

HONG KONG / JUDGMENT

ME v. CYM

COURT

Court of First Instance

DECIDED

30 August 2017

CASE / FILE NUMBER

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bjbj HCMP 1624/2017 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1624 OF 2017

IN THE MATTER OF MPJ, female, a child born on 26 September 2016 and SECTION 56 OF the Child Abduction and Custody Ordinance, Cap 512 and Order 121 of the Rules of the High Court, Cap 4A and IN THE MATTER OF the Hague Convention on the Civil Aspects of International Child Abduction, 1980

BETWEEN ME Plaintiff and CYM Defendant

Before: Hon Lok J in Chambers (Not open to public) Date of Hearing: 22 August 2017 Date of Judgment: 22 August 2017 Date of Reasons for Judgment: 30 August 2017

REASONS FOR JUDGMENT

This is an application under the Child Abduction and Custody Ordinance (Cap 512) and the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Hague Convention) for the return of the Child to the United Kingdom (the UK). In the hearing on 22 August 2017, I refused such application by the Father. I now give my reasons.

BACKGROUND

The Child, who is a girl, was born in Hong Kong () on 26 September 2016. She is now 11 months old. The Mother, a Chinese now aged 30, was born and raised in HK. She had her own business in HK as a jewellery designer. Prior to giving birth to the Child, she ran her business selling jewellery from a shop in Quarry Bay. The Father s family was originally from Cyprus, and they

came to settle in the UK in mid-1970s. The Father, now aged 37, was born in London. After completing his postgraduate degree in Cambridge University, he worked in London. In 2013, he moved to work in HK as a director of an investment company. In late 2014, the Father started to work for a hedge fund up to the end of 2015. The Father and the Mother met in August or September 2015. They had a relationship and they found out that the Mother was pregnant in February 2016. The couple got married on 19 March 2016 and the Child was born in September. There is some dispute as to the employment status of the Father in 2016. The Father had an advisory contract in that year but it is unclear how much he earned for his income. The evidence shows that the Father has begun a worldwide hunt for jobs as early as June 2016 when the couple went to Singapore for holiday and job interview for the Father. Shortly before the Child's birth, the couple moved to live in a flat in Shatin in HK (the Flat) under a two-year tenancy made between the landlord and the Mother from 1 July 2016 to 30 June 2018 with a one-year break clause. At around the same time, the Mother closed her jewellery shop. The couple and the Child left HK and arrived in London on 15 December 2016. Before their departure, the couple did not terminate the tenancy of the Flat and they had return tickets back to HK on 12 January 2017. There is a dispute between the parties as to why they travelled to the UK. According to the Mother, they travelled to the UK for a holiday and the Father's family to meet the new-born. After arriving in the UK, the Father wanted to look for jobs there and the Mother agreed to extend their stay to accommodate the job hunt. The Mother was prepared to move to live in whatever place in which the Father was able to obtain a stable job to earn sufficient income to support the young family. She denies that the parties had made a plan to settle in the UK for good whether prior to the trip or at all. On the other hand, the Father claims that, prior to the trip, the couple had already decided to settle in the UK for good. According to him, the Mother likes to live in the UK as she had been studying in Newcastle for some time. During their time in London from December 2016 to early June 2017, the family stayed at the premises of the Father's parents. The Father did not secure any full-time employment in the UK or elsewhere during the couple's stay and to-date. The family flew back to HK on 9 June 2017 with return tickets back to London on 11 July 2017. There is again dispute between the parties as to why they travelled back to HK. According to the Mother, they were concerned that the Father was not able to secure a job in the UK. She actually gave the Father a deadline of 1 April 2017 which was later extended to 1 May 2017, after which the couple had to consider to move back to HK. Before they travelled back to HK, the Mother had begun a negotiation with a hotel in Shatin (the Hotel) about setting up a booth to sell her jewellery. The Father also looked for jobs in HK in April 2017. On 2 June 2017, the Father applied for a workstation in the Hong Kong Science and Technology Parks (the Science Parks) in HK. According to the Mother, without a stable job in the UK, it would be more practicable for the family to stay in HK, as: (i) it would be easier for the Child to get education in HK; (ii) it would be easier for the Mother to take care of the Child in HK with the support of her family whilst working at the same time; and (iii) as compared with the UK, it would be easier for the Father to get a visa to stay in HK. The Father gives a different version about the purpose of the HK trip. He claims that the trip was only to enable the Mother to visit her family and to apply for the UK's visa from the Mother's country of origin. They intended to travel back to the UK on 11 July 2017. In fact, the Child had an audition for modelling work scheduled in July 2017. The

