

HONG KONG / JUDGMENT

L M v. H T S

COURT

Court of First Instance

DECIDED

19 April 2001

CASE / FILE NUMBER

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HCMP 1329/2001

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 1329 OF 2001

IN THE MATTER OF N, female,

a child born on 6th November 1999

and

IN THE MATTER of the Child

Abduction and Custody Ordinance

(Ord. No.49 of 1997)

and

IN THE MATTER of the Hague

Convention on the Civil Aspects of

International Child Abduction, Article 12

and

IN THE MATTER of Section 8 of the

Hong Kong Reunification Ordinance

(Ord. No.110 of 1997)

BETWEEN

L M Plaintiff

and

H T S Defendant

Before: Hon Hartmann J in Chambers

Dates of Hearing: 3, 4 and 6 April 2001

Date of Handing Down Judgment: 19 April 2001

JUDGMENT

These proceedings, brought under the Child Abduction and Custody Ordinance, Chapter 512, were heard by me over a period of three days. Oral testimony is unusual in these matters but, as there were a number of fundamental conflicts on the facts, I deemed it necessary to hear from both parties; that is, the father of the child who is a German and the mother who comes from Hong Kong. Both testified but only within those narrow parameters that I directed were relevant.

The proceedings had been instituted by the father on the basis that the mother

s flight from Germany with the child of their marriage, a girl of tender years named N, constituted a wrongful abduction of the child. He sought the return of N to Germany so that matters of custody, access and the like could be resolved in the courts of that jurisdiction.

At the conclusion of the hearing, on the basis that Hague Convention matters must be dealt with expeditiously, I gave an oral ruling that I was satisfied that the father had proved his entitlement to an order and that, subject to various undertakings which would safeguard the interests of the child, N was ordered to be returned forthwith to Germany. At the time of giving the ruling I said that my reasons would be delivered later.

I am delighted to say that within an hour or so of my ruling, the father and mother were able to reconcile their differences and it was agreed that they would fly back together to Germany that same night with the child and would resume married life in their house in the town of Bad Homburg. I understand that the necessary practical arrangements were completed, despite the limited time available, and that the family was able to leave Hong Kong that same night as planned.

Although the matter ended ideally, it was agreed that I should still deliver a judgment. This was for a number of reasons. First, the matter had been fully argued and, notwithstanding the reconciliation, the child had been returned to Germany in terms of my order. Second, the hearing had concerned a matter of central importance in Hague Convention cases; namely, the meaning of the phrase

habitual residence

.

The factual background

The father, who was born in Germany in 1962, first came to Hong Kong in 1986. He set himself up in business here distributing health products by means of the internet. In January 1999, he met the mother who began to work for him. A love affair ensued and in early May of that same year they were married. The ceremony took place here in Hong Kong.

On 6 November 1999, a child was born of their union. That child is N, the subject of these proceedings. She is today some seventeen months of age.

In or about July 2000, a decision was made to leave Hong Kong and to move to Germany in order to make a new life for the family in that country. As a result, the necessary visa was obtained for the mother, personal belongings were shipped and on 5 October 2000 the family arrived in the town of Bad Homburg which, I am told, is near Frankfurt.

When I talk of the family, I should mention that at all times the father has had custody of his son, P, a child born of an earlier relationship. P was born in late 1996 and at this time is some four and a half years of age. P lived with the father and mother here in Hong Kong and accompanied them to Germany.

Sadly, the marriage between the father and mother appears for much of its duration to have been a tempestuous one. By that I mean that it has been punctuated by arguments of a most heated nature. Allegations and counter-allegations of physical abuse have been made. Despite this, it is apparent that both parties have (commendably) attempted to make their marriage a success and, of course, are now attempting to do so again. Indeed, the search for a new and better life was one of the principal reasons for the move to Germany.

The desire, however, was not met

before the commencement of these proceedings at least

by the reality. For the first month or so the family had to live in a hotel. The arguments continued, as heated as they had been in Hong Kong. Nevertheless, the father and mother took the necessary steps to attempt to make a new life for themselves. In this regard I accept, of course, that the father was returning to his country of birth. He spoke the language and was at home with the culture. The mother, whose native tongue is Cantonese, did not share those advantages. The continued arguments must have greatly aggravated her natural feelings of

uncertainty in a new and strange land.

