

HONG KONG / JUDGMENT

LCK v. CWL

[2023] HKCFI 3358**COURT**

Court of First Instance

DECIDED

28 December 2023

CASE / FILE NUMBER

HCMP469/2023

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HCMP 469/2023

[2023] HKCFI 3358 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLEANOUS PROCEEDINGS NO 469 OF 2023 IN THE MATTER of an application under section 10 and section 15 of the Child Abduction and Custody Ordinance (Cap. 512) and Order 121 of the Rules of the High Court (Cap. 4 sub. leg. A) in respect of a child, namely LS

BETWEEN LCK Applicant and CWL Respondent Before: Hon Au-Yeung J in Chambers (Paper Disposal) Closing Date for Written Submission: 21 August 2023 Date of Decision: 28 December 2023 D E C I S I O N The originating summons (“OS”) was taken out by the applicant Father against the respondent Mother for return of the youngest son, S, to Hong Kong. The matter was eventually withdrawn by the Father upon the undertaking of the Mother to return S to Hong Kong, which she had honoured. The Father seeks costs for the proceedings. The Mother asks for costs from the Father, alternatively no order as to costs. The parties were married at the time the OS was taken out. They have 3 sons, aged 16 to 8. Due to unhappy differences between them, the parties had in fact been living apart in 2 homes. The Father lived with the 2 elder sons at a public housing unit in the name of his own mother. The Mother had lived with S at a property owned by her. On 29 October 2022, the Father was supposed to pick up S from the Mother’s Property but could not do so. He called the Mother’s father who told the Father that he had no idea of the whereabouts of the Mother and S. When the Father was about to report the matter to the police, he received a text message from the Mother saying that she had already gone to Vancouver with S. She gave a similar text message to the 2 elder sons on the following day. The Father claimed that the Mother unilaterally took the youngest son S to Canada without his consent. On 24 March 2023, the Father took out the OS under Article 115 of the Hague Convention on the Civil Aspects of International Child Abduction (“the Convention”) and section 10 of the Child Abduction and Custody Ordinance, Cap 512, for a declaration that the removal of S from Hong Kong and his retention outside Hong Kong was wrongful. The Father also claimed that he had been denied

even telephone access to S. At the time of filing of the OS, the video calls were resumed but were limited to once a week made through the Mother's mobile phone number. The Mother claimed that it was the parties' common intention for the family to emigrate to Canada. She also claimed that the return of S to Hong Kong would subject him to grave risk of harm. That the removal of S to Vancouver and retention there was without the Father's consent could be seen from the following circumstances: The contemporaneous objection raised when he received the Mother's message informing him that she and S had gone to Vancouver. S was removed at the beginning of a new school term. His termination of schooling in Hong Kong was apparently without the Father's knowledge. The Mother's refusal to provide the address of S until the time she filed Form E in the subsequent divorce proceedings. Even if, as the Mother alleged, the Father had consented to removal of S, he plainly did not consent to his retention in Canada. The Father had good cause for issuing the OS. The Mother had initially intended to contest the proceedings, as evidenced by the consent summons filed on 20 April 2023 for the purpose of filing affirmation in opposition. Her allegation of risk of harm to S bore no particulars. Many of her assertions in §4 of her submission on why she took S away first before the other 2 sons and proposals on settlement were not put on affirmation and the Court is unable to rely on them. The Mother eventually undertook to and did return S to Hong Kong by 1 August 2023 (4 ½ months after issue of the OS) at her own cost. She also undertook until and including 15 September 2023, not to remove S out of Hong Kong without leave and pending determination of the matters in relation to S in the Family Court. Under Article 26 of the Convention, "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." (underline added) The return of S was voluntary. The only order made by the Court was to grant leave to the Father to discontinue the proceedings upon S' return. No order concerning rights of access was made. Accordingly, no order for costs should be made under Article 26 as a matter of law. In any case, the Father and Mother have come to terms such that costs and the Court's time have not been wasted on a trial. In the spirit of encouraging cooperation between the parties on child-related matters and to resolve issues in a practical manner, I make no order as to costs. The Father's own costs are to be taxed in accordance with Legal Aid Regulations. (Queeny Au-Yeung) Judge of the Court of First Instance High Court Wan and Leung, for the Applicant Kwong & Lee, for the Respondent

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