couple had an argument in HK in late June 2017. The Mother accused the Father of, inter alia, constant gambling and bad behaviour, whilst the Father complained that the Mother was unreasonable and refused to allow him to see the Child on a regular basis as from 26 June 2017. On 4 July 2017, the Mother filed her petition for divorce in HK on the ground of unreasonable behaviour. It is the Father's case that, by 11 July 2017 at the latest, the Mother has wrongfully retained the Child in HK as she did not take the return flight to the UK on 11 July 2017 and remained in HK with the Child. On 12 July 2017, the Father made an application to the HK Central Authority for the return of the Child under the Hague Convention. On 19 July 2017, the HK Central Authority filed an originating summons for the Child's return to the UK and made an ex parte application to the court prohibiting the Child's removal. By reason of the institution of the Hague proceedings, the divorce proceedings in HK have been stayed. On 27 July 2017, I gave directions for the conduct of this application. The Father has been substituted as the plaintiff in these proceedings whilst the Mother remains as the defendant. The Father has stayed in HK for the purpose of this Hague Convention application. On 28 July 2017, the Father filed wardship proceedings in the UK with the first hearing listed for 24 August 2017. The main disputes between the parties relate to the habitual residence of the Child and whether the retention of the Child in HK is wrongful. The Mother is also relying on the intolerable situation defence under Article 13(b) of the Hague Convention, but that is certainly not the main battlefield in this case.

THE RELEVANT LEGAL PRINCIPLES ON HABITUAL RESIDENCE The leading case on habitual residence in HK is *LCYP v JEK (Children: Habitual Residence)*, in which Cheung JA said the following relating to the principles on habitual residence. Instead of trying to discuss which of the principles in *BLW* should be modified, it will be more useful to restate the principles on habitual residence in the light of these decisions: 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 (*Re L (A child)* at [20]); The factual question is: has the residence of a particular person in a particular place acquire the necessary degree of stability (permanent is the word used in the English versions of the *810 two CJEU judgments) 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 (*Re LC (Children)* at [59]); The concept corresponds to the place which reflects some degree of integration by the child in a social and family environment (*Re L (A child)* at [20]); 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 the subjective factors are also relevant; what is the reason for his being there, and what is his perception about being there? (*Re LC (Children)* at [60]); There is no legal rule, akin to that in the law of domicile, that a child automatically takes the habitual residence of his parents (*Re L (A child)* at [21]); and 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 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 (re L (A child) at [23]. Since the present case concerns a pre-school infant of only 11 months old, I agree with Ms Cheng, counsel for the Mother, that the following dicta of the Court of Justice of European Union (CJEU) in *Mercredi v Chaffe* are also relevant here. In *Mercredi*, the CJEU was asked to determine the habitual residence of a child for the purpose of articles 8 and 10 of the Council Regulation (EC) No 2201/2003 on jurisdiction and enforcement in matrimonial and parental responsibility matters. The CJEU stated that:

47. To ensure that the best interests of the child are given the utmost consideration, the court has previously ruled that the concept of habitual residence under article 8(1) of the Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national court, taking into account of all the circumstances of the fact specific to each individual case: see *Proceedings brought by Am* para 44.
48. Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the conditions and reasons for the child's stay on the territory of a member state, and the child's nationality: see *Proceedings brought by A*, para 44.
49. As the court explained, moreover, in para 38 of *Proceedings brought by A*, in order to determine where a child is habitually resident, in addition to the physical presence of the child in a member state, other factors must also make it clear that that presence is not in any way temporary or intermittent.
50. In that context, the court has stated that the intention of the person with parental responsibility to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or rental of accommodation in the host member state, may constitute an indicator of the transfer of the habitual residence: see *Proceedings brought by A*, para 40.
51. In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must be a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.
52. In the main proceedings, the child's age, it may be added, is liable to be of particular importance.

