

HONG KONG / JUDGMENT

K v. K

COURT

Court of First Instance

DECIDED

22 September 2006

CASE / FILE NUMBER

HCMP1815/2006

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bjbj HCMP 1815/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO.1815 OF 2006

BETWEEN K Plaintiff and K Defendant

Before : Hon Hartmann J in Chambers (Not open to public) Date of Hearing : 22 September 2006
Date of Ruling : 22 September 2006

R U L I N G

Introduction

AUTONUMOUT The plaintiff in this matter is the father of a young boy, M, who was born in October 1996. The defendant is the child s mother. AUTONUMOUT s parents were married to each other in Hong Kong in January

1996. That marriage ended in July 2003 when a divorce was obtained. It was agreed at the time of the divorce that M would live with the father, the mother enjoying rights of access. In particular, it was agreed that M would spend the long summer holidays with his mother; that is, the northern hemisphere holidays from about late June until August.

AUTONUMOUT The mother has lived in Australia for some time and M has enjoyed his summer holidays with her in Sydney. In June of this year, in accordance with the standing access agreement, the mother met M in Hong Kong and the two of them flew to Sydney. However, a short time later the mother informed the father that M wished to remain in Australia and that she would be applying to the Australian courts for the right to have M live with her in Sydney. AUTONUMOUT The father flew to Sydney to discuss matters with the mother. The discussions were not successful. In the result, on 11 August of this year, the

father commenced proceedings in Australia under the Hague Convention seeking M's summary return to Hong Kong. AUTONUMOUT Hong Kong is a contracting party to the Hague Convention. The statute which incorporates the Hague Convention into Hong Kong law is the Child Abduction and Custody Ordinance, Cap.512. AUTONUMOUT By letter dated 21 August of this year, the father was asked by the Australian authorities to obtain a declaration under Article 15 of the Hague Convention to the effect that the mother's retention of M in Australia was a wrongful detention within the meaning of Article 3 of the Convention. AUTONUMOUT The father seeks such a declaration. The mother however opposes the application. On her behalf, it has been contended that at the time that she decided to keep M with her in Australia, her son was not habitually resident in Hong Kong but was living with his father in the Mainland and was habitually resident there.

AUTONUMOUT It must be noted that, in terms of the Basic Law, Hong Kong is able to enter into international treaties such as the Hague Convention as an independent jurisdiction. In the result, Hong Kong is a contracting party to the Convention while the Peoples Republic of China itself; that is, the Mainland, is not a party. AUTONUMOUT Having heard submissions from counsel for both the father and the mother, I am unable to make a declaration pursuant to Article 15 of the Convention. In my judgment, M was not habitually resident in Hong Kong at the time when his mother decided that it would be in his best interests if he remained in Australia. I am satisfied on all the evidence that at that time M was habitually resident in the Mainland. A consideration of the Convention AUTONUMOUT As I have said, the father has sought a declaration pursuant to Article 15 of the Convention. That Article reads 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. AUTONUMOUT Article 3 of the Convention is to the following effect 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. AUTONUMOUT I should make brief mention of Article 4 which reads The Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years. AUTONUMOUT It will be seen that the Convention only applies to a child who was habitually resident in a contracting jurisdiction immediately before any alleged breach of custody rights took place. The issue of habitual resident is therefore crucial. Habitual

residence a consideration of applicable principles AUTONUMOUT The term habitual residence is not defined in the Hague Convention. In *Re N (a Child)* [2001] 2 HKLRD 377, one of the first judgments concerning the working of the Convention delivered by myself after the Convention came into force in Hong Kong, I observed that this lack of definition was a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems. I observed further that the term is not to be treated as one of art but is to be interpreted according its ordinary and natural meaning. Habitual residence is therefore primarily a question of fact to be decided by reference to the circumstances of every individual case. AUTONUMOUT Beaumont and McEleavy, the authors of *The Hague Convention on International Child Abduction* (1st Ed.), page 89, say that The strength of habitual residence in the context of family law is derived from the flexibility it has to respond to the demands of a modern mobile society, a characteristic which neither domicile nor nationality can provide. To preserve this versatility, the Hague Conference has continually declined to countenance the incorporation of a definition. AUTONUMOUT The term, therefore, has built into it a flexibility which meets the demands of a modern mobile society. The present case, in my view, illustrates the degree to which so many families today do move from place to place and country to country in order to take advantage of career and life style opportunities. AUTONUMOUT As to how habitual residence is to be ascertained, the classic approach was enunciated by Lord Brandon in the House of Lords in *Re J (a Minor) (Abduction : Custody Rights)* [1990] 2 AC562 at page 578 In considering this issue, it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression 'habitually resident', as used in Article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A and is subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. AUTONUMOUT As a short definition, it may be said that habitual residence is a term which refers to a person's abode in a particular country, adopted voluntarily for a settled purpose as part of the regular order of life of that person for the time being, whether it is of short or long duration. All that the law requires is that the intention should have a sufficient degree of continuity to be properly described as settled. AUTONUMOUT As a matter of basic principle, the habitual residence of a young child such as M is the habitual residence of his custodian parent, the parent with whom he lives and who directs his day-to-day life. AUTONUMOUT For the reasons to which I shall come shortly, I am satisfied that at all