After a matter of only nineteen or twenty days, in the heat of an argument, the mother threatened to take N and return to Hong Kong. Those threats (or

wishes

as the mother expressed them) were articulated almost each time they argued. Clearly, the father took them seriously for he sought advice from a lawyer on the matter and later, in the immediate wake of an argument, took the mother to his lawyer

s office so that she could receive the same advice.

But as I have said, when not arguing the parties continued with their arrangements to construct a new life. A five-year lease was taken out on a house. Arrangements were put in hand to renovate the kitchen. The father and mother browsed the shops for new furniture. P was enrolled in primary school while steps were taken to ensure that N would be able to enjoy some form of pre-school activities. The father ordered a new car.

Towards the end of the year, the mother took steps to renew her visa, receiving one that now permitted her to work. At the beginning of February of this year - some four months after her arrival in Germany - she also enrolled at a language school for what is described in the English translation of the invoice as a

crash course

in German. The lessons commenced on 6 February and, according to the mother, she attended a number of classes. Her reason, she said, was because of her love of languages.

When the parties were not arguing, there appears to have been no talk (at least any talk of substance) concerning the mother

s desires to return to Hong Kong with N. Both the father and the mother put this down to an inability to communicate or a desire not to provoke further arguments. But, as I have said, it is apparent also that there was

on the part of both parties

some attempt made in the more tranquil moments to keep their marriage going. During the course of her oral testimony the mother, searching for the right word, described the marriage as

crazy

. The word was said in a tone of perplexed affection. In context, the word was not simply perjorative.

During the hearing, much was made of a string of e-mails sent by the father to the mother

s sister in Hong Kong. In these e-mails he complained that the arguments were getting worse not better and that they were affecting his ability to work. The e-mails bear witness to the fact that on at least two occasions the father booked tickets for the mother and N to return to Hong Kong. One occasion was for a vacation only but it is not denied that the other booking was intended to bring about a formal separation as a result of which mother and daughter would return to Hong Kong to live. According to the father, he had taken advice from a business colleague who had suggested that a formal separation was the best and that the mother should be allowed to return to Hong Kong with the child. Suffice to say that neither booking resulted in the mother and daughter leaving Germany. On both occasions arguments resulted in cancellation of the bookings. The father blamed the mother, the mother blamed the father.

Instead of the mother returning to Hong Kong, the mother

s sister made a trip to Germany in January of this year. As for the father

s acceptance that there should be a separation, he testified that he very quickly rejected the advice given to him by his business colleague and resolved that, even if the mother was to return to Hong Kong, their daughter would remain in Germany. The mother accepts that this is the case. Indeed, she said that on a number of occasions the father made it plain that he would resist any attempt by her to remove the child.

This no doubt explains why, on 20 February of this year, the mother took N and made a clandestine journey to Frankfurt Airport. Tickets were waiting for her. They had been purchased by the sister. Mother and child then flew back to Hong Kong.

Later that same day, the father discovered a note left at the matrimonial home in which inter alia, the mother apologised for leaving, saying that she needed to get away and that it was best this way as they were always

poisoning

each other. The mother concluded by saying that she would do her best to look after N and that the father was not to worry about her.

A few days thereafter

after some acrimonious e-mails with the mother and her Hong Kong family

the father reported the matter to the German central authorities. A formal request for the return of N under the Hague Convention was received in Hong Kong by the Department of Justice which acts as this Territory

s central authority. These proceedings were instituted on 7 March.

The matter at issue

The Child Abduction and Custody Ordinance (the Ordinance

) gives the Hague Convention on the Civil Aspects of International Child Abduction the force of law in Hong Kong

The Convention, which was signed in the Hague on 25th October 1980, is designed to counter the growing problem of the civil abduction of children across international borders. Although neither the Preamble nor Article 1 of the Convention have been enacted into Hong Kong law, they may nevertheless be considered in understanding the objects of the Convention. The Preamble states the objects succinctly; namely,

to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence

. The essential mischief which the Convention is designed to counter is the removal either by abduction or wrongful retention

of a child from its natural environment, that is, its country of habitual residence. The means by which the Convention counters such mischief is by an early restoration of the status quo which is achieved by ensuring the prompt return of the child to the country of its habitual residence. If this were not done, it would allow the party who has abducted the child to a country of refuge or wrongfully retained the child in that country to seek the assistance of the courts there and by that means create a jurisdiction which is more or less artificial.