53. The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.
54. As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.
55. That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her father, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case law, such as the reasons for the move by the child's mother to another member state, the languages known to the mother or again her geographic and family origins may become relevant.
56. It follows from all the foregoing that the answer to the first question is that the concept of habitual residence, for the purposes of articles 8 and 10 of the Regulations, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a member state other than that of her habitual residence to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that member state and for the mother's move to that state and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and the child have with that member state. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of the fact specific to each individual case. In other words, the social and family environment of the child is still the main consideration in determining the question of habitual residence. In the case of a very young child where the mother is usually the main caregiver, the court should assess the mother's integration in her social and family environment such as the reason for the move and her geographic and family origins. The judgment in *Mercredi* was endorsed by the UK Supreme Court in *A v A (Children: Habitual Residence)*, *In re LC* and *In re B (A Child)* (*Reunite International Child Abduction Centre and others intervening*). In *In re LC*, Baroness Hale echoed the child-centred approach in *Mercredi* and observed that: The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his

home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another. The UK Supreme Court in *A v A (Children: Habitual Residence)* and *In re B* also recognised that a child may conceivably have no country of habitual residence, but considered that to be exceptional. Ms Cheng has also referred me to *Re Alcott (1)*, a recent English case that has received much media attention given the parties involved. The court there applied the principles in the abovementioned UK Supreme Court decisions, which were also endorsed by Cheung JA in *LCYP v JEK*, and ruled in favour of the mother on the basis that the child, who left England with the mother, never acquired habitual residence in Australia, where the child and the mother spent 7 days. The facts of that case are quite different from the present one, in particular: (i) there was a certain amount of pre-planning on the move in *Alcott* whereas there was practicably none in the present case; and (ii) the stay was only 7 days in Australia in *Alcott* whereas the stay in the UK was much longer (slightly less than 6 months) in the present case. However, I agree with Ms Cheng that some of the factors considered by the court in that case are also relevant here. In *Alcott*, the mother did not intend the move to be a permanent one without conditions; whether or not she stayed in Australia depended on whether the parties relationship worked out. One of the purposes of the trip was to explore the possibility of cohabiting. The mother did not leave England with any intention of emigrating and certainly she had not made all the necessary plans to do so. The mother left England in ambiguous circumstances without any clear plan to move permanently. Had the mother known the true state of affairs, i.e. the father infidelity, she would in all likelihood not have moved to Australia with the child even for a trial period. The court held that, under such circumstances, the child was not integrated to a sufficient degree in a social and family environment in Australia and the mother was probably not integrated at all. The burden is on the Father to prove the Child's habitual residence and satisfy the court that the Hague Convention was engaged in the first place. As with many cases on habitual residence, the evidence inevitably comprises a considerable amount of he said, she said. The approach of the court to disputed evidence on affidavits is however well established by Butler-Sloss LJ in *Re F (A Minor)(Child Abduction)*: If a judge faced with irreconcilable affidavit evidence and no oral evidence is available or, as in this case, there was no application to call it, how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision, this not requiring a determination. If the issue has to be faced on disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on either side, the applicant will have failed to establish his case. **FACTUAL DISPUTES** The Father and the Mother have both filed detailed evidence in this case with conflicting versions of events. In deciding which version to accept, the court should

consider, where necessary, the inherent probability of the parties respective contentions and the extent to which their cases are each supported by independent and contemporaneous evidence. The main disputes between the parties relate to the following matters: the purpose of the London trip and the alleged agreement or consensus to settle in the UK for good without condition; the conduct of the parties during the London trip and the integration of the Child and the Mother in the social and family environment in the UK; and the purpose of the family travelling back to HK. I will deal with these disputes in turn.