material times, the father's residence in the Mainland was one adopted voluntarily by him for settled purposes as part of the regular order of his life. The length of time that he has lived and worked in the Mainland at least four years is, in my view, clear evidence of a settled intention to make the Mainland his place of habitual residence for the time being. M has lived with the father in the Mainland and has gone to school in the Mainland. His day-to-day life, governed by his father, has been in the Mainland and I am satisfied that his habitual residence too, following that of his father, was in the Mainland. AUTONUMOUT It is to be emphasised that habitual residence is not the same as domicile. In order to be habitually resident in a country, it is not necessary to intend to make that country a permanent home. In this regard, the United States Court of Appeal (9th Circuit) in *Mozes v. Mozes* said Being habitually resident in a place must mean that you are, in some sense, settled there, but it need not mean that that is where you plan to leave your bones. The relevant facts concerning M's habitual residence AUTONUMOUT s mother and father were raised in Hong Kong. The father remains a permanent resident. AUTONUMOUT s paternal grandparents have a home in Hong Kong. M and his father often stay there. AUTONUMOUT Although the father has lived and worked in the Mainland since about 2001 and intends to work there for the time being, it is his case that he has always maintained the usual incidents of his life in Hong Kong. For example, he has always operated bank accounts and stock trading accounts here. His credit cards have been issued by Hong Kong banks. He still shops in Hong Kong for personal items such as spectacles. It seems to be the father's case that he still considers Hong Kong to be his home, the Mainland being essentially a temporary place where he lives because of his work. AUTONUMOUT I have of course taken all this into account. However, more fundamental, I think, is the fact that, for whatever reason, M's father has lived and worked on a regular, day-to-day basis in the Mainland since about 2001. AUTONUMOUT The father first went to Beijing, representing a company called G, a manufacturer and distributor of medical and diagnostic equipment. The job meant that he had to base himself in the capital city. He was provided with a housing allowance to enable him to obtain suitable quarters. He enjoyed an expatriate salary together with perks. His job involved a good deal of travelling. M went with him to Beijing and began attending school there. AUTONUMOUT In the summer of 2002, M returned to Hong Kong and went to school here for about six months. However, having become used to an international school environment, he found the traditional Hong Kong system difficult and it was agreed that he would give up his schooling here and return to stay with his father in Beijing. AUTONUMOUT While the father changed his employment, he remained in Beijing with another company, C. He worked with C until May of this year. AUTONUMOUT In May, just a month or two before the present crisis concerning M arose, the father took up employment with a company called E. This new job entailed a move to Shanghai. AUTONUMOUT The father has been fortunate in that he has apparently at all times been employed on an expatriate basis enjoying expatriate perks. His new job not only gives him a salary that is much higher than the salary of local Shanghai people but also includes a home leave allowance which means that he can return to Hong Kong to spend time here. AUTONUMOUT All of the father's jobs have apparently involved a good deal of travel. But it cannot be denied that Beijing, and now Shanghai, have at all times

been his two residential bases. AUTONUMOUT The father has emphasised that he has no independent right to live in the Mainland. His right to live and work there is dependent upon a work permit and, if he loses that work permit, he loses his right to live in the Mainland. This is the case, I am informed, even though in June of 2005, the father married a Chinese National. That marriage still subsists. AUTONUMOUT I accept that the father lives in the Mainland because his career demands that he does so. I accept that, at this time, he has no right to live permanently in the Mainland. But the fact remains, in my view, that the father has made the Mainland his settled place of abode for the past few years and intends that it should remain his settled place of abode. His wife lives with him in the Mainland and M has at all times shared the father's home. AUTONUMOUT It is to be emphasised that M's education has not been at boarding school away from his father. He has attended day schools in the Mainland, returning to the care of his family every night. AUTONUMOUT I have been shown a chronology of M's movements over the last three or four years. There is evidence that he has come back, for example, at Christmas time and from time to time to attend family weddings and the like. It is also evident that in the summer of each year he has returned to Hong Kong and has stayed here for a period of time. The essential purpose however has been to enable his mother to collect him in order to take him to Australia. AUTONUMOUT I am sure that the father does still regard Hong Kong as his home. It may perhaps be said that M too in the summer of this year regarded Hong Kong as his home. But that is not the issue. The issue is one of defining M's place of habitual residence in the summer of this year, that term bearing the meaning that I have given it earlier in this ruling. AUTONUMOUT During the course of submissions, it was said that M's paternal grandparents still retain a home in Hong Kong, living here much of the year. I was told that M and his father have free access to that home. But more telling, in my view, is the fact that the grandparents themselves have, for some time now, spent a large part of the year in the Mainland, living with the father in order specifically to care for M. AUTONUMOUT accept that the father may be classified as an expatriate in the Mainland. But that of itself cannot determine the issue. By way of analogy, Hong Kong has always had a large expatriate population, often enjoying better terms and conditions than locals. Some expatriates, however, have lived in Hong Kong for all their working lives years or longer even though they still call England, Japan, Korea, Australia or New Zealand their home. AUTONUMOUT Finally, by way of an overview, I think it is pertinent to refer to the observations of Waite J in *Re B (Minors: Abduction)* (No. 2) [1993] 1 FLR 993 in which he said A settled purpose is not something to be searched for under a microscope. If it is there at all, it will stand out clearly as a matter of general impression...

Conclusion

AUTONUMOUT When the present case is examined from its commanding heights, the impression that emerges is clear. It is that for the past three years at least, before he was taken to Australia this summer, M's place of habitual residence was with his father and his father's family in the Mainland. For that reason, it is not possible to grant the declaration pursuant to Article

15. The father, in my judgment, must seek the return of his son outside of the parameters of the Hague Convention. That, of course, does not deny him access to the Australian courts which will give him a full hearing, determining M s future according to the child s paramount best interests. (M.J. Hartmann) Judge of the Court of First Instance, High Court Miss Wing Kay Po, instructed by Messrs Tang Tso & Lau, for the Plaintiff Mr Tong Ng, instructed by Messrs Y.L. Yeung & Co., for the Defendant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$) /~ VaJX@ VaJX & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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