For the Convention to come into play, there must first be a wrongful removal. In this regard, Article 3 reads:

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

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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

Article 4 concerns the scope of the Convention *ratione personae* as regards those children who are to be protected and 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 sixteen years.

In these proceedings it was not disputed that on the day when the mother flew out of Germany with N, both the mother and the father, in terms of the law of Germany, shared custody of the child. In that regard, the law in Germany is no different from the law of Hong Kong. The removal of N without the father

s consent was therefore in breach of his rights of custody.

But while that was accepted, what was not accepted was that N was habitually resident in Germany at the time when she was removed. It was on that issue alone that these proceedings were contested.

Put succinctly, if I was satisfied that the father had discharged the evidential burden on him of showing on the balance of probabilities that N was habitually resident in Germany immediately before her removal then I was obliged to order that N be returned forthwith to that country. If I was not so satisfied, then the Convention was not operable in this matter and there would be no order made for return; at least not in terms of the Convention although the same order may perhaps have been made if I had considered it to be in the paramount best interests of the child.

My obligations to return the child arise out of Article 12 of the Convention which reads:

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.

[my emphasis]

The merits of custody

Before moving to consider the concept of

habitual residence

and its application to those proceedings, let me emphasise that it is not my function in this matter to decide upon the merits of either party

s claim for custody rights. In this regard, I can do no better than refer to the Explanatory Report of Madam Elisa Perez

Vera which was prepared on the basis of what was said and agreed at the meetings of the First Commission responsible for drafting the Convention. In paragraph 19 of that report, she states:

In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken

in which case the violated custody rights were exercised ex lege - as to a removal in breach of a pre-existing custody decision.

Habitual Residence

The term

habitual residence

, although of central importance to the working of the Convention, is nowhere defined in it. The editors of Dicey & Morris, *The Conflict of Laws* (13th edition) at page 149 explain this lack of a definition (in respect of all of the Hague conventions on private international law) by saying:

No definition of habitual residence has ever been included in a Hague Convention; this has been 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. In those contexts, the expression is not to be treated as a term of art but according to the ordinary and natural meaning of the two words it contains. The Court of Appeal has emphasised that habitual residence is primarily a question of fact to be decided by reference to the circumstances of each particular case.

The authors Beaumont and McEleavy, in their work, *The Hague Convention on International Child Abduction* (1st edition) page 89 support this by saying:

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. Indeed, commenting on the Draft Convention on the Recognition of Divorces and Legal Separations, Anton remarked:

Whether the residence is habitual is regarded simply as a question of fact, making definition otiose.

This was certainly the view which prevailed in the late 1970s during the drafting of the Child Abduction Convention.

Habitual residence

is not therefore a term of art. It is not to be decided by reference to a set of arcane rules. It is to be decided rather as a matter of fact by reference to the relevant evidence. This has been confirmed in England and Wales in what may now be described as the classic approach to the phrase, that approach being enunciated by Lord Brandon in the House of Lords decision of *In re J. (a minor)* [1990] 2 A.C. 562 at 578F:

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 his 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.

[my emphasis]

While

habitual residence

is not a term of art, nevertheless certain guiding principles

and I put them no higher than that

may be derived from the English authorities. In my judgment of *N v. O* [1999] 1 HKLRD 68 (at page 81), I adopted certain of those principles as they had been summarised by Waite J in *Re B* [1993] 1 FLR 993. Because they are central to this present matter, I repeat them hereunder:

1. The habitual residence of the young children of parents ` who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.
2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration. All that the law requires for a

settled purpose

is that the parents

shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention.

From these principles, when a couple moves to a new country, I take it that two fundamental elements have been defined in order to ascertain whether habitual residence has been established. First, there must be a settled purpose on the part of the couple to take up residence in the country or territory and to do so as part of the regular order of their lives for the time being. Second, this settled purpose must be accompanied by actual residence for an

appreciable

period of time.

A settled intention does not have to equate to an intention to settle permanently. In this regard, see the decision of the United States Court of Appeals (Ninth Circuit) in *Mozes v. Mozes* 239 F. 3d 1067 (2nd Cir. 2001):

Being habitually resident in a place must mean that you are, in some sense,

settled

there but it need not mean that

s where you plan to leave your bones.