- (i) The purpose of the London trip and the agreement or consensus to settle in the UK There can be little dispute that the habitual residence of the Child prior to the London trip was HK. The Child was born here, lived with her parents in the Flat, and was taken care of primarily by the Mother with the help of her maternal grandmother. The dispute therefore turns on whether the trip to London was a permanent move to the UK, agreed upon by the parties even before the Child was born, as the Father now contends. I find that the Father's version of the agreement or consensus is inconsistent with the objective evidence. His allegation also does not sit well with the circumstances facing the young family by that time. Other conducts of the couple prior to the London trip also do not, on any objective view, evince an intention to leave Hong Kong for good. First, the evidence shows that, whether in HK or London, the Father had been looking for jobs in different places outside the UK including the United States, Japan, Monaco, Cyprus and Singapore. Even the Father himself accepts that he explored all potential opportunities. Though the trips might also serve as their holidays, the couple travelled to Singapore and Monaco for his job interviews. The Father's job search also covered HK where, on 22 August 2016, he applied to the Science Parks for a workstation there for up to 6 months. Such worldwide job hunt is certainly inconsistent with the Father's allegation about a definite plan to settle in the UK. The Father's allegation about such definite plan is also unrealistic given the circumstances facing the young family by that time. Without a stable job with sufficient income in the UK, it would be quite impossible for the family to stay in the UK for good both in terms of finance to support the family and the Mother's status to stay in the UK. Second, the Mother entered into a two-year lease to rent the Flat before the UK trip. More importantly, the couple did not terminate the tenancy before departing for London. If they decided to settle in the UK for good, one would expect them to start the negotiation with the landlord to terminate the tenancy before they left. By not doing so, they were liable to pay monthly rent of \$12,800 for a considerable period of time, which were by no means trivial amounts given their financial situation. Third, even the Father now admits to have interviewed Filipino helpers in HK with a view to hiring one for a brief period before one move to England. I agree with Ms Cheng that it is inherently incredible that the parties would have interviewed domestic helpers just to hire one for a couple of months, when it is well known that the standard contract for a foreign domestic helper in HK is one of two years. Fourth, the couple did not make any enquiries about the immigration and visa status of the Mother prior to the London trip. If the couple had already decided to settle in the UK for good, it is very difficult to explain why they had not done so before the trip. Even Mr Egerton, counsel for the Father, cannot provide

satisfactory answers to these observations. On the other hand, the Mother's story makes much more sense. She, who ran her own jewellery business in HK prior to giving birth and has been funding the family expenses with her savings, tells the court that the trip to London was meant to be a holiday and for the Father's relatives to meet the new-born. The Mother frankly admits that she would have agreed to move to a place, be it London or elsewhere, if the Father was able to find a confirmed and settled job with a stable income, and had indeed extended her stay in London to accommodate his job search. I agree with Ms Cheng that this is quite different from the couple having agreed to move to the UK unconditionally. The return flight tickets for 12 January 2017 and the Mother's purchase of travel insurance for one month with subsequent extensions also support the Mother's version of events. The return flight tickets may now be a neutral factor given that there were also return tickets back to the UK for 11 July 2017, but the return tickets for January are certainly consistent with the Mother's story. Further, although the Father denies knowledge of the purchase of the travel insurance, such factor shows that at least the Mother by that time did not regard the stay in the UK as a permanent one. To support his version of events, the Father submits that, by having settled his tax affairs with the HK tax authority before he left HK, it shows an intention to leave HK for good. I disagree. Every taxpayer has a duty to pay his tax, and it is common knowledge that defaulting taxpayer may be stopped at the immigration counters for the clearance of his tax liability possibly causing great disruption to one's travel plan. This is therefore very much a neutral factor and I do not accept that this can take the Father's case any further. For the above reasons, I reject the Father's evidence about the alleged plan to settle in the UK and the purpose of the trip to London. I accept the Mother's version as the truth. (ii) Conducts of the parties and the integration of the family in the UK The Father relies very much on the conducts of the parties in the UK to show that they had a plan to settle there for good, including: The Child acquired a UK passport after her arrival in London; The couple allowed the return flight tickets for 12 January 2017 to lapse. The Child was registered with a doctor in Kew in London. The Child attended the Children's Centre at Ham in London. Starting in February 2017, the Child attended a playgroup every Friday in London. The couple made enquires and applied for nursery places for the Child to attend at 2.5 years old and they had paid 75 for the registration. The Child attained a contract with a modelling agency in February 2017 receiving offers of auditions. The Mother opened a bank account in the UK. The Mother also registered herself with the same doctor's practice for her future medical needs. The Father looked for long term employment in the UK resulting in two separate job interviews in January 2017. In February 2017, the parties started the negotiation with the landlord of the Flat to break their lease. In February 2017, the Mother registered with an estate agent in London. In March 2017, the Child's maternal grandmother visited the family in London. The parties discussed the possibilities of buying a shared ownership flat in London in the event that the Father obtained a stable job. The Father registered his interest in buying such a property. The Mother has given explanations as to why they did all these things. I do not see the necessity of reciting all her accounts here. It suffices for me to say that, as acknowledged by the Mother herself, the family might be prepared to settle in the UK if the Father was able to

