board the flight as proposed by F. If M is not prepared to do so, then F should do his quarantine in Hong Kong for 21 days and he is to arrange for the children to undergo any tests or to comply with all necessary requirements before they board the return flight.

M should also indicate whether she will be prepared to enter into an agreement with F for provisions regarding interim custody, care and control and access over the children and if so, such agreement can be incorporated in an order of the French Court.

In light of the above, I direct M to provide F and his solicitors with her response to the above indications of this Court and to F's proposed undertakings or protective measures in his 4th draft affidavit within 7 days hereof.

Order

The parties may need time to resolve the above matters and F may have to do quarantine for 21 days. Thus, my order is that the children shall be returned to France not later than 28 days from today subject to the protective measures being in place.

I will hear the parties separately on costs. F is to submit his written submissions on costs of not more than 10 pages within 14 days hereof, and M to submit hers of not more than 10 pages, within 14 days thereafter. The matter will be dealt with on paper.

(Bebe Pui Ying Chu)

Judge of the Court of First Instance

High Court

Mr Azan Marwah, instructed by Withers, for the Applicant

Ms Elizabeth Liu, of Fan Wong & Tso, for the Respondent

Ms Anthea Li, Deputy Principal Government Counsel & Ms Hin Kwok, Senior Government Counsel of Department of Justice, Observers

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