A settled intention, I believe, may be for reasons which in themselves lack an achieved (and therefore settled) result. For example, a couple may move to a new country in the hope that the move will shore up an otherwise problematic marriage or that one of the parties by finding new work, will be able to enhance his or her career. In such circumstances, habitual residence may still be established even if the goal is not finally achieved. In this regard, for example, see *Re B* (Supra) in which Waite J 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.....

When the present case is examined in that way from its commanding heights, the impression which emerges is, in my judgment, a clear one. This was a couple fighting commendably to save their marriage, for their own sake and that of the children. They shared the common objective of a limited sojourn in Germany as a platform from which to agree, if they could, a future pattern of life and work which would not clash with the misgivings which each of them felt about living permanently in the other

s home country. Since that platform was sited in the mother

s own home territory it was natural that she should hope, as she clearly did, that as his surroundings in Germany became more familiar to him, her husband would find them more tolerable. She was disappointed in that hope, but it led her to stall and adopt a non-committal attitude towards the various suggestions which he advanced from time to time for an alternative home. That may explain why, in the end, he took the action he did in retaining the children in England against her will.

It does not, however, in the least affect, in my judgment, the essential nature and purpose of the sojourn in Germany, namely to provide a base for reconciliation and for planning a fresh start. That purpose was a settled one, and, despite the father

s impatience at its failure and private resolve to bring it to an end, it remained a settled purpose in my view right up to the time when the mother came to England for what she supposed to be a short holiday. It was a purpose, moreover, which remained settled and continued for a period which can readily be described, for the purpose of the authorities mentioned at the outset of this judgment, as appreciable.

In the same decision, Waite J commented that logically, provided there was a settled intent, the period of habitation need not to be too long. This view is shared by other common law jurisdictions which have ratified or acceded to the Convention. See, for example, *Harsacky v. Harsacky* 930 S.W. 2d 410 (Ky. App. 1996) a decision of the United States District Court in which a period of approximately one month was considered sufficient to establish habitual residence when it was accompanied by a clear intent to settle on an indefinite basis. The parents (an American father and a Finish mother) had been living in Finland for three years. They decided to return to the United States, where their two children had been born, with the intention of settling indefinitely. Approximately one month after arriving in the United States, the marriage broke up. Despite the fact that the children had only been in the United States for such a short period, the court found that their habitual residence had changed from Finland to the United States.

The English Court of Appeal in the seminal case of *Re F* [1992] 1 FLR 548 found also that, when accompanied by a settled intention, a month can be

an appreciable period of time

. The parents, an Australian mother and English father, had married in England and lived there for the first four years of their marriage. Their child was born in England. The family moved to Australia with the intention of emigrating there. However, upon arrival, the relationship between the parents deteriorated. They separated and within a matter of days the father flew back to England with the child. Giving the principal judgment of the court, Butler-Sloss LJ said (at page 555):

The judge was entitled to make the finding that the family did intend to emigrate from the UK and settle in Australia. With that settled intention, a month can be, as I believe it to be in this case, an appreciable period of time. Looking realistically at the position of [the father], by the time he left Sydney on 10 July 1991, he had been resident in Australia for the substantial period of nearly 3 months.

Butler-Sloss LJ (a judge of great experience in Hague Convention cases) continued:

Mr. Setright, wearing two hats, on behalf of the mother and of the Lord Chancellor as the central authority, reminds us that it is important for the successful operation of the Convention that a child should have, where possible, an habitual residence, otherwise he cannot be protected from abduction by a parent from the country where he was last residing. Paraphrasing his argument, we should not strain to find a lack of habitual residence where, on a broad canvas, the child was settled in a particular country.

The dicta of Butler-Sloss LJ was cited with approval in the Family Court of Australia in the 1995 decision of *Department of Health and Community Services, State Central Authority v. Casse* (1095) FLC 92-629. This was a case under the Convention, the central authorities in Australia being responsible for prosecuting such cases.

I have mentioned several overseas decisions in this judgment on the basis that international consensus is to be preferred in respect of internationally binding conventions.

In the cases to which I have referred, a period of approximately one month was considered sufficient to establish habitual residence. But one month is not to be taken as some guideline

figure. There is no such arbitrary indicator. All will depend on the facts of the case.