obtain a job to support the family and to pay for the nursery fees. That is why the parties were making preparations and enquiries in case that they eventually decided to stay in the UK. These explanations make perfect sense to me. Being parents, I would expect them to do just these things in the event that they decided to settle in the UK. Apart from the payment of 75 which was a very small sum of money, the parties had not made commitment to any arrangements in the UK whether they relate to the education of the Child or accommodation for the family. One should also note that all these preparations were done after they arrived in the UK and not before. If the parties already had a plan to settle in the UK for good, one would expect them to make the preparation much earlier. On the contrary, the conducts of the parties in HK prior to the trip are inconsistent with a pre-existed plan to settle in the UK. One should also ask the question: how would the family afford to pay for the house and the nurse fees if the Father does not have a stable job with sufficient income in the UK? Hence, the extended stay of the family in the UK was definitely conditional upon the Father obtaining a stable job with sufficient income to support the family. Furthermore, I cannot see how a visit by the maternal grandmother, the child's visit to the playgroup, the application for UK passport for the Child and the registration of the Child with the health service evince an intention to settle in the UK for good. At most, these are only neutral factors. The Child would require regular check-up and injections and attend play-group no matter whether she was in London or elsewhere. Many parents would apply for a passport for their child if eligible, but that does not mean the child would settle there for good. A visit by the maternal grandmother is also neither here or there. For the contract signed with the modelling agency, though the Father may offer a lot of reasons to dress up why he obtained the modelling contract for the Child, it is clear to me that one of the main purposes of such arrangement was to enable the family to earn some income. This is certainly consistent with the Mother's evidence that the family had to find ways to support themselves, in particular the Father had no full-time job for a considerable period of time. Even the Father in the Whatsapp message on 20 March 2017 acknowledged that the family was in need of money by that time. If income was the main concern of the family, it naturally follows that the stay in the UK had to be conditional upon the Father obtaining a stable job to support the family to settle there. For the negotiation relating to the termination of the tenancy of the Flat, I will deal with it in more details in the latter part of this Reasons for Judgment. I also do not accept that the Mother, the primary caregiver of the Child, has integrated in the social and family environment in the UK. First, she did not have a status to stay in the UK apart from a tourist visa. Second, the family did not have separate accommodation and they had to stay at the house of the Father's parents which can only be regarded as temporary accommodation. Third, despite the time given to the Father, he was not able to secure a stable job with sufficient income to support the family. Given these ambiguous circumstances facing the Mother, she cannot be regarded as having integrated in the environment in the UK even though her stay there was more than 5 months (during which there were trips to Monaco and Greece). (iii) Purpose of the trip to HK The parties accounts as to the purpose of the family's return to HK on 9 June 2017 are conflicting but the objective circumstances and contemporaneous evidence clearly support the Mother's case. The circumstances facing the

family by that time also sit well with her story. First, by the time of the family's return, the Father had been job-hunting for months without success. The family certainly needed income to support their living. The Mother received an invitation from the Hotel on work opportunities on 31 May 2017. Although the airline tickets back to HK were purchased on 22 May 2017, it shows that at least the Mother was considering to come back to HK to earn some income. According to the Father, the Mother first told him that the contract offered by the Hotel was only for one month which fits the family's plan to return to the UK on 11 July 2017. However, the Whatsapp message on 23 June 2017 clearly shows the Father was supportive of the Mother's plan to work in HK for three months. If the plan was to return to the UK after one month, one would expect the Father to raise the matter for further discussion once he heard about news. It is clear to me that the family was in need of money by that time and the parties were flexible if there was any working opportunities available in HK. In fact, this matter had been a subject in a much earlier discussion as shown in the Whatsapp message dated 20 March 2017. Such message supports the fact that the family was in need of money by that time. Further, the Mother clearly indicated that if nothing were to happen before 1 April 2017, presumably about obtaining a stable job in the UK, then the parties would have to leave and think about what to do next. By that time, the Father replied and said that. There is also evidence to show that even the Father was considering that the stay in HK would be much longer. In the Whatsapp message dated 15 April 2017, the Father mentioned that he was applying for a job and requested the Mother to supply him their HK address. On 2 June 2017, a few days before the flight to HK, the Father put in an application to the Science Parks for a workstation of up to 6 months. The Father claims in his reply affidavit that his own answer of up to 6 months on the application form was mere window dressing. According to the Father, the application to the Science Parks was made pursuant to a possible project involving Essex University and the Science Parks relating to an artificial intelligence project. He intended to work on such project in the UK. Furthermore, the Father mentioned in the application form that the number of week stay was 4 weeks, and the words 1 week rolling appeared after the words up to 6 months. The application form also stated business opportunities in mainland China and overseas markets. Again I do not accept the Father's explanation. First, there is no proper explanation given as to why the Father wanted to obtain the HK address for the job application or at all in April 2017. It is clear from the application form that it was not necessary to supply a HK address for the application of a workstation in the Science Parks, a matter which should be known to the Father as he had made similar application before. Further, nothing has been supplied by the Father about the details of the intended project, why it had to involve the Science Parks, why he had to apply for a workstation in the Science Parks and why there had been no progress to the project after the Father made a similar application to the Science Parks in August 2016. The Father should have known that the Science Parks application would be crucial for the court to determine the reason why the family flew back to HK, and yet the Father, given the opportunity to file the last affidavit of reply, avoids to supply any further details about the intended project. Hence, I find that the parties were coming back to HK to look for opportunities to earn income. The Mother frankly admits that they have not made any

definite plan to come back to settle in HK. The parties were undecided as to their future, though it would be more practical for the family to stay in HK given the ambiguous circumstances. The parties have not ruled out any possibilities including going back to the UK if the Father is able to get a stable job there with sufficient income to support the family to live in the UK. Finally, the Father does not dispute that the Child's maternal grandmother made substantial preparations for the family's return to HK as detailed in 141 of the Mother's affirmation, which certainly supports that the intended stay was much longer than one month. In trying to establish that the stay in HK was only intended to be one month, the Father is relying on, inter alia, the facts that: There were return tickets for the flight back to London on 11 July 2017. There was an audition for the Child scheduled in July 2017. There was still at least one job interview scheduled in August 2017. The Father did not pack up all this belongings and personal items for his trip to HK. The family terminated the tenancy for the Flat after they arrived in HK in June 2017. The Whatsapp messages dated 7 and 8 June 2016 between the Mother and the Father's sister indicate that the Mother would come back to visit the Father's family in the future; and In May 2017, the Father made enquires with immigration lawyers as to the most appropriate visa for the Mother. The Father was advised that the application needs to be made from the Mother's originating country. Again I do not accept that these factors can take the Father's case any further. It is clear that the airline tickets play a very small part in the plan for the family to search for a place to settle, which depends very much as to where the couple are able to earn income to support the family. The family had returned tickets for the flight back to HK for 12 January 2017, and yet the family allowed the tickets to lapse in order to look for job opportunities. I am therefore quite sure that, if there are opportunities available in HK to earn some income for the family, they would likewise allow the tickets to lapse. For the proposed audition in July 2017, I have already mentioned above that the main object of obtaining a modelling contract is to earn some income to support the family. If income is such a serious concern, I am quite sure that the parties would change their plan if there are any working opportunities available in HK, in particular there is no guarantee that the audition would result in any gainful work. The other factors relied on by the Father only support that the family may consider travelling to the UK at some future time. As the Father's family is in the UK, it would be unrealistic to suggest that the family would not travel to the UK again. However, unless and until the Father can obtain a stable job with sufficient income in the UK, it would be unrealistic to suggest that any such visit to the UK would be more than a temporary one. The Father may argue that, if the parties had already decided to go back to HK for good, there would be no need for him to make enquires with the immigration lawyers about the immigration status of the Mother in May 2017. But so far as I understand it, the Mother is not suggesting that the parties have already decided to come back to HK for good. What she is saying is that the trip was more than a visit to the family or an occasion to apply visa, rather the parties were coming back to HK to look for opportunities to earn income. The parties have not ruled out the possibility of going back to the UK if the Father is able to obtain a stable job there. Further, such enquires were made by the Father himself. It does not alter the fact that the Mother was planning to come back to HK to earn some income given the financial