Finally, it must be emphasised that, in talking of habitual residence, the Convention refers to the child

s habitual residence not that of the parents together or one of them in preference to the other. See, for example, *Re M* [1996] 1 FLR 887 (at 896) where Millett J said:

The fallacy in the approach of [the judge] with due respect, is that she assumed that the dispute is a dispute between the parents, whereas for present purposes its proper characterisation is that it is a dispute about the future of the child; and that she regarded it as appropriate that the dispute should be determined in the country where the parents are habitually resident, whereas Parliament has determined that it should be decided in the country where the child is habitually resident.

By having regard always to the habitual residence of the child, the court

s focus remains on the facts of the case as they relate to the child rather than on the intentions of either of the parents to live in a specific country.

Of course, when a child is in the physical custody of its parents who are living together, inevitably (unless the facts otherwise dictate) the child

s habitual residence will be that of the parents. Where that is the case, neither parent can unilaterally change the habitual residence of the child by removing the child wrongfully and in breach of the other parent

s rights: that is the very mischief the convention aims to avoid.

My conclusions on the facts of the present case

a) A settled purpose

It was submitted by Mr. Clough on behalf of the mother that the evidence did not reveal any form of joint settled intent to move to Germany in order to make a new life there. The decision to move, said Mr. Clough, was a unilateral one made by the father. He presented the mother with a *fait accompli*. The mother was left with no real choice in the matter. Either she remained in Hong Kong and let the marriage collapse or, for the sake of the union, she complied with the father

s wishes. She chose the latter course. Mr. Clough argued for this view of the evidence with his expected vigour but I do not accept that it accurately reflected the position at the time of the move.

It is not disputed that it was the father who originally suggested the move to Germany. No doubt he was the prime motivator. He researched matters on the internet and quite clearly used his powers of persuasion to convince the mother. But I am satisfied on the evidence that, despite any private reservations she may have had, the mother was convinced. As a result, both parties left Hong Kong with the intention of building a new life in Germany, one that would provide a better living environment for the children and that would

hopefully

also strengthen their marriage.

It was suggested that the mother went to Germany with the intention of doing no more than

testing the water

there; in short, that it was for her very much a provisional affair and not in any way settled. But if that was so, she said nothing about it to the father. On her own admission, she only shared her reservations with her sister and did so privately. A move across international boundaries in order to make a new life is not a task that is normally embarked upon lightly. Of course there are concerns. But in my judgment no weight can be given to private, uncommunicated fears or reservations. Weight must rather be given to the manifest intentions of the parties evidenced by their words and their actions.

Often in a marriage one party is more dominant in terms of decision making. But that takes the matter no further if, no matter who made the original decision, the evidence reveals the coming into being of a joint settled intent to abandon one country of habitual residence in favour of another. And that, I am satisfied, is what happened in the present case. The idea to move to Germany came up in or about July 2000. The actual move only took place at the beginning of October of that year, some two to three months later. At no time during that period, despite the stormy and argumentative nature of their marriage, did the mother express any real concern about the move to the father. To the contrary, she made application for the necessary visa to the German Consulate in Hong Kong and together she and the father packed up all their belongings for shipment to Germany. Nothing was left behind. Those things that were not to be shipped were sold or given away. It was contended that the parties did not, in fact, have a great deal. That may be so but I note that the mother shipped all her personal belongings too, such items, for example, as her old photograph albums.

As to her intentions, the mother made it plain in her evidence that, whatever her private fears, she went to Germany, giving up everything in Hong Kong, in order to try and keep the marriage alive by means of building a new life in a new place. That, I believe, is the nub of the matter. For that was manifestly the settled joint intention of the parties; namely, to build a new life for the family. In one of her e-mails to Germany the mother

s sister spoke of them being in Germany to build a new life and the father in his e-mails back to his sister-in-law spoke of

trying

Germany for this purpose too. Patently, the long term future could not be determined by either party but Germany was nevertheless chosen as the place where the family would for an indefinite period (perhaps permanently if all went well) conduct the regular order of their lives; where the husband would work, where the children would be educated and where the mother would learn the language to better integrate herself into local society.

b) The assumption of residence for an appreciable period of time

The parties, together with the two children, arrived in Germany on 5 October 2000. The mother fled Germany with the daughter of the marriage on 20 February of this year. The family had been together in Germany for a period of some four and a half months, therefore, before the mother's flight. In that period of time, as a family, the following had been achieved or at least commenced:

- (i) The father had settled into his internet business, operating from Bad Homburg.
- (ii) The father and mother together had sought out a house in which to live and had negotiated a 5-year lease, a lease sufficiently long to warrant internal renovation works being undertaken on the kitchen.
- (iii) The father had ordered a motor car, a Mercedes Benz.
- (iv) The father and mother had gone looking for furniture and bought a certain amount of that furniture, especially for the children.
- (v) The mother had successfully applied to renew her resident visa, obtaining a visa which endured for some 5 years and now gave her the right to work in Germany.
- (vi) The mother had enrolled in German language classes.
- (vii) A primary school had been found for P and arrangements had been made for some form of pre-schooling activities for the daughter, N.
- (viii) There had been discussions about a holiday a little later this year in Europe, with the family driving in the new Mercedes.

In light of all of these matters, whatever privately the instability of the marriage may have indicated, I am satisfied that by mid February of this year any reasonable on-looker, if asked what was the children

s place of normal, settled residence, would have answered:

Well, of course, it is now Germany.

Yes, there were difficulties in the marriage. After some nineteen days the mother first threatened to take N and return to Hong Kong. But it was not for the mother unilaterally to change what had been the settled purpose of the family. Why should her unilateral intent carry any more weight than that of the father? They both shared custody of N. Neither could unilaterally alter what had been agreed as a settled purpose for the regular order of the family

s life, a purpose now being put into effect.

In any event, in my view, the arguments between the father and the mother constituted part of a continuum. The couple had argued in Hong Kong, they were now arguing in Germany. But between such arguments they continued, as best they could, with the everyday routine of their lives. Seemingly, the mother made Chinese friends. Critically, in my opinion, as late as February

of this year, after some four months in Germany, and after a series of arguments with the father, the mother chose to enrol in a German language course: clear evidence that she still saw Germany, hopefully, as her future home despite the frailty of the marriage.

As for the father

s short-lived agreement that the mother could bring N back to Hong Kong to live, this was part of an on-going argument between the couple and was, in any event, a consent which the father quickly retracted. No doubt in the heat of the moment a great many things were said by the parents

as to separate beds, separation, who would live where and the like. But I do not see how the peaks and troughs of such an emotional graph can affect the steady construction of a new life in Germany by the children, one that I am satisfied by mid-February of this year had brought about a situation where their place of habitual residence would accurately be described as Bad Homburg.

Conclusion and costs

It is for the reasons contained in this judgment that at the end of the 3-day hearing, I gave an oral ruling that N, the child of the parties

marriage, should in terms of Article 12 of the Convention be returned forthwith to Germany.

As for costs, I am told that both parties received legal aid. Added to this is the fact that immediately after my oral ruling the parties reconciled and returned together to Germany with the child to resume married life together.

Article 26 of the Convention deals with costs in these circumstances in the following terms:

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 26 therefore gives to this court the discretion to order the mother to pay necessary expenses incurred by the father, these expenses to include payment of legal costs. The purpose is to act as a deterrent to behaviour which is contrary to the objects of the Convention and, of course, gives to this court the power to order the mother to pay the kind of expenses not normally envisaged in litigation; for example, payment of travel expenses for both herself and the child.

But the Article does not detract from the principle of our domestic family law that, when the interests of a child are in issue, the court should be slow to penalise either parent in costs unless a degree of moral turpitude has been revealed which demands sanction or the financial position of the successful party in the litigation has been so injured that justice demands that the other party should pay costs.

While the mother in this case clearly fled Germany with the child, it was against an unhappy background which may well, because of its high emotional dynamics, have coloured her thinking. She did not take the child into hiding. She returned to her family in Hong Kong. In addition, as I have said, the parties have now reconciled, an event which can only be in the child is paramount best interests and which this court should be careful not to undermine. As for the financial position of the parties, both were on legal aid.

In all the circumstances, I am inclined to make no order as to costs. I accept, however, that I have not had the benefit of hearing from counsel on the matter and there may well be issues relevant to costs which should be brought to my attention. As and for costs, there will therefore be an order nisi that there be no order as to costs subject to the condition that either party may apply within 30 days of the date of handing down this judgment to argue the matter.

(M J Hartmann)

Judge of the First Instance Court

Ms Selina Lau, instructed by Messrs Stevenson, Wong & Co, for the Plaintiff

Mr Neal Clough, instructed by Messrs Chaine, Chow & Barbara Hung, for the Defendant

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