circumstances facing the family by that time. This would be an important factor in determining the question as to whether the Mother has integrated in the social and family environment in the UK. Finally, I come to the termination of the tenancy for the Flat. As mentioned above, the failure to terminate the tenancy prior to the London trip is a clear indication that the parties by that time did not intend the stay in the UK to be a long one. The parties then made enquires with the estate agent in HK about the termination of the tenancy in February 2017 after the parties decided to extend the stay in the UK. This is certainly consistent with the Mother's story that the family was running out of money and they could not afford to continue to pay for the rent of the Flat. In honour of the tenancy agreement, the parties continued to pay the rent up to June 2017. When the parties came back to HK in June 2017, they terminated the tenancy because the family could not afford to keep the tenancy any longer. There is some dispute as to whether the Mother had told the estate agent that the family intended to stay in the UK, but I do not consider it necessary to resolve this particular factual issue. Even if the Mother had said such thing to the estate agent, which I do not accept it to be the case, such answer could not reflect the truth, given that the family could not have decided to settle in the UK in light of the uncertainties facing them by that time. That might be an excuse given by the Mother to facilitate the negotiation for the termination of the tenancy and the court should not therefore attach much weight to such answer, even if it was provided at all, by the Mother. For the above reasons, I do not accept the Father's evidence that the trip back to HK was just for the Mother to visit the family and apply for visa. Although there has been no fixed plan for the future, the parties were clearly coming back to look for opportunities to earn income. It would be quite impossible for the family to settle in the UK if the Father does not have a stable job there.

DETERMINATION ON THE QUESTION OF HABITUAL RESIDENCE For the reasons above, I accept the Mother's version as the truth. The objective evidence shows that, in around June in 2016, the parties were prepared to settle in HK by renting the Flat for two years (though with a one-year break clause) and interviewing Filipino domestic helpers. These were done when the Father was conducting a worldwide hunt for jobs, which indicates that at least the Mother and the Child might still be based in HK when the Father was working elsewhere. The parties then travelled to the UK with no preparation undertaken for a permanent stay of the Mother and the Child in the UK. The trip was intended as a holiday but the Mother agreed to extend the stay to accommodate the Father's search for jobs in the UK. The Mother might agree to stay there if the Father was able to secure a stable job to support the family, and they made preparations and enquires. As the Father was not able to find such kind of job for more than 5 months, the family travelled back to HK to look for opportunities. The Mother made an attempt to find some ways to support the family, whilst there are also indications to show that the stay in HK was intended to be much longer. It is under such kind of ambiguous circumstances that the Hague Convention application is taken out for the return of the Child to the UK. The burden lies on the Father to convince the court that the UK was the place of the Child's habitual residence so that the Hague Convention was engaged at all. It is for him to satisfy the court that the parties agreed to move to the UK for good before the trip to London, and that the Child acquired the UK as her new habitual residence during her stay

there. The evidence in the present case does not support the Father's application. The family's stay in the UK was, at best for the Father, a trial period for him to find work which might eventually enable the family to settle. As is made clear in *Mercredi v Chaffe*, *In re LC* and *Re Alcott* (1), where a person stays at a place for a temporary purpose and on condition, without a clear plan to move there permanently, or even in what may be described as ambiguous circumstances, he would not be treated as having acquired a new habitual residence, because the quality of his stay lacks the necessary degree of permanence and integration. None of these can be altered by the subjective wishes or ex post facto assertions of one particular parent. It is not seriously disputed that the Mother has all along been the Child's primary caregiver. As observed by the CJEU in *Mercredi v Chaffe*, in the case of a very young child, it is necessary to assess also the Mother's integration to the new environment, the reasons for her move, and her geographic and family origins. It is clear that the Mother, who has spent her whole life in HK including marrying to the Father and giving birth to the Child here, had not integrated at all into the UK during her limited stay on a tourist visa. In his submissions, Mr Egerton argues that the time spent by the Child in the UK (about 5.5 months) is longer than in HK (about 3 months). However, I do not accept that the length of the stay is an important consideration here. The Child is an infant, and the court needs to assess the character of the stay of her parents, the reason for the move and their geographic and family origins in particular that of the Mother, in determining the habitual residence of the Child. As mentioned above, all these factors favour the Mother's case. Even, for the purpose of argument, the Child had acquired the UK as her new place of habitual residence during her short stay there, it should not affect the result of this case. This argument would be based on the premise that the Child had lost HK as her place of habitual residence when she stayed in the UK for the Father to look for jobs and the future was very much unclear for the Mother. The future would also be unclear for the Father as he would not be able to support the family to live in the UK if he did not have a stable job there. If that was sufficient for the Child to acquire the UK as her new place of habitual residence, it would also mean that the Child would lose such habitual residence easily if she was travelling to other places for the same reason. To me, there is no great difference between the purpose of the extended stay in the UK and that of the return trip to HK, i.e. the family was exploring job opportunities with a view to decide where they should settle in the future. The circumstances and the uncertainties facing the family were more or less the same. Hence, assuming that the Child had acquired the UK as her place of habitual residence, she would reacquire HK as her new place of habitual residence during the stay in June and July 2017. The result is therefore the same. For the above reasons, I have no hesitation in holding that, at the time of the taking out of this application, the habitual residence of the Child was in HK.

INTOLERABLE SITUATION DEFENCE UNDER ARTICLE 13(b) The Mother is also relying on the intolerable situation defence under Article 13(b) of the Hague Convention. According to her, the Child would be placed in an intolerable situation if she were made to go to the UK unless the Mother is able to stay with her and take proper care of her. She does not believe that the Father or his family can take proper care of the Child. Further, the Father has made it clear to her that she would not be allowed to stay in his parents house in

the UK. She does not have the means to stay in the UK, and she has no right to stay there without a spouse visa. Based on my ruling on habitual residence, it is not necessary for me to consider the Article 13(b) defence. However, I am of the view that the evidence adduced by the Mother is not sufficient to satisfy the high threshold for such kind of defence. Firstly, it is also always possible for the Mother to seek proper relief from the English court, including financial relief to enable her to stay in the UK and appropriate access arrangement. In respect of her right to stay in the UK, I am sure that the HK Central Authority can liaise with the English Central Authority to make temporary arrangement to enable the Mother to stay in the UK for any matrimonial proceedings if such need arises. Secondly, it is not sufficient for the Mother to simply assert that she does not have the means to stay in the UK. The facts of the present case indicate that the parties might have obtained some financial assistance from their families. Hence, more materials need to be supplied to the court to substantiate her allegation about the lack of means to stay in the UK for any matrimonial proceedings. In any event, my ruling on such defence is now academic. Based on my finding on habitual residence, I refused the Father's application for the return of the Child. I now make a costs order nisi that there be no order as to costs of the present proceedings and there be legal aid taxation for the costs of both parties. Such order shall be made absolute 14 days after the date of the handing down of this Reasons for Judgment. I have already obtained the parties consent for the publication of this Reasons for Judgment. (David Lok) Judge of the Court of First Instance High Court Mr Robin Egerton, instructed by Howse Williams Bowers, for the Plaintiff (the Father) Ms Bonnie Cheng, instructed by Chan Lau Wai, for the Defendant (the Mother)

[2015] 4 HKLRD 798 at 7.7

[2012] Fam 22 at 47-56

[2014] AC 1, at 49-50, 53-54, 79-80

[2014] AC 1038, at 35, 61-62

[2016] AC 606, at 35,37, 62, 68 at *ibid*, at 44, 54(viii), 80(ix) *ibid*, at 30, 42-45

[2016] EWHC 2413 (Fam) *ibid* LCYP v JEK (Child: Habitual Residence), *ibid*, at 7.14

[1992] 1 FLR 548 at 553-554 it is common ground that the Mother cannot get a spouse visa unless the Father has a job with a minimum level of income see 40 to 46 above *ibid* *ibid* *ibid* see 25 & 26 above PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V g d W 2 g d W 2 g d W 2 g d t g d t g d t g d t g d ` E g d W 2 g d t h ? = l h ] % Z h ] % Z h u \$ x h ] % Z h 7 x ^ h 7 x ^ g d ] % Z h = t ` h = t ` h] % Z h] % Z g d c } y } y u y } q m y h R ^ B g d < k g d | . h | . h | . h < 9 L h < 9 L h < 9 L h R ^ B h < 9 L h | . h [m < g d , } / g d < k h 0 U F h R m * h , } / h 0 U F h 0 U F h 0 U F h 0 U F h , } / h , } / h 0 U F g d C 1 g d < 9 L g d B \ h z k 0 h R m * h z k 0 h A ; M h A ; M h A ; M g d f ^ 3 g d O 5 g d C 1 h < 9 L z g R @ R h f ^ 3 h Z y < h f ^ 3 h ? = l g d % 5 z v q g c ^ [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, s Q } # theme/theme/theme1.xml \$ O } } X p 9 0 + P H I | P P y u 9 x u 5 f s + W

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